[redacted] University
College of Law
COURT, SAN DIEGO, CA. 92123

NATIONAL UNIVERSITY
LIBRARY SAN DIEGO

NON CIRCULATING

Digitized by the Internet Archive
in 2023 with funding from
Kahle/Austin Foundation

https://archive.org/details/californiareport1741vari

# CALIFORNIA REPORTER

*Covering Cases Reported in*

PACIFIC REPORTER




## 174 P.—177 P.

---

*Cite by Volume and Page*

*of the*

PACIFIC REPORTER

*Thus:*

174 P. 26

ST. PAUL, MINN.
WEST PUBLISHING CO.
1956

COPYRIGHT, 1918, BY WEST PUBLISHING CO.
Pacific Reporter, Vol. 174, Nos. 1-4: Vol. 175, Nos. 1-9; Vol. 176, Nos. 1, 2.

---

COPYRIGHT, 1919, BY WEST PUBLISHING CO.
Pacific Reporter, Vol. 176, Nos. 3-6; Vol. 177, Nos. 1-4.

---

COPYRIGHT, 1956, BY WEST PUBLISHING CO.

Cal.Rep. 174-177 P.
2-1967

# CASES REPORTED

## Vols. 174–177 P.

---


| | P. Vol. | Page |
|---|---|---|
| Abbott v. Arp, Sup. | 176 | 458 |
| Abrahamson; Barber Asphalt Pav. Co. v., App. | 175 | 490 |
| Adams; City of Oakland v., App. | 174 | 947 |
| Ætna Life Ins. Co. v. Industrial Accident Commission of California, Sup. | 177 | 273 |
| A. F. Estabrook Co. v. Industrial Accident Commission, Sup. | 177 | 848 |
| Ah Gee; People v., App. | 174 | 371 |
| Akerman v. Moody, App. | 176 | 696 |
| Alcott; Welch v., Sup. | 174 | 34 |
| Ali; People v., App. | 176 | 883 |
| Allen; People v., App. | 174 | 374 |
| Allen v. Railroad Commission of California, Sup. | 175 | 466 |
| Allen v. Smith, App. | 176 | 365 |
| Allen; Wells v., App. | 177 | 180 |
| Allen v. Wilson, Sup. | 174 | 661 |
| Allred v. Pioneer Truck Co., Sup. | 176 | 455 |
| Alsaga v. Hart, App. | 174 | 684 |
| Althouse; Mickel v., App. | 176 | 51 |
| American Nat. Bank; Grange v., App. | 174 | 75 |
| American River Electric Co.; Fairbairn v., Sup. | 175 | 637 |
| Archambault; Lakas v., App. | 176 | 180 |
| Arp; Abbott v., Sup. | 176 | 458 |
| Aston; Pringle v., App. | 174 | 78 |
| Atchison, T. & S. F. Ry. Co.; California Adjustment Co. v., Sup. | 175 | 682 |
| Atchison, T. & S. F. Ry. Co.; Rogers v., App. | 176 | 176 |
| Bacon; Union Lithograph Co. v., Sup. | 175 | 464 |
| Bailey; People v., App. | 176 | 880 |
| Bailey v. Security Trust Co., Sup. | 177 | 444 |
| Bailey v. Security Trust Co., Sup. | 177 | 449 |
| Bakeman v. Superior Court in and for Los Angeles County, App. | 174 | 911 |
| Baker; People v., App. | 175 | 88 |
| Bandle v. Commercial Nat. Bank, Sup. | 174 | 44 |
| Bangham v. Michael, Sup. | 177 | 161 |
| Barber Asphalt Pav. Co. v. Abrahamson, App. | 175 | 490 |
| Barnum; Frame v., Sup. | 175 | 689 |
| Barr; McCollum v., App. | 176 | 463 |
| Bassot v. United Railroads of San Francisco, App. | 177 | 884 |
| Bauer; Burns v., App. | 174 | 346 |
| Bearce v. Davis, App. | 176 | 62 |
| Beggs, In re, Sup. | 176 | 165 |
| Beggs v. Superior Court of Santa Clara County, Sup. | 175 | 642 |
| Bekins v. Smith, App. | 174 | 96 |
| Bekins v. Smith, App. | 174 | 942 |
| Bekins Van & Storage Co.; Price v., Sup. | 176 | 452 |
| Bennett v. Hillman, App. | 174 | 362 |
| Bessemer Gas Engine Co.; Dimond v., App. | 177 | 858 |
| Binford v. Boyd, Sup. | 174 | 56 |
| Bird v. Huber, Sup. | 176 | 161 |

| | Vol. | Page |
|---|---|---|
| Blake; Richmond Wharf & Dock Co. v., App. | 177 | 508 |
| Blois, Ex parte, Sup. | 176 | 449 |
| Boadway Bros.; Guderitz v., App. | 177 | 859 |
| Board of Education of City of Oakland; Catania v., App. | 174 | 332 |
| Board of Education of City of Visalia; McClure v., App. | 176 | 711 |
| Board of Fire Com'rs of City and County of San Francisco; McCarthy v., App. | 174 | 402 |
| Board of Police Com'rs of City of Los Angeles; Co-operative Junk Co. of California v., App. | 177 | 308 |
| Board of Sup'rs of Merced County; McAulay v., Sup. | 174 | 30 |
| Board of Sup'rs of San Diego County; Ells v., App. | 176 | 709 |
| Board of Trustees of Leland Stanford Junior University v. Rodley, App. | 177 | 175 |
| Bohlig; Hornlein v., App. | 174 | 697 |
| Bohrmann; Firth v., App. | 175 | 23 |
| Bond v. Walters, App. | 175 | 909 |
| Boot v. Boyd, App. | 174 | 352 |
| Booth; People v., App. | 174 | 685 |
| Booth v. Stow, App. | 175 | 705 |
| Boselly's Estate, In re, Sup. | 175 | 4 |
| Boselly's Estate, In re, Sup. | 176 | 45 |
| Bouchard, Ex parte, App. | 176 | 692 |
| Bowdoin v. Southern Pac. Co., Sup. | 174 | 664 |
| Bowen v. Desser, Sup. | 176 | 453 |
| Boyce; Tulloh v., App. | 174 | 680 |
| Boyce; Tulloh v., Sup. | 177 | 847 |
| Boyd; Binford v., Sup. | 174 | 56 |
| Boyd; Boot v., App. | 174 | 352 |
| Boyd; Buick v., App. | 174 | 913 |
| Boyle; Vale v., Sup. | 175 | 787 |
| Bradbury; Brinck v., Sup. | 176 | 690 |
| Bradbury; Campbell v., Sup. | 176 | 685 |
| Bradbury Estate Co.; Geary St., P. & O. R. Co. v., Sup. | 175 | 457 |
| Brandon v. Sullivan Tractor Co., App. | 175 | 906 |
| Brandt v. Brandt, Sup. | 174 | 55 |
| Brewer; Furman v., App. | 177 | 495 |
| Brinck v. Bradbury, Sup. | 176 | 690 |
| Brown v. Lee, App. | 175 | 907 |
| Brown; People v., App. | 175 | 85 |
| Bruns; Heitman v., App. | 174 | 67 |
| Bryant v. Bryant, App. | 177 | 513 |
| Bryant; Tisdale v., App. | 177 | 510 |
| Bryant v. Whitney, Sup. | 174 | 32 |
| Buick v. Boyd, App. | 174 | 913 |
| Bumiller v. Bumiller, Sup. | 175 | 897 |
| Bunnell; Simons v., App. | 177 | 173 |
| Burger; Hope Mining Co. v., App. | 174 | 932 |
| Burns v. Bauer, App. | 174 | 346 |
| Burns Lumber Co.; La Fleur v., App. | 176 | 58 |
| Burt Motor Car Co.; Magee v., App. | 174 | 687 |
| Burton Auto Transfer Co. v. Industrial Accident Commission of California, App. | 174 | 72 |
| Busch v. Los Angeles Ry. Corporation, two cases, Sup. | 174 | 665 |
| Byrnes; Tadge v., Sup. | 176 | 439 |
| Caine; Carothers v., App. | 175 | 478 |
| California Adjustment Co. v. Atchison, T. & S. F. Ry. Co., Sup. | 175 | 682 |
| California Hospital Co.; Hesler v., Sup. | 174 | 654 |
| California Medical Missionary & Benevolent Ass'n; Stewart v., Sup. | 176 | 46 |

P.


| | Vol. | Page |
|---|---|---|
| California Midland Ry. Co. v. Smith, Sup. | 175 | 16 |
| California Midway Oil Co.; California Well Drilling Co. v., Sup. | 177 | 849 |
| California Rice Milling Co.; Doty v., App. | 174 | 389 |
| California Trona Co.; Glenn v., App. | 177 | 178 |
| California Vegetable Union v. Crocker Nat. Bank, App. | 174 | 920 |
| California Well Drilling Co. v. California Midway Oil Co., Sup. | 177 | 849 |
| Calistoga Electric Co.; Napa Valley Electric Co. v., App. | 176 | 699 |
| Campbell v. Bradbury, Sup. | 176 | 685 |
| Campbell v. Ingram, App. | 174 | 366 |
| Canepa; Myers v., App. | 174 | 903 |
| Canepa; Myers v., Sup. | 174 | 906 |
| Capps; Muther v., App. | 177 | 882 |
| Carothers v. Caine, App. | 175 | 478 |
| Carr v. Carr Co., App. | 177 | 856 |
| Carr Co.; Carr v., App. | 177 | 856 |
| Catania v. Board of Education of City of Oakland, App. | 174 | 332 |
| Cella v. Industrial Accident Commission, App. | 177 | 490 |
| Central California Traction Co.; Ellis v., App. | 174 | 407 |
| Central Forest Co.; Mendoza v., App. | 174 | 359 |
| Ceremony v. Drummond, App. | 174 | 696 |
| Chapin; Spaulding & Co. v., App. | 174 | 334 |
| Chapman, Appeal of, Sup. | 177 | 165 |
| Chapman; Patterson v., Sup. | 176 | 37 |
| Chappell; Onell v., App. | 176 | 370 |
| Charles Hing v. Joe Lee, App. | 174 | 356 |
| Chase v. Peters, App. | 174 | 116 |
| Chase v. Peters, App. | 174 | 119 |
| Chinn v. Penn, Sup. | 175 | 687 |
| Christie v. McCall, App. | 177 | 507 |
| Christman v. Southern Pac. Co., App. | 175 | 808 |
| Churchill Co. v. Kingsbury, Sup. | 174 | 329 |
| City and County of San Francisco; Kydd v., App. | 174 | 88 |
| City Council of City of Los Angeles; Wolfskill v., Sup. | 174 | 45 |
| City of Albany v. United States Fidelity & Guaranty Co., App. | 176 | 705 |
| City of Alhambra; Newman v., Sup. | 175 | 414 |
| City of Azusa; Shorr v., App. | 177 | 513 |
| City of Lemoore; People v., App. | 174 | 93 |
| City of Los Angeles; Fostler v., Sup. | 176 | 438 |
| City of Los Angeles; Noakes v., Sup. | 175 | 409 |
| City of Los Angeles; Riverside Portland Cement Co. v., Sup. | 174 | 31 |
| City of Marysville; Malaley v., App. | 174 | 367 |
| City of Oakland v. Adams, App. | 174 | 947 |
| City of Oakland v. Larue Wharf & Warehouse Co., Sup. | 176 | 361 |
| City of Pasadena v. Railroad Commission of California, Sup. | 177 | 989 |
| City of Petaluma v. Hughes, App. | 174 | 336 |
| City of Petaluma; Weisshand v., App. | 174 | 955 |
| City of Redding; Menzel Estate Co. v., Sup. | 174 | 48 |
| City of San Diego; Santa Fé Land Imp. Co. v., App. | 176 | 377 |
| City of Santa Monica v. Railroad Commission of California, Sup. | 177 | 989 |
| Clare; Hirons v., App. | 177 | 291 |
| Clark; Krotzer v., Sup. | 174 | 657 |
| Clark v. Superior Court in and for Los Angeles County, App. | 174 | 681 |
| Clelland; State Bank v., App. | 175 | 649 |
| Cline; Los Angeles County v., App. | 174 | 73 |
| Cline; Von Der Kuhlen v., App. | 176 | 883 |
| Clover v. Hathaway, Sup. | 176 | 452 |
| Clover's Estate, In re, Sup. | 176 | 452 |

P.


| | Vol. | Page |
|---|---|---|
| Cochran v. Superior Court, Sup. | 177 | 989 |
| Cohen; Shuken v., Sup. | 176 | 447 |
| Cohn v. Smith, App. | 174 | 682 |
| Colby; Paramore v., App. | 174 | 677 |
| Colf; McLean v., Sup. | 176 | 169 |
| Commercial Nat. Bank; Bandle v., Sup. | 174 | 44 |
| Conselho Supreme Da Uniao Portugueza Do Estado De California; Waters v., App. | 176 | 368 |
| Cooper; McDonough v., Sup. | 177 | 153 |
| Co-operative Junk Co. of California v. Board of Police Com'rs of City of Los Angeles, App. | 177 | 308 |
| Cornic v. Stewart, Sup. | 176 | 164 |
| Cosby v. Danziger, App. | 175 | 809 |
| Coulter Dry Goods Co. v. Munford, App. | 175 | 900 |
| Council of City of Richmond; Harbor Center Land Co. v., App. | 176 | 50 |
| Cousino v. Western Shore Lumber Co., Sup. | 175 | 406 |
| Cowan; McGill v., Sup. | 177 | 290 |
| Cowan v. Union Trust Co. of San Francisco, App. | 175 | 799 |
| Coward v. De Cray, App. | 176 | 56 |
| Coward v. De Cray, App. | 176 | 57 |
| Cowell Lime & Cement Co.; Doran, Brouse & Price v., App. | 174 | 90 |
| Cowell Lime & Cement Co.; Klimm v., App. | 175 | 908 |
| Cowper's Estate, In re, Sup. | 176 | 676 |
| Craig v. Stansbury, App. | 174 | 404 |
| Cramer; Frankfort General Ins. Co. v., Sup. | 174 | 33 |
| Crawfis v. Edwards, Brewster & Clover, Sup. | 175 | 410 |
| Crawford; Rose v., App. | 174 | 69 |
| Crescent Inv. Co. v. Lake County Inv. Co., App. | 177 | 167 |
| Crocker-Huffman Land & Water Co.; Owen v., App. | 177 | 299 |
| Crocker Nat. Bank; California Vegetable Union v., App. | 174 | 920 |
| Crosaro v. Industrial Accident Commission, App. | 177 | 489 |
| Cruse; Watterson v., Sup. | 176 | 870 |
| Curd; Federal Const. Co. v., Sup. | 177 | 469 |
| Curd; Federal Const. Co. v., Sup. | 177 | 473 |
| Cutting; Heitman v., App. | 174 | 675 |
| Danziger; Cosby v., App. | 175 | 809 |
| Dargie's Estate, In re, Sup. | 177 | 165 |
| Davidson v. Rafael, App. | 174 | 680 |
| Davis; Bearce v., App. | 176 | 62 |
| Davis; Pacific Coast Casualty Co. v., App. | 175 | 701 |
| Davitt; Macknight v., App. | 174 | 77 |
| De Cray; Coward v., App. | 176 | 56 |
| De Cray; Coward v., App. | 176 | 57 |
| Deering; White v., App. | 177 | 516 |
| De Laval Dairy Supply Co. v. Talbott, App. | 175 | 83 |
| Delgado; People v., App. | 175 | 24 |
| Denman; People v., Sup. | 177 | 461 |
| Desser; Bowen v., Sup. | 176 | 453 |
| Dexter's Estate, In re, Sup. | 176 | 168 |
| De Witt; Rose v., Sup. | 176 | 445 |
| Diamond v. Weyerhaeuser, Sup. | 174 | 38 |
| Diamond 66 Cattle & Dairy Co.; Glidden v., Sup. | 174 | 667 |
| Dillman; People v., App. | 174 | 951 |
| Dimond v. Bessemer Gas Engine Co., App. | 177 | 858 |
| Donnatin v. Union Hardware & Metal Co., App. | 175 | 26 |
| Donnatin v. Union Hardware & Metal Co., Sup. | 177 | 845 |
| Donnelly v. Wetzel, App. | 174 | 689 |

| | Vol. | P. Page |
|---|---|---|
| Donovan v. Stevens, Sup. | 175 | 400 |
| Donovan; Tracy v., App. | 174 | 113 |
| Doolittle v. McConnell, Sup. | 174 | 305 |
| Doran, Brouse & Price v. Henry Cowell Lime & Cement Co., App. | 174 | 90 |
| Doty v. California Rice Milling Co., App. | 174 | 389 |
| Doty v. Matson, App. | 174 | 396 |
| Doughty v. Moors, App. | 175 | 273 |
| Doughty v. Moors, App. | 175 | 275 |
| Drips v. Moore, Sup. | 176 | 159 |
| Drummond; Ceremony v., App. | 174 | 696 |
| D. Samuels Realty Co. v. Nunan, App. | 175 | 650 |
| Durst Bros.; Manwell v., Sup. | 174 | 881 |
| Dutton v. Locke-Paddon, App. | 174 | 674 |
| Dutwiler v. Klunk, App. | 174 | 919 |
| D. W. Hobson Co.; Howard v., App. | 176 | 715 |
| Eantosca; People v., App. | 174 | 71 |
| Eastern Outfitting Co. v. Superior Court of City and County of San Francisco, App. | 176 | 366 |
| East Riverside Irr. Dist.; Hooker v., App. | 177 | 184 |
| Eaton; International Mortg. Bank v., App. | 177 | 880 |
| Edwards, Brewster & Clover; Crawfis v., Sup. | 175 | 410 |
| Ellis v. Central California Traction Co., App. | 174 | 407 |
| Ellison; Turman v., App. | 174 | 396 |
| Ells v. Board of Sup'rs of San Diego County, App. | 176 | 709 |
| Emigh-Winchell Hardware Co. v. Pylman, App. | 176 | 722 |
| Emireck; Hertel v., Sup. | 174 | 30 |
| Empire Securities Co. v. Matthews, Sup. | 176 | 160 |
| Employers' Liability Assur. Corporation, Limited, of London, Eng., v. Industrial Accident Commission, App. | 177 | 171 |
| Employers' Liability Assur. Corporation, Limited, of London, England, v. Industrial Accident Commission of California, Sup. | 177 | 273 |
| Emrick; People v., App. | 175 | 81 |
| Engebritsen v. Latin-American Pub. Co., App. | 175 | 652 |
| Epperson; People v., App. | 176 | 702 |
| Equitable Trust Co. of New York v. Western Land & Power Co., App. | 176 | 876 |
| Erskine v. Marchant, App. | 174 | 74 |
| Espinosa's Estate and Guardianship, In re, Sup. | 175 | 896 |
| Estabrook Co. v. Industrial Accident Commission, Sup. | 177 | 848 |
| Evans v. Wixom, App. | 176 | 873 |
| Fairbairn v. American River Electric Co., Sup. | 175 | 637 |
| Farb, Ex parte, Sup. | 174 | 320 |
| Farquharson v. Scoble, App. | 177 | 310 |
| Farullo; Zucco v., App. | 174 | 929 |
| Fassio v. Woolfrey, App. | 174 | 700 |
| Federal Const. Co. v. Curd, Sup. | 177 | 469 |
| Federal Const. Co. v. Curd, Sup. | 177 | 473 |
| Federal Const. Co. v. Kneese, App. | 174 | 694 |
| Fererira v. Silvey, App. | 176 | 371 |
| Ferguson v. Marsh, App. | 174 | 678 |
| Fielden; Snook v., App. | 175 | 480 |
| Fife v. Mathes, Sup. | 176 | 167 |
| Fildew v. Shattuck & Nimmo Warehouse Co., App. | 177 | 866 |
| Fimple v. Southern Pac. Co., App. | 177 | 871 |
| Firth v. Bohrmann, App. | 175 | 23 |
| Fisher; Henderson v., App. | 176 | 63 |
| Fitzgerald v. Smith, Sup. | 174 | 660 |
| Flacco; People v., App. | 174 | 1178 |

| | Vol. | Page |
|---|---|---|
| Flint's Estate, In re, Sup. | 177 | 451 |
| F. L. Moore Motor Truck Co.; Smith v., App. | 176 | 367 |
| Fong Sing; People v., App. | 175 | 911 |
| Ford; Ogden v., Sup. | 176 | 165 |
| Formilli; Steere v., App. | 175 | 806 |
| Forster, In re, Sup. | 176 | 38 |
| Fostler v. City of Los Angeles, Sup. | 176 | 438 |
| Fowler; People v., Sup. | 174 | 892 |
| Frame v. Barnum, Sup. | 175 | 689 |
| Francis v. Shrader, App. | 177 | 168 |
| Franich; J. & H. Goodwin, Limited, v., App. | 174 | 83 |
| Frankfort General Ins. Co. v. Cramer, Sup. | 174 | 33 |
| Fraser; Galusha v., Sup. | 174 | 311 |
| Fredricks, Appeal of, Sup. | 175 | 895 |
| Freudenberg v. Lucas, App. | 175 | 482 |
| Friedman v. Southern California Trust Co., Sup. | 176 | 442 |
| Fritz, Ex parte, Sup. | 177 | 157 |
| Frost; People v., App. | 174 | 106 |
| Fryer; People v., App. | 177 | 989 |
| Fuller; Wilson v., App. | 174 | 671 |
| Furman v. Brewer, App. | 177 | 495 |
| Gage; MacCoy v., App. | 177 | 296 |
| Gage; Oree v., App. | 175 | 799 |
| Galusha v. Fraser, Sup. | 174 | 311 |
| Garner, Ex parte, Sup. | 177 | 162 |
| Gaylord; Smith v., Sup. | 175 | 449 |
| Geary St., P. & O. R. Co. v. Bradbury Estate Co., Sup. | 175 | 457 |
| Gee Chong Pong v. Harris, App. | 175 | 806 |
| George v. Industrial Accident Commission, Sup. | 174 | 653 |
| Germino, Ex parte, App. | 176 | 701 |
| Germino; People v., App. | 175 | 489 |
| Gero v. Richey, App. | 175 | 91 |
| Gibson v. Sacramento County, App. | 174 | 935 |
| Gifford; Security Inv. Co. v., Sup. | 176 | 444 |
| Gilbert; Vance v., Sup. | 174 | 42 |
| Gish v. Huckaby, App. | 175 | 651 |
| Glann; Hoare v., App. | 175 | 701 |
| Glenn v. California Trona Co., App. | 177 | 178 |
| Glidden v. Diamond 66 Cattle & Dairy Co., Sup. | 174 | 667 |
| Globe Grain & Milling Co. v. Walker Const. Co., App. | 176 | 725 |
| Golly; Lieman v., Sup. | 174 | 33 |
| Gomez v. Reed, Sup. | 174 | 658 |
| Goodall v. Superior Court in and for Santa Barbara County, App. | 174 | 924 |
| Goodwin, Limited, v. Franich, App. | 174 | 83 |
| Gordon v. Ransome-Crummey Co., App. | 174 | 906 |
| Graham; Nave v., App. | 174 | 76 |
| Grand Trunk Ry. Co. of Canada; Olcovich v., Sup. | 176 | 459 |
| Grange v. American Nat. Bank, App. | 174 | 75 |
| Gray; Huffaker v., App. | 177 | 183 |
| Gray; Roullard v., App. | 175 | 479 |
| Greenwell; Pezzoni v., Sup. | 174 | 60 |
| Greer-Robbins Co. v. Pacific Surety Co., App. | 174 | 110 |
| Guajardo; Moore v., App. | 174 | 92 |
| Guderitz v. Boadway Bros., App. | 177 | 859 |
| Hagerty; Tucker v., App. | 174 | 908 |
| Hall; Lewis v., App. | 176 | 171 |
| Hammond v. Justices' Court of Los Angeles Tp., App. | 174 | 69 |

| | Vol. | P. Page |
|---|---|---|
| Hammond; Ocean Shore Development Co. v., App. | 175 | 706 |
| Hanton v. Pacific Electric Ry. Co., Sup. | 174 | 61 |
| Harbor Center Land Co. v. Council of City of Richmond, two cases, App. | 176 | 50 |
| Hare v. McGue, Sup. | 174 | 663 |
| Harley; Sherman v., Sup. | 174 | 901 |
| Harris; Gee Chong Pong v., App. | 175 | 806 |
| Hart; Alsaga v., App. | 174 | 684 |
| Hart; People v., App. | 175 | 276 |
| Hart v. Railroad Commission of State of California, Sup. | 174 | 1178 |
| Hartigan v. Pacific Gas & Electric Co., App. | 177 | 484 |
| Hartwell; People v., App. | 175 | 21 |
| Hartwell; People v., App. | 177 | 885 |
| Hathaway; Clover v., Sup. | 176 | 452 |
| Hawley; Piper v., Sup. | 175 | 417 |
| Heazelton v. Monterey County Gas & Electric Co., Sup. | 175 | 695 |
| Heitman v. Bruns, App. | 174 | 67 |
| Heitman v. Cutting, App. | 174 | 675 |
| Henderson v. Fisher, App. | 176 | 63 |
| Heney v. Jordan, Sup. | 175 | 402 |
| Henry Cowell Lime & Cement Co.; Doran, Brouse & Price v., App. | 174 | 90 |
| Henry Cowell Lime & Cement Co.; Klimm v., App. | 175 | 908 |
| Herman v. Rohan, App. | 174 | 349 |
| Herrick, In re, Sup. | 176 | 165 |
| Hertel v. Emireck, Sup. | 174 | 30 |
| Hesler v. California Hospital Co., Sup. | 174 | 654 |
| Heydenfeldt v. Osmont, Sup. | 175 | 1 |
| Hillman; Bennett v., App. | 174 | 362 |
| Hinton v. Welch, Sup. | 177 | 282 |
| Hirons v. Clare, App. | 177 | 291 |
| Hirsch v. James S. Remick Co., App. | 177 | 876 |
| Hoare v. Glann, App. | 175 | 701 |
| Hobson Co.; Howard v., App. | 176 | 715 |
| Hoffman v. Patterson, Sup. | 176 | 162 |
| Holland; Sloss v., App. | 176 | 72 |
| Holland-Meisell Co. v. Kelly, App. | 174 | 698 |
| Hollenbeck-Bush Planing Mill Co. v. Roman Catholic Bishop of Monterey, Sup. | 176 | 166 |
| Hooker v. East Riverside Irr. Dist., App. | 177 | 184 |
| Hope Mining Co. v. Burger, App. | 174 | 932 |
| Hornlein v. Bohlig, App. | 174 | 697 |
| Horton v. Moore, App. | 177 | 188 |
| Houston, Gore & Loy; Wheeler v., App. | 174 | 121 |
| Howard v. D. W. Hobson Co., App. | 176 | 715 |
| Howard v. Stephens, App. | 176 | 65 |
| Howze; Rosenheim v., Sup. | 176 | 456 |
| Hoyerdahl; Morand v., App. | 175 | 483 |
| Huber; Bird v., Sup. | 176 | 161 |
| Hubermann v. National Surety Co., App. | 174 | 79 |
| Huckaby; Gish v., App. | 175 | 651 |
| Huey v. Patterson, App. | 174 | 939 |
| Huffaker v. Gray, App. | 177 | 183 |
| Hughes; City of Petaluma v., App. | 174 | 336 |
| Hume; Reeves v., Sup. | 176 | 681 |
| Hume's Estate, In re, Sup. | 176 | 681 |
| Hunsaker; Newhall v., App. | 176 | 380 |
| Huntington Land & Improvement Co. v. Wallace, Sup. | 175 | 695 |
| Hurley's Estate, In re, Sup. | 174 | 669 |

| | Vol. | P. Page |
|---|---|---|
| Indian Spring Channel Gold Mining Co.; Moore v., App. | 174 | 378 |
| Industrial Accident Commission; A. F. Estabrook Co. v., Sup. | 177 | 848 |
| Industrial Accident Commission; Cella v., App. | 177 | 490 |
| Industrial Accident Commission; Crosaro v., App. | 177 | 489 |
| Industrial Accident Commission; Employers' Liability Assur. Corporation, Limited, of London, Eng., v., App. | 177 | 171 |
| Industrial Accident Commission; George v., Sup. | 174 | 653 |
| Industrial Accident Commission; Klamath S. S. Co. v., Sup. | 177 | 848 |
| Industrial Accident Commission; Leadbettor v., Sup. | 177 | 449 |
| Industrial Accident Commission; Southern Pac. Co. v., Sup. | 175 | 453 |
| Industrial Accident Commission of California; Ætna Life Ins. Co. v., Sup. | 177 | 273 |
| Industrial Accident Commission of California; Burton Auto Transfer Co. v., App. | 174 | 72 |
| Industrial Accident Commission of California; Employers' Liability Assur. Corporation, Limited, of London, England, v., Sup. | 177 | 273 |
| Industrial Accident Commission of California; Kauffman v., App. | 174 | 690 |
| Industrial Accident Commission of California; Ocean Accident & Guarantee Corporation v., Sup. | 177 | 273 |
| Industrial Accident Commission of California; Rosedale Cemetery Ass'n v., App. | 174 | 351 |
| Industrial Accident Commission of California; Williams v., Sup. | 177 | 989 |
| Industrial Development Land Co.; Southern Pac. R. Co. v., Sup. | 174 | 652 |
| Ingram; Campbell v., App. | 174 | 366 |
| Ingram v. Johnston, App. | 176 | 54 |
| International Mortg. Bank v. Eaton, App. | 177 | 880 |
| Jacobs, Ex parte, App. | 176 | 698 |
| Jacobson, Ex parte, App. | 176 | 693 |
| Jacuzzi v. Jacuzzi, App. | 176 | 872 |
| James S. Remick Co.; Hirsch v., App. | 177 | 876 |
| Jaques v. Tomb, Sup. | 177 | 280 |
| Jenny v. Jenny, Sup. | 174 | 652 |
| Joe Lee; Charles Hing v., App. | 174 | 356 |
| Johns v. Pond, App. | 177 | 293 |
| Johnston; Ingram v., App. | 176 | 54 |
| Jones; Waldteufel v., App. | 176 | 64 |
| Jordan; Heney v., Sup. | 175 | 402 |
| Jordan; Rodgers v., Sup. | 175 | 406 |
| Jordan v. Scott, App. | 177 | 504 |
| Jungquist; Scott v., Sup. | 175 | 412 |
| Justices' Court of Los Angeles Tp.; Hammond v., App. | 174 | 69 |
| J. & H. Goodwin, Limited, v. Franich, App. | 174 | 83 |
| Kauffman v. Industrial Accident Commission of California, App. | 174 | 690 |
| Kavanagh; Niles v., Sup. | 175 | 462 |
| Kawananakoa; People v., App. | 174 | 686 |
| Kawano; People v., App. | 177 | 174 |
| Kelley's Estate, In re, Sup. | 174 | 35 |
| Kelly; Holland-Meisell Co. v., App. | 174 | 698 |
| Kengel v. Stuart, App. | 176 | 874 |
| Keohane v. Keohane, App. | 176 | 386 |
| Keyes; People v., Sup. | 175 | 6 |
| Kimball v. Superior Court in and for City and County of San Francisco, App. | 177 | 488 |
| King v. Papazian, App. | 176 | 49 |
| Kingsbury; Churchill Co. v., Sup. | 174 | 329 |
| Klamath S. S. Co. v. Industrial Accident Commission, Sup. | 177 | 848 |
| Klimm v. Henry Cowell Lime & Cement Co., App. | 175 | 908 |

| | P. Vol. | Page |
|---|---|---|
| Klunk; Dutwiler v., App. | 174 | 919 |
| Kneese; Federal Const. Co. v., App. | 174 | 694 |
| Knowlton; Lindley v., Sup. | 176 | 440 |
| Knutsen; Nelligan v., App. | 175 | 18 |
| Kreitzer v. Southern Pac. Co., App. | 177 | 477 |
| Krohn v. Reclamation Dist. No. 17, App. | 174 | 342 |
| Krotzer v. Clark, Sup. | 174 | 657 |
| Kydd v. City and County of San Francisco, App. | 174 | 88 |
| La Fleur v. M. A. Burns Lumber Co., App. | 176 | 58 |
| Laing; Mills v., App. | 177 | 493 |
| Lakas v. Archambault, App. | 176 | 180 |
| Lake County Inv. Co.; Crescent Inv. Co. v., App. | 177 | 167 |
| Lamattina; People v., App. | 175 | 484 |
| Landau Economic Syphon Co.; Lugiani v., App. | 175 | 648 |
| Landrum; Willits Water & Power Co. v., App. | 175 | 697 |
| Landsberg; Placentia Nat. Bank v., App. | 175 | 22 |
| Lapalleteric v. Shimonowsky, App. | 176 | 365 |
| Larue Wharf & Warehouse Co.; City of Oakland v., Sup. | 176 | 361 |
| Latin-American Pub. Co.; Engebritsen v., App. | 175 | 652 |
| Laurel Hill Cemetery Ass'n; Polk v., App. | 174 | 414 |
| Laurence v. Pacific Oil & Lead Works, App. | 175 | 86 |
| Lawson; People v., Sup. | 174 | 885 |
| Leadbettor v. Industrial Accident Commission, Sup. | 177 | 449 |
| Lee; Brown v., App. | 175 | 907 |
| Lee Gow; People v., App. | 175 | 917 |
| Lee Sing Park; People v., App. | 174 | 346 |
| Lewis v. Hall, App. | 176 | 171 |
| Lewis; Los Angeles County v., Sup. | 177 | 154 |
| Lieman v. Golly, Sup. | 174 | 33 |
| Lindley v. Knowlton, Sup. | 176 | 440 |
| Lion Clothing Co.; Pacific Rys. Advertising Co. v., App. | 174 | 673 |
| Livermore & Co.; Madera Sugar Pine Co. v., Sup. | 175 | 456 |
| Locke-Paddon; Dutton v., App. | 174 | 674 |
| Lorden; Sea v., App. | 174 | 85 |
| Los Angeles County v. Cline, App. | 174 | 73 |
| Los Angeles County v. Lewis, Sup. | 177 | 154 |
| Los Angeles County; Lowry v., App. | 175 | 702 |
| Los Angeles Ice & Cold Storage Co.; San Pedro, L. A. & S. L. R. Co. v., Sup. | 174 | 656 |
| Los Angeles Ry. Corporation; Busch v., Sup. | 174 | 665 |
| Los Angeles Ry. Corporation; Sander v., App. | 175 | 901 |
| Lowry v. Los Angeles County, App. | 175 | 702 |
| Lucas; Freudenberg v., App. | 175 | 482 |
| Lugiani v. Landau Economic Syphon Co., App. | 175 | 648 |
| Lutz v. Merchants' Nat. Bank, Sup. | 177 | 158 |
| M. A. Burns Lumber Co.; La Fleur v., App. | 176 | 58 |
| McAulay v. Board of Sup'rs of Merced County, Sup. | 174 | 30 |
| McCall; Christie v., App. | 177 | 507 |
| McCarthy v. Board of Fire Com'rs of City and County of San Francisco, App. | 174 | 402 |
| McClure v. Board of Education of City of Visalia, App. | 176 | 711 |
| McCollum v. Barr, App. | 176 | 463 |
| McConnell; Doolittle v., Sup. | 174 | 305 |
| McCormick-Saeltzer Co.; Slaker v., Sup. | 177 | 155 |
| MacCoy v. Gage, App. | 177 | 296 |
| McCready, Ex parte, Sup. | 177 | 459 |
| McCreary v. Toronto Midway Oil Co., App. | 175 | 87 |

P.


| | Vol. | Page |
|---|---|---|
| Macdonald v. Roeth, two cases, Sup. | 176 | 38 |
| MacDonald; Smith v., App. | 174 | 80 |
| McDonough v. Cooper, Sup. | 177 | 153 |
| McGill v. Cowan, Sup. | 177 | 290 |
| McGilliard; Whitelaw v., Sup. | 176 | 679 |
| McGue; Hare v., Sup. | 174 | 663 |
| McGuire v. Miller & Lux, Sup. | 174 | 898 |
| Macknight v. Davitt, App. | 174 | 77 |
| McLean v. Colf, Sup. | 176 | 169 |
| McPhail v. Nunes, App. | 177 | 193 |
| Madera Sugar Pine Co. v. Norman B. Livermore & Co., Sup. | 175 | 456 |
| Magee v. W. J. Burt Motor Car Co., App. | 174 | 687 |
| Maginess v. Western Securities Corporation, App. | 175 | 277 |
| Malaley v. City of Marysville, App. | 174 | 367 |
| Manwell v. Durst Bros., Sup. | 174 | 881 |
| Marchant; Erskine v., App. | 174 | 74 |
| Marsh; Ferguson v., App. | 174 | 678 |
| Martin; People v., App. | 174 | 91 |
| Martin v. Smith, Sup. | 175 | 16 |
| Marysville Woolen Mills v. Smith, Sup. | 175 | 13 |
| Mathes; Fife v., Sup. | 176 | 167 |
| Mathews v. Wilson, App. | 175 | 647 |
| Matson; Doty v., App. | 174 | 396 |
| Matthews; Empire Securities Co. v., Sup. | 176 | 160 |
| Mauchle v. Panama-Pacific International Exposition Co., App. | 174 | 400 |
| Mayne v. San Diego Electric Ry. Co., Sup. | 175 | 690 |
| Meinzer; Wagner v., App. | 177 | 293 |
| Mendoza v. Central Forest Co., App. | 174 | 359 |
| Menzel Estate Co. v. City of Redding, Sup. | 174 | 48 |
| Mercantile Trust Co. of San Francisco v. Superior Court of California in and for Kern County, Sup. | 174 | 51 |
| Merchants' Nat. Bank; Lutz v., Sup. | 177 | 158 |
| Michael; Bangham v., Sup. | 177 | 161 |
| Mickel v. Althouse, App. | 176 | 51 |
| Miller & Lux; McGuire v., Sup. | 174 | 898 |
| Mills v. Laing, App. | 177 | 493 |
| Mirandi; People v., App. | 175 | 653 |
| Mitchell v. Wood, App. | 174 | 677 |
| Molloy v. Pierson, App. | 174 | 98 |
| Monterey County Gas & Electric Co.; Heazelton v., Sup. | 175 | 695 |
| Monterey County Gas & Electric Co.; San Francisco Theological Seminary v., Sup. | 175 | 693 |
| Moody; Akerman v., App. | 176 | 696 |
| Mooney; People v., Sup. | 174 | 325 |
| Moore; Drips v., Sup. | 176 | 159 |
| Moore v. Guajardo, App. | 174 | 92 |
| Moore; Horton v., App. | 177 | 188 |
| Moore v. Indian Spring Channel Gold Mining Co., App. | 174 | 378 |
| Moore Motor Truck Co.; Smith v., App. | 176 | 367 |
| Moore's Estate and Guardianship, In re, Sup. | 176 | 461 |
| Moors; Doughty v., App. | 175 | 273 |
| Moors; Doughty v., App. | 175 | 275 |
| Moosios v. Rusconi, App. | 174 | 92 |
| Morand v. Hoyerdahl, App. | 175 | 483 |
| Morneault v. National Surety Co., App. | 174 | 81 |
| Morton, In re, Sup. | 177 | 453 |
| Mouren; Mueller v., App. | 174 | 700 |

P.


| | Vol. | Page |
|---|---|---|
| Mueller v. Mouren, App. | 174 | 700 |
| Muller v. Walters, App. | 175 | 909 |
| Munford; Coulter Dry Goods Co. v., App. | 175 | 900 |
| Munson; Pasadena Rapid Transit Co. v., App. | 174 | 109 |
| Muther v. Capps, App. | 177 | 882 |
| Myers v. Canepa, App. | 174 | 903 |
| Myers v. Canepa, Sup. | 174 | 906 |
| Napa Valley Electric Co. v. Calistoga Electric Co., App. | 176 | 699 |
| National Surety Co.; Hubermann v., App. | 174 | 79 |
| National Surety Co.; Morneault v., App. | 174 | 81 |
| Nave v. Graham, App. | 174 | 76 |
| Neeley v. Neeley, Sup. | 176 | 163 |
| Negrete; People v., Sup. | 175 | 81 |
| Nelligan v. Knutsen, App. | 175 | 18 |
| Nelson Mfg. Co. v. Rush, Sup. | 174 | 327 |
| Neumiller; Spurrier v., App. | 174 | 338 |
| Newhall v. Hunsaker, App. | 176 | 380 |
| Newman v. City of Alhambra, Sup. | 175 | 414 |
| New Method Co-op. Laundry Co.; O'Brien v., App. | 176 | 879 |
| Nichols v. Pacific Electric Ry. Co., Sup. | 174 | 319 |
| Nichols; People v., App. | 177 | 861 |
| Nickel v. State, Sup. | 175 | 641 |
| Nickerson v. San Bernardino County, Sup. | 177 | 465 |
| Niles v. Kavanagh, Sup. | 175 | 462 |
| Noakes v. City of Los Angeles, two cases, Sup. | 175 | 409 |
| N. O. Nelson Mfg. Co. v. Rush, Sup. | 174 | 327 |
| Norman B. Livermore & Co.; Madera Sugar Pine Co. v., Sup. | 175 | 456 |
| Nunan; D. Samuels Realty Co. v., App. | 175 | 650 |
| Nunes; McPhail v., App. | 177 | 193 |
| Oakman Consol. Mining Co.; Schneider v., App. | 176 | 177 |
| O'Brien v. New Method Co-op. Laundry Co., App. | 176 | 879 |
| Ocean Accident & Guarantee Corporation v. Industrial Accident Commission of California, Sup. | 177 | 273 |
| Ocean Shore Development Co. v. Hammond, App. | 175 | 706 |
| O'Donnell; People v., App. | 174 | 102 |
| Ogden v. Ford, Sup. | 176 | 165 |
| Olcovich v. Grand Trunk Ry. Co. of Canada, Sup. | 176 | 459 |
| Onell v. Chappell, App. | 176 | 370 |
| Opitz v. Schenck, Sup. | 174 | 40 |
| Oree v. Gage, App. | 175 | 799 |
| Osmont; Heydenfeldt v., Sup. | 175 | 1 |
| Oubridge; People v., App. | 175 | 276 |
| Owen v. Crocker-Huffman Land & Water Co., App. | 177 | 299 |
| Pacific Coast Casualty Co. v. Davis, App. | 175 | 701 |
| Pacific Electric Ry. Co.; Hanton v., Sup. | 174 | 61 |
| Pacific Electric Ry. Co.; Nichols v., Sup. | 174 | 319 |
| Pacific Gas & Electric Co.; Hartigan v., App. | 177 | 484 |
| Pacific Oil & Lead Works; Laurence v., App. | 175 | 86 |
| Pacific Rys. Advertising Co. v. Lion Clothing Co., App. | 174 | 673 |
| Pacific Surety Co.; Greer-Robbins Co. v., App. | 174 | 110 |
| Pacific Telephone & Telegraph Co. v. Standard American Dredging Co., App. | 176 | 49 |
| Panama-Pacific International Exposition Co.; Mauchle v., App. | 174 | 400 |
| Panama-Pacific International Exposition Co. v. Panama-Pacific International Exposition Commission of California, Sup. | 174 | 890 |
| Panama-Pacific International Exposition Co.; Perera v., Sup. | 175 | 454 |

| | Vol. | Page |
|---|---|---|
| Panama-Pacific International Exposition Commission of California; Panama-Pacific International Exposition Co. v., Sup. | 174 | 890 |
| Papazian; King v., App. | 176 | 49 |
| Paramore v. Colby, App. | 174 | 677 |
| Parks v. Parks, Sup. | 177 | 455 |
| Pasadena Rapid Transit Co. v. Munson, App. | 174 | 109 |
| Patterson v. Chapman, two cases, Sup. | 176 | 37 |
| Patterson; Hoffman v., Sup. | 176 | 162 |
| Patterson; Huey v., App. | 174 | 939 |
| Patterson; Riggins v., App. | 174 | 119 |
| Patton, Ex parte, Sup. | 174 | 655 |
| Payne; Redhead v., App. | 177 | 298 |
| Pearl v. Pearl, Sup. | 177 | 845 |
| Penn; Chinn v., Sup. | 175 | 687 |
| People v. Ah Gee, App. | 174 | 371 |
| People v. Ali, App. | 176 | 883 |
| People v. Allen, App. | 174 | 374 |
| People v. Bailey, App. | 176 | 880 |
| People v. Baker, App. | 175 | 88 |
| People v. Booth, App. | 174 | 685 |
| People v. Brown, App. | 175 | 85 |
| People v. City of Lemoore, App. | 174 | 93 |
| People v. Delgado, App. | 175 | 24 |
| People v. Denman, Sup. | 177 | 461 |
| People v. Dillman, App. | 174 | 951 |
| People v. Eantosca, App. | 174 | 71 |
| People v. Emrick, App. | 175 | 81 |
| People v. Epperson, App. | 176 | 702 |
| People v. Flacco, App. | 174 | 1178 |
| People v. Fong Sing, App. | 175 | 911 |
| People v. Fowler, Sup. | 174 | 892 |
| People v. Frost, App. | 174 | 106 |
| People v. Fryer, App. | 177 | 989 |
| People v. Germino, App. | 175 | 489 |
| People v. Hart, App. | 175 | 276 |
| People v. Hartwell, App. | 175 | 21 |
| People v. Hartwell, App. | 177 | 885 |
| People v. Kawananakoa, App. | 174 | 686 |
| People v. Kawano, App. | 177 | 174 |
| People v. Keyes, Sup. | 175 | 6 |
| People v. Lamattina, App. | 175 | 484 |
| People v. Lawson, Sup. | 174 | 885 |
| People v. Lee Gow, App. | 175 | 917 |
| People v. Lee Sing Park, App. | 174 | 346 |
| People v. Martin, App. | 174 | 91 |
| People v. Mirandi, App. | 175 | 653 |
| People v. Mooney, Sup. | 174 | 325 |
| People v. Negrete, Sup. | 175 | 81 |
| People v. Nichols, App. | 177 | 861 |
| People v. O'Donnell, App. | 174 | 102 |
| People v. Oubridge, App. | 175 | 276 |
| People v. Pimentel, App. | 174 | 687 |
| People v. Pope, App. | 174 | 673 |
| People v. Power, App. | 175 | 803 |
| People v. Rose, App. | 176 | 694 |
| People v. Rossi, App. | 174 | 916 |
| People v. Shortridge, Sup. | 177 | 458 |

P.


| | Vol. | Page |
|---|---|---|
| People v. Smith, App. | 175 | 696 |
| People v. Tinney, App. | 175 | 17 |
| People v. Votaw, App. | 177 | 485 |
| People v. Wademan, App. | 175 | 791 |
| People v. William Yee, App. | 174 | 343 |
| People v. Wong Bow, App. | 175 | 802 |
| People v. Young, App. | 176 | 696 |
| People v. Zavala, App. | 175 | 94 |
| People v. Zemansky, Sup. | 175 | 408 |
| People's Water Co. v. Sweet, App. | 177 | 855 |
| Perera v. Panama-Pacific International Exposition Co., Sup. | 175 | 454 |
| Perry, Ex parte, App. | 174 | 105 |
| Peters; Chase v., App. | 174 | 116 |
| Peters; Chase v., App. | 174 | 119 |
| Pezzoni v. Greenwell, Sup. | 174 | 60 |
| Pezzoni v. Pezzoni, App. | 175 | 801 |
| Pierson; Molloy v., App. | 174 | 98 |
| Pimentel; People v., App. | 174 | 687 |
| Pioneer Truck Co.; Allred v., Sup. | 176 | 455 |
| Piper v. Hawley, Sup. | 175 | 417 |
| Placentia Nat. Bank v. Landsberg, App. | 175 | 22 |
| Planz; Ravn v., App. | 174 | 690 |
| Polk v. Laurel Hill Cemetery Ass'n, App. | 174 | 414 |
| Pond; Johns v., App. | 177 | 293 |
| Pope; People v., App. | 174 | 673 |
| Power; People v., App. | 175 | 803 |
| Pratt; Williamson v., App. | 174 | 114 |
| Prescott's Estate, In re, Sup. | 175 | 895 |
| Pretty v. Warden, App. | 177 | 489 |
| Price v. Bekins Van & Storage Co., Sup. | 176 | 452 |
| Pringle v. Aston, App. | 174 | 78 |
| Pylman; Emigh-Winchell Hardware Co. v., App. | 176 | 722 |
| Rafael; Davidson v., App. | 174 | 680 |
| Railroad Commission of California; Allen v., Sup. | 175 | 466 |
| Railroad Commission of California; City of Pasadena v., Sup. | 177 | 989 |
| Railroad Commission of California; City of Santa Monica v., Sup. | 177 | 989 |
| Railroad Commission of State of California; Hart v., Sup. | 174 | 1178 |
| Raisch v. Regents of University of California, App. | 174 | 943 |
| Rancho Buena Ventura; Shields v., App. | 177 | 499 |
| Ransome-Crummey Co.; Gordon v., App. | 174 | 906 |
| Ravn v. Planz, App. | 174 | 690 |
| Reclamation Dist. No. 17; Krohn v., App. | 174 | 342 |
| Redhead v. Payne, App. | 177 | 208 |
| Reed; Gomez v., Sup. | 174 | 658 |
| Reed; Reher v., Sup. | 176 | 170 |
| Reeves v. Hume, Sup. | 176 | 681 |
| Regents of University of California; Raisch v., App. | 174 | 943 |
| Regoli v. Stevenson, Sup. | 176 | 158 |
| Reher v. Reed, Sup. | 176 | 170 |
| Remick Co.; Hirsch v., App. | 177 | 876 |
| Retail Clerks' Ass'n, Local 428; Rosenberg v., App. | 177 | 864 |
| Reuter v. San Pedro, L. A. & S. L. R. Co., App. | 174 | 927 |
| Richey; Gero v., App. | 175 | 91 |
| Richmond Wharf & Dock Co. v. Blake, App. | 177 | 508 |
| Rideout; Union Oil Co. of California v., App. | 177 | 196 |
| Riggins v. Patterson, App. | 174 | 119 |
| Riley, Ex parte, App. | 177 | 854 |

P.


| | Vol. | Page |
|---|---|---|
| Riverside Portland Cement Co. v. City of Los Angeles, Sup. | 174 | 31 |
| Robert v. Superior Court of Los Angeles County, App. | 175 | 800 |
| Robertson; Wilhelm v., App. | 175 | 919 |
| Robinett's Estate, In re, Sup. | 174 | 37 |
| Rodgers v. Jordan, Sup. | 175 | 406 |
| Rodley; Board of Trustees of Leland Stanford Junior University v., App. | 177 | 175 |
| Roeth; Macdonald v., Sup. | 176 | 38 |
| Rogers v. Atchison, T. & S. F. Ry. Co., App. | 176 | 176 |
| Rohan; Herman v., App. | 174 | 349 |
| Roman Catholic Bishop of Monterey; Hollenbeck-Bush Planing Mill Co. v., Sup. | 176 | 166 |
| Rose v. Crawford, App. | 174 | 69 |
| Rose v. De Witt, Sup. | 176 | 445 |
| Rose; People v., App. | 176 | 694 |
| Rose v. Southern Trust Co., Sup. | 174 | 28 |
| Rosedale Cemetery Ass'n v. Industrial Accident Commission of California, App. | 174 | 351 |
| Rosenberg v. Retail Clerks' Ass'n, Local 428, App. | 177 | 864 |
| Rosenheim v. Howze, Sup. | 176 | 456 |
| Rosenthal; Uhte v., App. | 174 | 83 |
| Rossi; People v., App. | 174 | 916 |
| Rothrock v. Sanborn, Sup. | 174 | 314 |
| Roullard v. Gray, App. | 175 | 479 |
| Rusconi; Moosios v., App. | 174 | 92 |
| Rush; N. O. Nelson Mfg. Co. v., Sup. | 174 | 327 |
| Sacramento County; Gibson v., App. | 174 | 935 |
| Samuels Realty Co. v. Nunan, App. | 175 | 650 |
| San Bernardino County; Nickerson v., Sup. | 177 | 465 |
| Sanborn; Rothrock v., Sup. | 174 | 314 |
| Sander v. Los Angeles Ry. Corporation, App. | 175 | 901 |
| San Diego Electric Ry. Co.; Mayne v., Sup. | 175 | 690 |
| San Francisco Theological Seminary v. Monterey County Gas & Electric Co., Sup. | 175 | 693 |
| San Pedro, L. A. & S. L. R. Co. v. Los Angeles Ice & Cold Storage Co., Sup. | 174 | 656 |
| San Pedro, L. A. & S. L. R. Co.; Reuter v., App. | 174 | 927 |
| Santa Fé Land Imp. Co. v. City of San Diego, App. | 176 | 377 |
| Schenck; Opitz v., Sup. | 174 | 40 |
| Schneider v. Oakman Consol. Mining Co., App. | 176 | 177 |
| Schubert; Sobaje v., App. | 174 | 364 |
| Scoble; Farquharson v., App. | 177 | 310 |
| Scott; Jordan v., App. | 177 | 504 |
| Scott v. Jungquist, Sup. | 175 | 412 |
| Scott v. Times-Mirror Co., Sup. | 174 | 312 |
| Sea v. Lorden, App. | 174 | 85 |
| Security Inv. Co. v. Gifford, Sup. | 176 | 444 |
| Security Trust Co.; Bailey v., Sup. | 177 | 444 |
| Security Trust Co.; Bailey v., Sup. | 177 | 449 |
| Selowsky, Ex parte, App. | 177 | 301 |
| Sharon's Estate, In re, Sup. | 177 | 283 |
| Shattuck & Nimmo Warehouse Co.; Fildew v., App. | 177 | 866 |
| Shelton, Ex parte, Sup. | 174 | 31 |
| Sherman v. Harley, Sup. | 174 | 901 |
| Sherwood v. Wood, App. | 177 | 491 |
| Shields v. Rancho Buena Ventura, App. | 177 | 499 |
| Shimonowsky; Lapalleteric v., App. | 176 | 365 |
| Shorr v. City of Azusa, App. | 177 | 513 |
| Shortridge; People v., Sup. | 177 | 458 |

| | Vol. | P. Page |
|---|---|---|
| Shrader; Francis v., App. | 177 | 168 |
| Shuken v. Cohen, Sup. | 176 | 447 |
| Silva, Ex parte, App. | 175 | 481 |
| Silvey; Ferreira v., App. | 176 | 371 |
| Simmons v. Superior Court of California in and for San Diego County, App. | 174 | 670 |
| Simons v. Bunnell, App. | 177 | 173 |
| Simpson; Smith v., App. | 177 | 190 |
| Slaker v. McCormick-Saeltzer Co., Sup. | 177 | 155 |
| Sloan's Estate, In re, Sup. | 177 | 150 |
| Sloss v. Holland, App. | 176 | 72 |
| Smith; Allen v., App. | 176 | 365 |
| Smith; Bekins v., App. | 174 | 96 |
| Smith; Bekins v., App. | 174 | 942 |
| Smith; California Midland Ry. Co. v., Sup. | 175 | 16 |
| Smith; Cohn v., App. | 174 | 682 |
| Smith; Fitzgerald v., Sup. | 174 | 660 |
| Smith v. F. L. Moore Motor Truck Co., App. | 176 | 367 |
| Smith v. Gaylord, Sup. | 175 | 449 |
| Smith v. MacDonald, App. | 174 | 80 |
| Smith; Martin v., Sup. | 175 | 16 |
| Smith; Marysville Woolen Mills v., Sup. | 175 | 13 |
| Smith; People v., App. | 175 | 696 |
| Smith v. Simpson, App. | 177 | 190 |
| Smith v. Smith, App. | 176 | 382 |
| Smith; Wienke v., Sup. | 176 | 42 |
| Smyer; Wolfsen v., Sup. | 175 | 10 |
| Snook v. Fielden, App. | 175 | 480 |
| Sobaje v. Schubert, App. | 174 | 364 |
| Sormano v. Wood, Sup. | 175 | 451 |
| Southern California Trust Co.; Friedman v., Sup. | 176 | 442 |
| Southern Pac. Co.; Bowdoin v., Sup. | 174 | 664 |
| Southern Pac. Co.; Christman v., App. | 175 | 808 |
| Southern Pac. Co.; Fimple v., App. | 177 | 871 |
| Southern Pac. Co. v. Industrial Accident Commission, Sup. | 175 | 453 |
| Southern Pac. Co.; Kreitzer v., App. | 177 | 477 |
| Southern Pac. Co.; Walker v., App. | 176 | 175 |
| Southern Pac. R. Co. v. Industrial Development Land Co., Sup. | 174 | 652 |
| Southern Trust Co.; Rose v., Sup. | 174 | 28 |
| South Pasadena Realty & Improvement Co.; Warden v., Sup. | 174 | 26 |
| Spaulding & Co. v. Chapin, App. | 174 | 334 |
| Spurrier v. Neumiller, App. | 174 | 338 |
| Standard American Dredging Co.; Pacific Telephone & Telegraph Co. v., App. | 176 | 49 |
| Stansbury; Craig v., App. | 174 | 404 |
| Stansbury v. Superior Court of California, App. | 174 | 404 |
| State; Nickel v., Sup. | 175 | 641 |
| State Bank v. Clelland, App. | 175 | 649 |
| Stedman v. Stedman, Sup. | 176 | 437 |
| Steere v. Formilli, App. | 175 | 806 |
| Stenian v. Tashjian, Sup. | 174 | 883 |
| Stephens; Howard v., App. | 176 | 65 |
| Stevens; Donovan v., Sup. | 175 | 400 |
| Stevenson; Regoli v., Sup. | 176 | 158 |
| Stewart v. California Medical Missionary & Benevolent Ass'n, two cases, Sup. | 176 | 46 |
| Stewart; Cornic v., Sup. | 176 | 164 |

| | P. Vol. | Page |
|---|---|---|
| Stow; Booth v., App. | 175 | 705 |
| Street v. Upton, Sup. | 176 | 446 |
| Street's Estate, In re, Sup. | 176 | 446 |
| Stuart; Kengel v., App. | 176 | 874 |
| Sullivan Tractor Co.; Brandon v., App. | 175 | 906 |
| Superior Court; Cochran v., Sup. | 177 | 989 |
| Superior Court in and for City and County of San Francisco; Kimball v., App. | 177 | 488 |
| Superior Court in and for Los Angeles County; Bakeman v., App. | 174 | 911 |
| Superior Court in and for Los Angeles County; Clark v., App. | 174 | 681 |
| Superior Court in and for Los Angeles County; Title Insurance & Trust Co. v., Sup. | 176 | 678 |
| Superior Court in and for Los Angeles County; Van Alen v., App. | 174 | 672 |
| Superior Court in and for Santa Barbara County; Goodall v., App. | 174 | 924 |
| Superior Court of California; Stansbury v., App. | 174 | 404 |
| Superior Court of California in and for Kern County; Mercantile Trust Co. of San Francisco v., Sup. | 174 | 51 |
| Superior Court of California in and for San Diego County; Simmons v., App. | 174 | 670 |
| Superior Court of City and County of San Francisco; Eastern Outfitting Co. v., App. | 176 | 366 |
| Superior Court of Los Angeles County; Robert v., App. | 175 | 800 |
| Superior Court of Santa Clara County; Beggs v., Sup. | 175 | 642 |
| Sweet; People's Water Co. v., App. | 177 | 855 |
| Tadge v. Byrnes, Sup. | 176 | 439 |
| Talbott; De Laval Dairy Supply Co. v., App. | 175 | 83 |
| Tanner, Ex parte, Sup. | 175 | 81 |
| Tashjian; Stenian v., Sup. | 174 | 883 |
| Thompson, In re, App. | 174 | 86 |
| Thurber, Ex parte, App. | 174 | 112 |
| Times-Mirror Co.; Scott v., Sup. | 174 | 312 |
| Tinney; People v., App. | 175 | 17 |
| Tisdale v. Bryant, App. | 177 | 510 |
| Title Insurance & Trust Co. v. Superior Court in and for Los Angeles County, Sup. | 176 | 678 |
| Title Insurance & Trust Co.; Whitaker v., Sup. | 175 | 460 |
| Tomb; Jaques v., Sup. | 177 | 280 |
| Toronto Midway Oil Co.; McCreary v., App. | 175 | 87 |
| Tracy v. Donovan, App. | 174 | 113 |
| Tremper v. Tremper, App. | 177 | 868 |
| Tucker v. Hagerty, App. | 174 | 908 |
| Tulloh v. Boyce, App. | 174 | 680 |
| Tulloh v. Boyce, Sup. | 177 | 847 |
| Turck, Ex parte, App. | 174 | 100 |
| Turek, Ex parte, App. | 176 | 693 |
| Turman v. Ellison, App. | 174 | 396 |
| Turner's Estate, In re, App. | 177 | 854 |
| Ty Fook; Wong Ah Sure v., App. | 174 | 64 |
| Uhte v. Rosenthal, App. | 174 | 83 |
| Union Hardware & Metal Co.; Donnatin v., App. | 175 | 26 |
| Union Hardware & Metal Co.; Donnatin v., Sup. | 177 | 845 |
| Union Lithograph Co. v. Bacon, Sup. | 175 | 464 |
| Union Oil Co. of California v. Rideout, App. | 177 | 196 |
| Union Trust Co. of San Francisco; Cowan v., App. | 175 | 799 |
| United Railroads of San Francisco; Bassot v., App. | 177 | 884 |
| United States Fidelity & Guaranty Co.; City of Albany v., App. | 176 | 705 |
| University of California; Raisch v., App. | 174 | 943 |

P.


| | Vol. | Page |
|---|---|---|
| Upton; Street v., Sup. | 176 | 446 |
| Vale v. Boyle, Sup. | 175 | 787 |
| Van Alen v. Superior Court in and for Los Angeles County, App. | 174 | 672 |
| Vance v. Gilbert, Sup. | 174 | 42 |
| Ventura Mfg. & Implement Co. v. Warfield, App. | 174 | 382 |
| Von Der Kuhlen v. Cline, App. | 176 | 883 |
| Votaw; People v., App. | 177 | 485 |
| Wademan; People v., App. | 175 | 791 |
| Wagner v. Meinzer, App. | 177 | 293 |
| Wahl v. Yori, App. | 174 | 692 |
| Waldecker v. Waldecker, Sup. | 174 | 36 |
| Waldteufel v. Jones, App. | 176 | 64 |
| Walker v. Southern Pac. Co., App. | 176 | 175 |
| Walker Const. Co.; Globe Grain & Milling Co. v., App. | 176 | 725 |
| Wallace; Huntington Land & Improvement Co. v., Sup. | 175 | 695 |
| Walters; Bond v., App. | 175 | 909 |
| Walters; Muller v., App. | 175 | 909 |
| Warden; Pretty v., App. | 177 | 489 |
| Warden v. South Pasadena Realty & Improvement Co., Sup. | 174 | 26 |
| Warfield; Ventura Mfg. & Implement Co. v., App. | 174 | 382 |
| Waters v. Conselho Supreme Da Uniao Portugueza Do Estado De California, App. | 176 | 368 |
| Watterson v. Cruse, Sup. | 176 | 870 |
| Watts' Estate, In re, Sup. | 175 | 415 |
| Weisshand v. City of Petaluma, App. | 174 | 955 |
| Welch v. Alcott, Sup. | 174 | 34 |
| Welch; Hinton v., Sup. | 177 | 282 |
| Wells v. Allen, App. | 177 | 180 |
| Western Land & Power Co.; Equitable Trust Co. of New York v., App. | 176 | 876 |
| Western Securities Corporation; Maginess v., App. | 175 | 277 |
| Western Shore Lumber Co.; Cousino v., Sup. | 175 | 406 |
| Wetzel; Donnelly v., App. | 174 | 689 |
| Weyerhaeuser; Diamond v., Sup. | 174 | 38 |
| Wheeler v. Houston, Gore & Loy, App. | 174 | 121 |
| Whitaker v. Title Insurance & Trust Co., Sup. | 175 | 460 |
| White v. Deering, App. | 177 | 516 |
| Whitelaw v. McGilliard, Sup. | 176 | 679 |
| Whitney; Bryant v., Sup. | 174 | 32 |
| Wienke v. Smith, Sup. | 176 | 42 |
| Wiley v. Young, Sup. | 174 | 316 |
| Wilhelm v. Robertson, App. | 175 | 919 |
| Williams v. Industrial Accident Commission of California, Sup. | 177 | 989 |
| Williamson v. Pratt, App. | 174 | 114 |
| William Yee; People v., App. | 174 | 343 |
| Willits Water & Power Co. v. Landrum, App. | 175 | 697 |
| Wilson; Allen v., Sup. | 174 | 661 |
| Wilson v. Fuller, App. | 174 | 671 |
| Wilson; Mathews v., App. | 175 | 647 |
| Wise's Estate, In re, Sup. | 177 | 277 |
| Wixom; Evans v., App. | 176 | 873 |
| W. J. Burt Motor Car Co.; Magee v., App. | 174 | 687 |
| Wolfsen v. Smyer, Sup. | 175 | 10 |
| Wolfskill v. City Council of City of Los Angeles, Sup. | 174 | 45 |
| Wong Ah Sure v. Ty Fook, App. | 174 | 64 |
| Wong Bow; People v., App. | 175 | 802 |
| Wood; Mitchell v., App. | 174 | 677 |
| Wood; Sherwood v., App. | 177 | 491 |

P.


| | Vol. | Page |
|---|---|---|
| Wood; Sormano v., Sup. | 175 | 451 |
| Woolfrey; Fassio v., App. | 174 | 700 |
| Wright v. Yosemite Transp. Co., App. | 175 | 905 |
| Wright v. Yosemite Transp. Co., App. | 175 | 906 |
| Yori; Wahl v., App. | 174 | 692 |
| Yosemite Transp. Co.; Wright v., App. | 175 | 905 |
| Yosemite Transp. Co.; Wright v., App. | 175 | 906 |
| Young; People v., App. | 176 | 696 |
| Young; Wiley v., Sup. | 174 | 316 |
| Zavala; People v., App. | 175 | 94 |
| Zemansky; People v., Sup. | 175 | 408 |
| Zucco v. Farullo, App. | 174 | 929 |




# CALIFORNIA REPORTER

174 PACIFIC REPORTER

178 Cal. 440

## WARDEN et al. v. SOUTH PASADENA REALTY & IMPROVEMENT CO. et al. (L. A. 4198.)

(Supreme Court of California. June 24, 1918. Rehearing Denied July 22, 1918.)

1. BOUNDARIES ⟸20(3) — SIDE LINE OF STREET—"DIFFERENT INTENT."
A deed giving a boundary "along the southerly line" of a street, shows a "different intent" within Civ. Code, § 1112, providing that a transfer of land, bounded by a highway, passes title to the center thereof, unless a different intention appears from the grant.

2. CORPORATIONS ⟸445—GRANTORS—DEEDS.
A deed is the individual deed of the signers, they signing as individuals, though it recites they compose the last board of directors of a defunct corporation.

3. APPEAL AND ERROR ⟸1071(3)—PREJUDICIAL ERROR—FINDING TITLE TO LAND.
Though plaintiff proves no title to the land, yet she, being in possession, cannot be said not to be prejudiced by the adjudication on insufficient evidence that defendant is the owner and has the right of possession; this entitling him, under Code Civ. Proc. § 380, to execution for possession.

Department 1. Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Grace P. Warden and another against the South Pasadena Realty & Improvement Company and others. From a judgment for defendant John R. Leahy, plaintiffs appeal. Reversed.

J. Irving McKenna and Catherine A. McKenna, both of Los Angeles, for appellants. Phelps, Greer, Winston & Wharton and Paul E. Greer, all of Los Angeles, for respondents.

SHAW, J. The plaintiffs appeal from the judgment in favor of the defendant John R. Leahy. The complaint states a cause of action against the defendants to quiet alleged title of the plaintiff Grace P. Warden to a tract of land described therein as lot 4, tract 246, in the city of South Pasadena, as per map recorded in Map Book 15, page 18, records of the county of Los Angeles. C. P. Warden has no interest in the action except as the husband of his coplaintiff. The defendant John R. Leahy answered, denying that the plaintiffs are the owners of the property, or that his claim thereto is without right, and alleging that he is the owner thereof in fee simple. In a cross-complaint he further alleges his ownership, and that he derives title thereto under a sheriff's deed executed in pursuance of a foreclosure sale of the property, made by said sheriff upon a judgment foreclosing a mortgage on said property entered in the superior court of Los Angeles county on July 19, 1910, in an action wherein said Leahy was the plaintiff and Julia P. Warden and C. D. Warden were defendants, and from these facts he asks judgment quieting his alleged title in the premises against the claims of plaintiffs and the other parties to the action.

The plaintiffs claim title under two deeds. The first is a deed from Julia P. Warden and C. D. Warden to Grace P. Warden, executed on April 14, 1910, and recorded on August 5, 1910. This deed describes the property as "lot 4, tract No. 246, in South Pasadena," situated in Los Angeles county. The second is a deed executed on April 25, 1912, by C. C. Teague, A. C. Hardison, A. W. Ryan, and Lyman Stewart, as grantors, to Grace P. Warden, as grantee. It describes the property as "lot 4, tract 246, as per map recorded in Book 15, page 18, of Maps records of Los Angeles county."

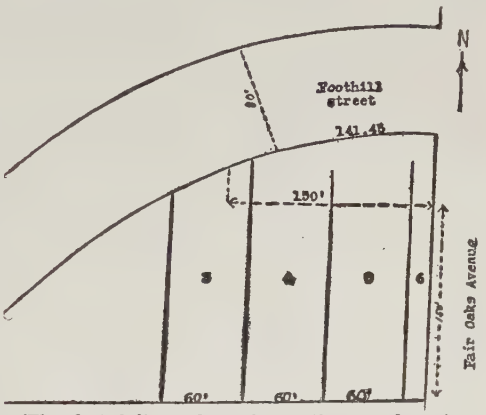
The title of Leahy is derived wholly from the sheriff's deed mentioned in his cross-complaint. Its date is October 6, 1911. It describes the property conveyed as a parcel of land in South Pasadena, Los Angeles county, bounded as follows:

"Beginning at a point on the east line of Lot 6, 150 feet north of the southeast corner of said lot; thence west 150 feet on a line parallel with the southerly line of lots 3, 4, 5 and 6; thence north, parallel with the easterly line of lot 6 to a point on the southerly line of Foothill street; thence easterly along the southerly line of Foothill street to the northeast corner of said lot; thence southerly along the easterly line of lot 6 to the place of beginning; said lots laid down and delineated on map of Oak Lawn addition tract as per map recorded in Book 11, page 53, in the office of the county recorder of Los Angeles county."

[1] It should be here noted that, under our decisions, this description carries title only to the southerly line of Foothill street as shown on the survey and map of the Oak Lawn addition referred to. It does not give the grantee title to the center of that street, as in a case where the boundary line is said to run "along a street." Our decisions are to the effect that such a description as this in the sheriff's deed shows an intent to give title only to the side line of the street, the "different intent" referred to in section 1112 of the Civil Code. Severy v. C. P. R. R. Co., 51 Cal. 197; Alameda, etc., Co. v. Williams, 70 Cal. 540, 12 Pac. 530. The importance of this will be seen presently.

[2] The court found that the property covered by this description was the same property as that described in the complaint herein. If that were true, the judgment for Leahy would probably be correct. His foreclosure suit was begun on November 30, 1909, and the judgment of foreclosure was entered on July 19, 1910. The title of Grace P. Warden, derived from the deed from Julia P. Warden to her, executed on April 4, 1910, would be subject to the foreclosure sale if, as we assume, she had notice of the action, and the sheriff's deed would prevail over her title under that deed. It does not appear that Grace P. Warden obtained any title by the deed from Teague, Hardison, Ryan, and Stewart. No title was proved to have been vested in them, and hence their deed conveyed none. The deed recites that they comprise "the last board of directors of the Raymond Improvement Company, a defunct corporation." But it does not purport to convey the title of that company, assuming that it had any, which does not appear; the grantors sign as individuals, not as trustees. It is therefore a mere quitclaim deed of the individual grantors, and does not convey any other title.

But the finding that the sheriff's deed conveys the same land as that described in the complaint is not supported by the evidence. In order to understand the want of evidence to support this finding, an explanation is necessary. The land embraced in lot 4, tract No. 246 of South Pasadena, as shown on the map in book 15, page 18, has been the subject of three subdivisions. Maps of each were duly recorded. The first was recorded in the year 1887, and, as it has been superseded by a later one, it need not be further referred to. The second was a resubdivision of a part of the lots included in the first map. This map was recorded on November 5, 1906. It was styled "Oak Lawn addition tract." It will better illustrate the question to give here a plat of the portion of this subdivision which is material to the question. It is as follows:




(The dotted lines show the southern and western lines of the tract described in the sheriff's deed.)

The subdivision in which the lot described as lot 4, tract 246, first appears, was recorded in book 15, page 18, on March 23, 1909. This subdivision reduces the width of Foothill street from 80 feet to 60 feet, changes its name to Mound avenue, and also changes the shape, size, and frontage of lots as formerly delineated. The 20 feet is taken from the southerly side of the street and is added to the tract subdivided into lots. Three lots, numbered 5, 6, and 7, are shown as fronting fifty feet on Fair Oaks avenue and running back westerly therefrom 150 feet, No. 5 being the northerly lot of the three. Its northerly line is parallel with and 150 feet northerly of the former southerly lines of lots 3, 4, 5 and 6 of the Oak Lawn addition map. Lot No. 4 of this subdivision is the one claimed by the plaintiff. It lies immediately north of lot 5 and is of the same length. Its east

and west lines, respectively, are continuations of the end lines of lot 5, and they extend from the line of lot 5 to the southerly line of Mound avenue, formerly Foothill street, so as to include all of the tract lying north of lot 5 and south of the southerly line of that street as reduced in width. Hence the 20-foot strip taken from the street and added to the lots is partly included in lot 4, and constitutes the northerly 20 feet thereof.

As the description in the sheriff's deed carried title only to the land lying south of the southerly line of Foothill street, as it was laid down in the Oak Lawn addition map, wherein it was shown to be 80 feet wide, it follows that it does not describe all the land included in lot 4, tract 246. Lot 4 includes the 20-foot strip formerly included in Foothill street. The description in the sheriff's deed does not include that strip. Hence the court below erred in deciding, on the evidence before it, that the description in the complaint and that in the sheriff's deed were identical, and that Leahy was the owner in fee of the whole of lot 4, tract 246.

There is evidence which leads us to suspect that in June, 1908, at the time Mrs. Jackson bought the lot from Raymond Improvement Company and made the mortgage to Leahy which was foreclosed, the new survey which culminated in the map of 1909, showing lot 4, tract 246, had been made, but that the lots were not yet numbered, and that the parties intended and believed that the description in the deed to her and in said mortgage embraced all of lot 4 as shown on the map afterwards filed. Perhaps the calls in the sheriff's deed could be explained by evidence that the new survey was in existence and was intended to be referred to in said calls. We need not decide the question. The testimony regarding it is altogether too vague, unsatisfactory, and incomplete to justify a finding that the description covers all of lot 4. The condition of the survey and the position of the lines at that time were not shown. No person except Mrs. Jackson testified on the subject. She did not testify to the declarations or intent of Leahy or of her grantors on the subject. It does not appear when the survey was made, nor is the date of the mortgage shown. The evidence is wholly insufficient to prove that the description in the sheriff's deed or mortgage, if construed in the light of the circumstances existing when they were executed, would cover the 20-foot strip added to the lots in 1909.

[3] It is proper to say, further, that the deed from Mrs. Jackson to Julia P. Warden, the grantor of the plaintiff, gives the same description as that contained in the sheriff's deed, and it did not convey to Julia P. Warden any title to the 20-foot strip in controversy. Consequently the deed from Julia P. Warden to the plaintiff Grace P. Warden conveyed no title with respect to that strip. We have shown that she proved no title by the deed from Teague and others above mentioned. She was in possession, however, at the time she began the action, and as Leahy asserted his title in a cross-complaint and the judgment was that he is the owner of all of lot 4, tract 246, and has the right of possession thereof, he would be entitled to an execution thereon to recover the possession from Grace P. Warden. Code Civ. Proc. § 380; Kitts v. Austin, 83 Cal. 172, 23 Pac. 290; Landregan v. Peppin, 94 Cal. 468, 29 Pac. 771. Under the evidence in this case, he has no right to possession of the 20-foot strip in question. Hence we cannot say that the plaintiffs will not be injured by an affirmance of the judgment which will entitle the defendant to relief of that character. A reversal of the judgment is therefore imperative. We find no ground upon which the judgment in favor of Leahy can be sustained.

The judgment is reversed.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

---

(178 Cal. 580)

## ROSE v. SOUTHERN TRUST CO.
(L. A. 3956.)

(Supreme Court of California. July 30, 1918. Rehearing Denied Aug. 29, 1918.)

1. TRIAL ⟸85—OFFER OF TESTIMONY—EVIDENCE INADMISSIBLE IN PART—OBJECTION.
Court's ruling, excluding offer of portion of testimony of plaintiff at other trial to meet portion of testimony of defendant, since deceased, at such trial, cannot be upheld on the theory that offer containing inadmissible evidence, as well as admissible, must be rejected, where only a general objection was made to offer, and there was no indication that all of such testimony was to be used.

2. WITNESSES ⟸139(2)—TRANSACTIONS WITH DECEDENTS—EFFECT OF ADMISSION OF EVIDENCE AT FORMER TRIAL.
Under Code Civ. Proc. § 1880, subd. 3, forbidding "party" to action against executor, etc., of deceased person, on claim against estate, to testify, and section 1870, subd. 8, making admissible testimony of deceased person at former trial, in action between plaintiff at former trial and executor of defendant at former trial, plaintiff cannot introduce his testimony at such trial, or his deposition, to meet testimony of deceased at former trial, admitted under subdivision 8.

In Bank. Appeal from Superior Court, Los Angeles County; Willis I. Morrison, Judge.

Action by Margarett R. Rose against the Southern Trust Company, a corporation (executor of the estate of Frances L. Mooers, deceased). From a judgment for defendant, plaintiff appeals. Affirmed.

Shepard & Alm, A. G. Alm, Paul W. Schenck, and Richard Kittrelle, all of Los Angeles, for appellant. E. J. Fleming, W. N. Goodwin, Hunsaker & Britt, and Le Roy M. Edwards, all of Los Angeles, for respondent.

MELVIN, J. This case was twice heard by the District Court of Appeal, and upon the original hearing an opinion was prepared by Mr. Justice Works (serving pro tempore). It was in part as follows:

"This is an appeal from the judgment and from an order denying a motion for a new trial. The action was commenced against Frances L. Mooers, but she has since died, and respondent has been substituted as her executor. Appellant sought a recovery of the amount alleged to be due upon a contract by which Mrs. Mooers agreed to pay Mrs. Rose the sum of $5,000 for acting as her nurse and companion during a journey to Europe. The trip was taken, and upon the return of the parties certain troubles arose between them, which ended in action brought by Mrs. Mooers against Mrs. Rose. That litigation will, for convenience, be referred to as the old case. It is necessary to describe that case only to the extent of saying that it involved the question whether a sum of money which passed between the parties had to do with a certain transaction concerning corporate stock, or whether it related to the contract sued on in this action. The death of Mrs. Mooers occurred before the trial of the present action.

"At the trial of this action the appellant offered in evidence a part of the transcribed testimony of Mrs. Mooers in the old case, and it was received without objection. A portion of the testimony of Mrs. Rose in that case was then offered, but objection was made, and the evidence was excluded. The correctness of the ruling is challenged, and the first question on this appeal is presented. The evidence was refused admission under the language of subdivision 3 of section 1880 of the Code of Civil Procedure, which, with the introductory portions of the section, reads: 'The following persons cannot be witnesses: * * * Parties or assignors of parties to an action or proceeding or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person.' Subdivision 8 of section 1870 of the same Code provides that 'the testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties' as those in a present litigation, 'relating to the same matter' as that involved in such litigation, is receivable in evidence therein. The appellant contends that the testimony of Mrs. Mooers in the old case was admissible under the section last quoted, and that, therefore, the provisions of section 1880 cannot operate to exclude the testimony of Mrs. Rose in the same case."

A decision was reached regarding the admissibility of the proffered testimony, but upon motion the case was reheard, and then for the first time a new question was presented. The District Court of Appeal then decided, upon the authority of Stone v. Hunt, 114 Mo. 66, 21 S. W. 454, that, even conceding that Mrs. Rose's testimony was receivable at all, it could only be admitted as to matters covered by the testimony of Mrs. Mooers which had been allowed without objection a place in the record, and that, since some of the testimony of Mrs. Rose, offered over respondent's objection, was not pertinent to the subjects covered by the testimony of Mrs. Mooers, the court properly rejected all of the evidence; the rule being that where an offer of evidence includes different propositions, grouped together, parts of the offer being vulnerable to an objection made, the objection should be sustained. Swafford v. Board of Education, 127 Cal. 484, 59 Pac. 900.

[1] While the rule is announced correctly by the District Court of Appeal, we have some doubt of its applicability in this case, because of the general nature of the objection to the transcript of testimony as offered. There was nothing in the offer which indicated the intention of the plaintiff to prove all the facts as a whole or none of them, and in view of the authority of Lick v. Diaz, 37 Cal. 437–446, we are inclined to the belief that the court's ruling upon the objection to the admission of the proffered portion of the transcript may not be upheld upon the ground that the inadmissibility of a part vitiated the whole offer. It is not necessary, however, to discuss this subject at length, as we are persuaded that, in view of the provisions of subdivision 3 of section 1880 of the Code of Civil Procedure, neither the testimony of Mrs. Rose, given at the former trial, nor her deposition, which was also offered, was admissible.

[2] The rule of section 1870, subdivision 8, of the Code of Civil Procedure, does not apply to the testimony of a party who is incompetent under the provisions of section 1880, subdivision 3, of the same Code. The provisions of subdivision 8 of section 1870 of the Code of Civil Procedure, relating to the testimony of witnesses generally, does not apply to the testimony of a party who is made incompetent as a witness by subdivision 3 of section 1880. A disqualified witness is not one who is merely "unable to testify." Such a witness must not testify. In the case on trial Mrs. Rose was entirely able and doubtless willing to take the stand and to give her testimony, but the law declared that she could not be a witness as to any matter or fact occurring before the death of Mrs. Mooers. To say that such inhibition created merely an inability to testify would ignore the clear meaning of simple language. From their juxtaposition in the statute the words "unable to testify" refer, not to a legal, but to a physical, inability to appear upon the witness stand and there to give testimony. The ruling of the court in refusing to admit the transcript of the testimony of Mrs. Rose given at the trial of another action was therefore entirely proper.

If the testimony of Mrs. Rose is inadmissible under section 1880, subdivision 3, there is no ground for holding it admissible at all. It is purely hearsay, and to permit the introduction, because of the fact that the decedent had testified on the same subject and that such testimony was available, would be judicial legislation. The deposition of plaintiff taken in the former action was also offered and rejected. It was clearly

inadmissible, upon the principles discussed above and upon the authority of Mitchell v. Haggenmeyer, 51 Cal. 108.

Our conclusion upon these matters makes it unnecessary to pass upon the question whether or not the superior court correctly held that the claim sued upon was barred by the statute of limitations.

The judgment and order are affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SLOSS, J.; SHAW, J.; RICHARDS, Judge pro tem.; LORIGAN, J.

178 Cal. 628

## McAULAY v. BOARD OF SUP'RS OF MERCED COUNTY et al. (Sac. 2867.)

(Supreme Court of California. Aug. 1, 1918. Rehearing Denied Aug. 29, 1918.)

WATERS AND WATER COURSES ⊜225—IRRIGATION DISTRICT—ORGANIZATION—WITHDRAWAL OF PETITIONERS.

Petitioners for the organization of an irrigation district under Act March 31, 1897 (St. 1897, p. 254), and acts amendatory and supplementary thereto, may withdraw from the petition at any time prior to its presentation to the board of supervisors on the date fixed therefor.

In Bank. Application by L. McAulay for mandamus against the Board of Supervisors of the County of Merced, and T. H. Scandrett and others as members thereof. Writ denied.

L. L. Dennett and J. C. Needham, both of Modesto, for plaintiff.

PER CURIAM. We are satisfied that it must be held that petitioners for the organization of an irrigation district under the act approved March 31, 1897, and acts amendatory thereof and supplementary thereto, may effectively withdraw from the petition for the organization of such district at any time prior to the presentation of the petition to the board of supervisors on the date fixed in the published notice for such presentation, with the result that at the time of such presentation they can no longer be considered by the board as petitioners. If this be true, it follows that the petition here does not make a case for relief.

The application for a writ of mandate is denied.

178 Cal. 534

## HERTEL v. EMIRECK et al. (L. A. 4573.)

(Supreme Court of California. July 15, 1918.)

1. APPEAL AND ERROR ⊜523(2) — RECORD — AFFIDAVITS USED ON MOTION FOR NEW TRIAL—AUTHENTICATION—BILLS OF EXCEPTION.

Under Supreme Court rule 29 (119 Pac. xiv), providing that upon appeal from orders of the superior court papers and evidence used or taken on the hearing of the motion must be authenticated by incorporation in a bill of exceptions, except where another mode of authentication is provided by law, affidavits, copies of which are embodied in the printed transcript, but are not authenticated either by incorporation in a bill of exceptions or under Code Civ. Proc. § 953a, providing for preparation of transcript by stenographer to be certified to by court, cannot be considered on appeal.

2. APPEAL AND ERROR ⊜1071(6)—FINDINGS OF FACT—FAILURE TO FIND ON PARTICULAR ISSUES — FINDINGS SUFFICIENT TO SUSTAIN JUDGMENT.

Court's failure to find upon certain issues raised by the pleadings is immaterial, where the findings actually made were such as to require judgment in plaintiff's favor which would not have been affected by a disposition, either way, of such other issues.

3. APPEAL AND ERROR ⊜907(2) — PRESUMPTIONS—ABSENCE OF FINDING.

Court's failure to find on certain issues raised by appellant's allegations is not ground for reversal, where, the evidence not having been brought up, it must be assumed that appellant offered no proof in support of such allegations.

Department 1. Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by Albert Hertel against Idella Emireck, the Summerland Realty Company, a corporation, and others. From the judgment for plaintiff and from an order denying motion for new trial, the last-named defendant appeals. Affirmed.

Victor T. Watkins, of Los Angeles, for appellant. Hindman & Yakey, of Los Angeles, for respondent.

SLOSS, J. This action was brought to foreclose a mortgage of real property, executed by the defendant Summerland Realty Company, a corporation, to secure its note for $300. Said defendant appeals from the judgment, which was in favor of the plaintiff, and from an order denying its motion for a new trial.

The answer admitted the execution of the note and mortgage and nonpayment of the debt. It set up affirmative defenses based upon misrepresentations alleged to have been made by the plaintiff in the negotiations leading up to the giving of the note and mortgage. The court found that no such misrepresentations had been made. The evidence is not before us, and the appellant makes no point on its appeal from the judgment.

[1] It is argued that a new trial should have been granted on the ground of newly discovered evidence. But the record contains no showing upon which this point can be considered. Copies of certain affidavits are embodied in the printed transcript. But these papers are not authenticated, either by incorporation in a bill of exceptions, or under Code of Civil Procedure section 953a. They cannot therefore be considered here. Supreme Court rule 29 (119 Pac. xiv); Herrlich v. McDonald, 80 Cal. 472, 22 Pac. 299; Von Glahn v. Brennan, 81 Cal. 261, 22 Pac. 596; Melde v. Reynolds, 120 Cal. 234, 52 Pac. 491; San Diego Savgs. Bank v. Goodsell, 137 Cal. 420, 70 Pac. 299.

[2, 3] The further point is made that the decision was against law, in that the court failed to find upon certain issues raised by the pleadings. The findings actually made were such as to require a judgment in plaintiff's favor, and this result could not have been changed by a disposition, either way, of other issues. The want of further findings was therefore immaterial. Fogg v. Perris Irr. Dist., 154 Cal. 209, 97 Pac. 316. Besides, the issues which, as appellant claims, were not answered by findings were raised by its own affirmative allegations. The evidence not having been brought up, we must assume that the defendant offered no proof in support of these averments. The want of findings thereon is accordingly no ground for reversal. Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098; Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504; Roberts v. Hall, 147 Cal. 434, 82 Pac. 66; Coats v. Coats, 160 Cal. 671, 118 Pac. 441, 36 L. R. A. (N. S.) 844.

The judgment and the order denying a new trial are affirmed.

We concur: SHAW, J.; RICHARDS, Judge pro tem.

178 Cal. 609

RIVERSIDE PORTLAND CEMENT CO. v. CITY OF LOS ANGELES et al.
(L. A. 4518.)

(Supreme Court of California. July 31, 1918.)

MUNICIPAL CORPORATIONS ⊂=993(2) — ACTION AGAINST—ULTRA VIRES.

A taxpayer may maintain an action to restrain a city from carrying out an ultra vires contract between the city and county, wherein the county unlawfully agreed to furnish cement to the city.

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by the Riverside Portland Cement Company against the City of Los Angeles and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded, with directions.

O'Melveny, Stevens & Millikin and Walter K. Tuller, all of Los Angeles, for appellant. Albert Lee Stephens, Chas. S. Burnell, W. B. Mathews, Wm. B. Himrod, A. J. Hill, and Robert B. Murphey, all of Los Angeles, for respondents.

WILBUR, J. Plaintiff brings this action as a taxpayer to restrain the city of Los Angeles from carrying out a contract entered into between the city of Los Angeles and the county of Los Angeles for the furnishing by the county of 750,000 barrels of cement from the Monolith cement plant, which had been purchased by the city. The county sought to purchase and operate this plant under and by virtue of the provisions of section 4041, subd. 9a, added to the Political Code in 1913 (St. 1913, p. 667). The invalidity of this section was determined by this court in City of Los Angeles v. Lewis, 167 Pac. 390. It was therein held that the attempt to authorize the county of Los Angeles to engage in the manufacture of cement as a private enterprise was violative of the Constitution and that the law enacted in pursuance thereof was unconstitutional and void. It follows, therefore, that the contract between the city of Los Angeles and the county of Los Angeles, wherein the county agreed to furnish cement to the city, was ultra vires and void so far as the county of Los Angeles is concerned, and it is unnecessary to inquire whether or not the various steps required by the charter of the city of Los Angeles in the purchase of supplies were followed. The contract being void, the demurrer to the plaintiff's complaint should have been overruled.

The judgment is reversed, and the case remanded to the superior court, with directions to overrule the demurrer to the complaint.

We concur: LORIGAN, J.; MELVIN, J.

178 Cal. 552

Ex parte SHELTON. (Cr. 2192.)

(Supreme Court of California. July 22, 1918.)

1. HABEAS CORPUS ⊂=54 — APPLICATION — REQUISITES AND SUFFICIENCY.

Application for writ of habeas corpus, to secure release from prison, which failed to show that the board of prison directors unlawfully deprived applicant of credits for good conduct, under Pen. Code, § 1588, without which credits his term would not have expired, was insufficient.

2. HABEAS CORPUS ⊂=54 — APPLICATION — REQUISITES AND SUFFICIENCY.

It is incumbent on one seeking his discharge on habeas corpus from the state prison to specifically show by proper allegation of facts his right to a discharge, in view of Pen. Code, § 1474, requiring statement on such application of "in what the illegality consists."

In Bank. Application by James T. Shelton for writ of habeas corpus. Application denied without prejudice.

James T. Shelton, in pro. per.

PER CURIAM. [1, 2] The petition for a writ of habeas corpus does not sufficiently show the existence of facts entitling the petitioner to be discharged. It is not made to appear therein that the petitioner was not lawfully deprived by the board of prison directors of the credits to which he would be entitled for good conduct under section 1588 of the Penal Code, and if he has been so deprived his term has not expired. It is incumbent on one seeking his discharge on habeas corpus from the state prison to specifically show by proper allegation of facts his right to a discharge. The law governing the matter expressly provides that, if the imprisonment is alleged to be illegal, the petitioner for a writ must state "in what the alleged

illegality consists." Section 1474, Pen. Code. This, in our judgment, the petitioner has not sufficiently done.

The application for a writ is denied, without prejudice to the making of a further application.

---

(178 Cal. 640)

BRYANT et al. v. WHITNEY. (L. A. 4601.)

(Supreme Court of California. Aug. 2, 1918.)

1. PLEADING ⟸253 — AMENDMENT AFTER TRIAL—NECESSITY OF ANSWER.

When the amendment to the complaint has been added after trial, apparently to conform to the proof, a formal answer thereto is unnecessary, for the amendment is deemed denied.

2. INJUNCTION ⟸62(3)—BUILDING RESTRICTIONS—VIOLATIONS.

Where building restrictions on 28 lots, comprising part of a general improvement scheme, were violated by the owners of 7 of the lots, and the enforcement of restrictions against defendant will not tend materially to restore the district, and the infraction complained of does not diminish the value of the other estates, being merely the erection of a house with one side and a projecting chimney too close to the side line, the restriction will not be enforced by injunction.

Department 2. Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Suit by Addie D. Bryant and others against Edwin P. Whitney. From judgments for defendant, plaintiffs appeal. Affirmed.

Stewart & Stewart, of Los Angeles, for appellants. Tanner, Odell, Odell & Taft, of Los Angeles, for respondent.

WILBUR, J. Plaintiffs appeal from the judgment denying them relief by injunction from an alleged violation of a building restriction by defendant, by the erection of two houses on one lot (13), each alleged to be of a cost of less than $1,500, the restricted amount, and alleged to be "nearer than 4 feet from the side lines of said lot." The court found that the houses were to cost more than $1,500 each, but that one was within 3 feet and 8 inches of the south side line of the lot, with a chimney projecting 1 foot further, 4 feet in width. There was no privity between the plaintiffs and the defendant, who were lot owners within the same tract, but all derived their title to their lots from one Mary King Elliott, who purchased 28 lots in the Dos Robles Park Tract, Alhambra, already subdivided, fronting on Dos Robles place, and thereafter at various times from January 15, 1908, to January 7, 1911, sold said lots, including those of the parties hereto, to various purchasers; each lot by its deed of conveyance from said grantor being subject to the same building restriction, which, so far as involved in this case, reads as follows:

"This deed is made and accepted upon the following express conditions, to wit: First. That said property shall be used for residence purposes only, and such residence shall cost not less than $1,500, and shall be located not nearer than 20 feet from the front line of said lot or nearer than 4 feet from either side line there."

[1, 2] Plaintiff relies upon the rule that where, under a general plan of improvement for a particular tract, such restrictions are imposed, equity will enjoin the violation of such conditions or covenants, if any, by the grantees of such lots. The original complaint, however, failed to allege a general plan of improvement, but after answer and trial it appears that an amended complaint was filed, alleging:

"That, pursuant to a general plan of improvement for the benefit of all lots of said tract, each lot of said tract was, by one grantor, sold and conveyed by recorded deed, each lot, except lot 1, subject to uniform building restrictions inserted in the deed thereof in words and figures following," etc.

This allegation was not denied, and the court made no finding on the issue so presented, if any, nor was the failure to so find specified as an error on motion for a new trial. When the amendment to the complaint has been added after trial, apparently to conform to the proof, a formal answer thereto is unnecessary, for the amendment is deemed denied. McDougald v. Argonaut Land, etc., Co., 117 Cal. 87-95, 48 Pac. 1021; Hines v. Brode, 168 Cal. 507, 516, 143 Pac. 729.

Assuming, without deciding, however, that plaintiff sufficiently alleged a general plan of improvement, and that the findings of court as to the method by which said restrictions were imposed upon the land of the parties amounted in legal effect to a finding that there was a general plan of improvement, an assumption most favorable to plaintiffs, respondent, nevertheless, claims that there have been such violations of the restrictions by plaintiffs and others, acquiesced in by plaintiffs, as preclude them from enforcing such restriction against the defendant. The violation of the restriction by the defendant, which is found by the court, consisted in placing the building, with a projecting chimney, too close to the side line of the lot. In April, 1912, on lot 5 two apartment houses were erected, each within 1 foot of the respective side lines. In 1913, on lot 23, apartment houses were erected, two less than 4 feet from the northerly line, and one within less than 4 feet of the southerly line. Plaintiffs Addie D. Bryant and Annie J. East occupy and maintain four houses on three lots. On lot 21 a house has been erected, the body of which is within 4 feet of the south line, and the roof of which projects over the north line of said lot. The building of plaintiff East is erected immediately upon one of the side lines of one of the originally restricted lots; that is to say, by reason of her ownership of the north 25 feet of lot 17 and the south 25 feet of lot 18, her building, erected in the center of this space, covers the whole 8-foot strip along the boundary between lots

17 and 18, required by the restriction to be clear of buildings. The same condition obtains with reference to the three lots occupied by four houses. The owner of the adjoining lot nearest the buildings of defendant is not a party to this action, and plaintiffs neither alleged nor proved any special or other pecuniary damage. As was said by the Supreme Court of Massachusetts:

"Where there has been no uniform observance of the restrictions, and substantially all the landowners have so conducted themselves as to indicate an abandonment of the right, which is in the nature of an easement, to have the neighborhood kept to the standard established by the original plan, and where the enforcement * * * will not tend materially to restore to the district the character impressed upon it by the scheme, and the infraction complained of does not diminish the value of other estates, then it would be inequitable and oppressive to compel at great loss a compliance with the restrictions." Loud v. Pendergast, 206 Mass. 122, 125, 92 N. E. 40, 41.

See, also, Zelman v. Kaufherr, 76 N. J. Eq. 52, 73 Atl. 1048.

There was no miscarriage of justice in the decision appealed from.

The judgment is affirmed.

We concur: LORIGAN, J.; MELVIN, J.

178 Cal. 553

## FRANKFORT GENERAL INS. CO. et al. v. CRAMER. (L. A. 4622.)

(Supreme Court of California. July 23, 1918.)

APPEAL AND ERROR ⊜766—BRIEFS—MATTERS TO BE INCLUDED.

For failure of appellant in brief or a supplement, on appeal by alternative method, on typewritten transcript, to give portions of record relied on, pursuant to Code Civ. Proc. § 953c, or to try to correct deficiency on attention being called thereto, transcript being 120 pages, and insufficiency of evidence the contention, there will be an affirmance.

Department 1. Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by the Frankfort General Insurance Company and another against A. Cramer. From an adverse judgment, defendant appeals. Affirmed.

A. T. Roark, of San Diego, for appellant. Clarence Harden, of San Diego, for respondents.

RICHARDS, Judge pro tem. The record upon this appeal justifies a strict application of the rule laid down in section 953c of the Code of Civil Procedure. The appeal is by the alternative method. The typewritten transcript embraces 120 pages. The appellant relies solely upon the point that the evidence is insufficient to justify the findings and judgment of the court. His opening brief contains no supplement such as is required by the rule, nor does it disclose any attempt at compliance with the rule by quotation, reference, or otherwise, directing the court to the portions of the record upon which appellant relies to sustain his point. Although appellant's attention was expressly directed by respondent's brief to his utter disregard of the rule, no effort has been made to correct the deficiencies in his brief, either by way of a reply brief or by application for relief to the court. Instead appellant has filed a stipulation submitting the cause upon the briefs on file. Upon the authority of Marcucci v. Vowinckel, 164 Cal. 693, 130 Pac. 430, O'Rourke v. Skellenger, 169 Cal. 270, 146 Pac. 633, and Williams v. Hawkins, 20 Cal. App. 161, 128 Pac. 754, the judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.

178 Cal. 544

## LIEMAN v. GOLLY. (L. A. 4498.)

(Supreme Court of California. July 18, 1918.)

1. CANCELLATION OF INSTRUMENTS ⊜53 — FINDINGS OF FACT—SUFFICIENCY.

In suit to annul deeds as having been secured by fraud and undue influence, without consideration, finding that they were executed for a good consideration passing from defendant to the grantor was sufficient as a finding as to consideration.

2. DEEDS ⊜15 — CONSIDERATION — VOLUNTARY CONVEYANCE.

In suit to annul deeds as having been secured by fraud and undue influence, without consideration, finding that they were executed voluntarily, with knowledge of their contents and with intent to convey, obviated necessity of consideration, in view of Civ. Code, § 1040, making consideration unnecessary to validity of executed voluntary deed.

3. COSTS ⊜260(1)—APPEAL FOR DELAY.

Where appeal from a judgment was wholly without merit and evidently taken for delay, damages should be imposed against appellant.

Department 1. Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by J. H. Lieman against Joseph Charles Golly. Judgment for defendant, and plaintiff appeals on the judgment roll alone. Affirmed.

Henry G. Bodkin and Irwin, White & Rosecrans, all of Los Angeles, for appellant. G. Harold Janeway and Hunsaker & Britt, all of Los Angeles, for respondent.

SHAW, J. The appeal is from the judgment on the judgment roll alone. The plaintiff by his complaint sought to annul two deeds executed by his daughter, Annie M. Golly, to the defendant, at different dates, one on July 1, 1912, and the other on December 3, 1912, for the same parcel of land, and for a judgment declaring that the title to the parcel of land covered by said deeds, vested in the heirs of said Annie M. Golly; the plaintiff being one of such heirs. The grounds for the claim that the deeds are void or voidable are that Annie M. Golly at the time of the execution of said deeds was of unsound

mind, that no consideration passed from said defendant for the execution thereof, and that the execution of each deed was procured from her by defendant by means of undue influence and fraud. Issue was taken upon these allegations and the cause was tried by the court. The findings of the court on the material issues are that said Annie M. Golly was sane at the time of the execution of the deeds, that they were not obtained from her by any undue influence or fraud, and that they were executed for a good consideration.

[1, 2] The appeal is wholly without merit. The findings cover all the issues and are in favor of the defendant on all of them. In his brief the appellant claims that the finding of the consideration is insufficient. The ninth finding states that each of said deeds "was executed for a good consideration passing from defendant to said Annie M. Golly." No further finding was necessary. On the contrary, since the findings also show that the deeds were executed voluntarily and with knowledge of their contents and the intent to convey, no consideration was necessary to support the deeds as valid conveyances of the land. Civ. Code, § 1040. There is some discussion of the question whether the deed of July 1, 1912, was executed properly. As the deed of December 3d was properly executed, the point is wholly immaterial, for the last deed would convey the property, even if the first was void.

[3] There is no reason whatever for the claim that the judgment is not supported by the findings, and the record presents no other grounds for review of the appeal. The only conclusion we can reach is that it was taken simply for delay and that it is a proper case for the imposition of damages, which we hereby fix at the sum of $50.

Judgment is affirmed, and it is considered by the court that the defendant recover of the plaintiff the sum of $50 as damages.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

---

178 Cal. 530

## WELCH v. ALCOTT. (L. A. 4618.)

(Supreme Court of California. July 15, 1918.)

1. Costs ⊂=154—Depositions—Necessity — Failure to Use—Trial.

Expenses of taking a deposition before trial are proper disbursements to put into a cost bill, unless it is shown that it was unnecessary, or that for some special reason should not have been allowed, though such deposition was not in fact offered in evidence.

2. Costs ⊂=154—Depositions—Necessity — Question for Court.

In ascertaining whether expenses of taking depositions before trial should be taxed as costs, it was for court to decide whether the taking of the depositions was reasonably necessary for the protection of the party taking them.

3. Costs ⊂=189 — Stenographer's Fees — Transcribing Testimony.

Where court ordered reporter to transcribe testimony, and ordered plaintiff to pay therefor, and the trial being a protracted one, plaintiff, after paying $220.60, directed reporter to cease further transcription, it was within court's discretion, upon judgment for plaintiff, to tax such expenses as costs, under Code Civ. Proc. § 274, authorizing fees for transcripts ordered by court to be taxed as costs; the fact that entire testimony was not transcribed in no way injuring defendant.

4. Costs ⊂=189 — Taxation — Transcript — Failure to Follow.

Where court ordered transcript of testimony to be taken, paid for by plaintiff, and filed, plaintiff's failure to file transcript is not fatal to his right to have expense of transcripts taxed as costs, where he filed it when objection was made on hearing of motion to tax.

Department 1. Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Edmund Welch against Edward H. Alcott. Judgment for plaintiff, and defendant appeals from the court's order of taxation of costs. Affirmed.

James P. Clark and F. W. Gail, both of Los Angeles, for appellant. Frank C. Prescott, of Los Angeles, for respondent.

SLOSS, J. By the judgment in this action the plaintiff recovered costs. He served and filed his memorandum in due time, whereupon the defendant moved to tax costs by striking out a number of items claimed. The court sustained the defendant's objections to some of the items, but disallowed them as to others. From the order so made, in so far as it is unfavorable to him, the defendant appeals.

Whether or not plaintiff should have been allowed costs at all is a question that is discussed to some extent in the briefs. It does not arise on this appeal, but may be presented for consideration on the appeal from the judgment itself. All that we are here concerned with is the propriety of the various items of costs charged against the defendant over his objection. They are as follows:

[1, 2] 1. The memorandum included a charge of $87.40 for taking the deposition of the defendant, Alcott. The deposition was taken by the plaintiff before the trial, and was not, in fact, offered in evidence. But it does not follow that the expense of taking it could not properly be charged as an item of costs. Such expenses "are proper disbursements to put into a cost bill, unless it be shown that they were unnecessary, or that for some special reason they should not have been allowed. * * * It is frequently proper and necessary for a party to have depositions taken, although afterwards the case may take such a course as to make it unnecessary to use them." Lindy v. McChesney, 141 Cal. 351, 74 Pac. 1034. It is for the trial court to determine whether, under all the circumstances, the taking of the deposition was reasonably necessary to the protection of the rights of the party taking it. Lomita L. & W. Co. v. Robinson, 154 Cal.

36, 52, 97 Pac. 10, 18 L. R. A. (N. S.) 1106. We cannot say that the court abused its discretion in deciding that question in plaintiff's favor on the facts before it.

[3] 2. The appellant objects to the allowance of an item of $220.60 paid the reporter for transcribing testimony. It appears that after the beginning of the trial the court made an order that the testimony be transcribed by the reporter, that the "transcript of all the testimony be paid for by plaintiff," and that the charges therefor be taxed as costs in the action, if plaintiff should recover judgment. The order further provided that the transcript be filed. The grounds of objection to the item were that only a part of the testimony had been transcribed, and that the transcript had not been filed. The Code authorizes fees for transcripts "ordered by the court to be made" to be taxed as costs. Code Civ. Proc. § 274. The disputed charge falls within this description. The statute does not require that the transcript cover all the testimony. The appellant's claim is that this condition was imposed by the court's order. But we do not so read the order. Under section 274, fees for transcripts ordered by the court are to be paid by the parties in equal proportions, or either may pay "the whole thereof." When the court ordered that plaintiff pay for the "transcript of all the testimony," it was prescribing that the whole cost should, in the first instance, be met by one of the parties, instead of being divided. Apart from any limitation in the order, it was within the discretion of the trial court to say whether plaintiff should recover costs for a transcript of only a part of the testimony. The evidence indicates that the trial was a protracted one, and that, after plaintiff had paid the sum in question for so much of the transcript as had then been furnished, he was without funds to pay for more, and accordingly directed the reporter to cease further transcription. There may, no doubt, be cases in which it would be unjust to the losing party to charge him with the expense of transcribing isolated fragments. But on the record before us we think the court was justified in concluding that the plaintiff had reasonable grounds for stopping the transcription when he did, and that the defendant was in no way injured by the act of the adverse party in having only a part of the proceedings written up. In one aspect he was, indeed, benefited, since the charge would necessarily have been greater, if the entire testimony had been transcribed.

[4] So far as the want of filing is concerned, it appears that, when the objection was made at the hearing of the motion to tax, the plaintiff did file the transcript. It was then available for the defendant's use in further proceedings looking to a new trial, or the preparation of a record on appeal, and we cannot say that the court erred in holding that the failure to file it earlier was not fatal to plaintiff's right.

3. The final objection is to the charge made for witness fees in the case of several witnesses, who, as appellant claims, were not in attendance for the number of days covered by the charge. The court reduced the items in some particulars. Where it declined to interfere with the charge, we think the conclusion that the charges allowed were proper was not without support in the evidence.

No other points are made.

The order is affirmed.

We concur: SHAW, J.; RICHARDS, Judge pro tem.

---

(178 Cal. 523)

## In re KELLEY'S ESTATE. (L. A. 5432.)

(Supreme Court of California. July 13, 1918.)

1. WILLS ⊂⊃475—CONSTRUCTION—CODICILS.
Two codicils, made within a few days of each other, are to be read together.

2. WILLS ⊂⊃614(5)—ESTATE GIVEN—ESTATE FOR LIFE.
Under a will and the sixth, seventh, and ninth of nine codicils thereto, *held*, that testator's widow took a life estate in all his property, real and personal, excepting minor bequests, and including a particular residence property claimed by her in fee.

Department 1. Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

In the matter of the estate of John G. Kelley, deceased. From a decree of distribution, Edith S. Kelley appeals. Affirmed.

Fred H. Schauer, of Santa Barbara, B. Rey Schauer, of Los Angeles, and A. Mitchell Palmer, of Stroudsburg, Pa., for appellant. Richards & Heaney, of Santa Barbara (A. C. Postel, of Santa Barbara, Charles L. Benoist, of Los Angeles, and Francis Price, of Santa Barbara, of counsel), for respondent.

RICHARDS, Judge pro tem. This is an appeal from that portion of a decree of distribution which purports to distribute certain real estate in Santa Barbara to the appellant for life. The contention of the appellant is that under the will and codicils of the testator she was entitled to have the said property distributed to her in fee simple.

The testator, John G. Kelley, was a resident of Pennsylvania, but maintained a home in Santa Barbara upon the property here in question, and where he died on May 29, 1911. He left a will and nine codicils, which were admitted to probate in Monroe county, Pa., on June 28, 1911. Ancillary administration was had in Santa Barbara county for the purpose of disposing of the property there. The decedent left surviving him his widow, Edith S. Kelley, who was his second wife, and a daughter, whose name was Anna K. Hornbrook. He also left certain nephews and nieces, who were under certain eventualities

to become his residuary legatees. In his will, dated January 31, 1905, after certain specific bequests, he used the following words:

"All the rest of my estate I give and bequeath to my dear wife, Edith S. Kelley, for life or so long as she remains my widow (except in the case of my Santa Barbara property corner Garden and Mission Street, which I give to her absolutely)."

The first, second, third, fourth, and fifth codicils to this will, executed at intervals within the period of about four years after its date, do not purport to make any change in the disposition of his property in so far as Edith S. Kelley is concerned. The codicil of June 21, 1909, does, however, purport to make a number of changes in his will, amounting practically to the making of a new will, in which he gives all of his real estate and one-third of his personal property to his wife, Edith S. Kelley, leaving the balance of his personal property, aside from specific bequests, to his daughter, Anna K. Hornbrook, or in trust for her benefit. Four days after the making of this important codicil the testator added thereto the following brief olographic codicil, viz.:

"June 25, 1909.

"It is my intention that my wife shall have all I am possessed of during her life, except in case of remarriage, when I wish it placed in trust for her free from interference of any one."

On May 26, 1910, he added another codicil, which is not material, but on September 2, 1910, he framed his final codicil, which was also olographic, and made, as he states, "to clear up any possible misunderstanding."

[1, 2] While it is true that in this codicil the testator had apparently the ultimate disposition of his money uppermost in his mind, he makes use of the following words:

"I have made my will providing for a share of my estate to go to Anna K. Hornbrook, but if she has no heirs and should predecease my wife Edith S. Kelley, I do not want a dollar of my money to go to any Hornbrook, but first I expect my wife to have and to hold during her life and then Anna K. Hornbrook, and failing her or her heirs of her body, Edward W. Kelley and his heirs, subject to all the provisions of my will."

We are unable to escape the conclusion that it was the intent of the testator by the sixth and seventh codicils of his will to radically change his former disposition of his estate as expressed in his first will. These two codicils, made within a few days of each other, are to be read together, and when so read are susceptible of no other construction, without doing violence to their plain language, than that it was the testator's intention, as therein expressed, that his wife should have a life estate in all of his property, real and personal (excepting minor bequests), but including the Santa Barbara home. The testator's final codicil, while less clear as to its scope, is entirely consistent with this interpretation, which is itself in entire harmony with the letter and spirit of sections 1317 to 1327 of the Civil Code governing the interpretation of wills.

This being our conclusion, it follows that the decree of distribution appealed from must be affirmed; and it is so ordered.

We concur: SLOSS, J.; SHAW, J.

---

178 Cal. 566

## WALDECKER v. WALDECKER.

(L. A. 4493.)

(Supreme Court of California. July 25, 1918. Rehearing Denied Aug. 22, 1918.)

1. DIVORCE ⟹150(2)—TRIAL—FINDINGS.
Under Civ. Code, § 131, and Code Civ. Proc. § 634, findings of fact are not required to be filed by the court on the denial of a divorce on evidence presented in a default case.

2. DIVORCE ⟹184(5) — REVIEW — DISCRETION.
Where the record does not present a case of such clear and satisfactory proof as to take away the discretion of the trial court, the denial of a divorce on the evidence presented will not be disturbed.

Department 1. Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Gertrude Waldecker against Carl R. Waldecker. From a judgment denying a divorce, plaintiff appeals. Affirmed.

Georgia P. Bullock, of Los Angeles, for appellant.

RICHARDS, Judge pro tem. This is an appeal from a judgment denying the plaintiff a divorce. The complaint in the action was in three counts, setting up, respectively, willful neglect, extreme cruelty, and desertion on the part of the defendant as grounds for a divorce. The defendant was served with process by publication and defaulted. After entry of such default, the plaintiff proffered her proofs to the court, which, after hearing them, denied the divorce. In so doing the court simply made and entered its decree to that effect, but filed no findings of fact. The plaintiff appeals, urging two points as grounds for a reversal.

Her first point is that the failure of the court to make or file findings of fact was an error of procedure requiring a reversal under section 131 of the Civil Code and upon the authority of the cases of Perkins v. Perkins, 29 Cal. App. 68, 154 Pac. 483, and Nelson v. Nelson, 18 Cal. App. 602, 123 Pac. 1099. Section 131 of the Civil Code reads, in part, as follows:

"In actions for divorce, the court must file its decision and conclusions of law as in other cases, and if it determines that no divorce shall be granted, final judgment must thereupon be entered accordingly. If it determines that the divorce ought to be granted, an interlocutory judgment must be entered, declaring that the party in whose favor the court decides is entitled to a divorce."

The question here involved turns upon the meaning to be given to the phrase "as in other cases" in the above-quoted section of the Code. In the consideration of this question it is to be noted that the section above quoted is to be found in the Civil Code, which Code is not ordinarily to be construed as regulating procedure in civil actions, but rather as declaring substantive law. The Code of Civil Procedure is the place wherein the procedure to be followed in such actions is to be found. Turning to the Code of Civil Procedure, we discover that findings of fact and conclusions of law in civil actions are only required to be filed in cases where issues of fact have been raised by the pleas and denials of the respective parties. Code Civ. Proc. §§ 588–590. In the case of Foley v. Foley, 120 Cal. 33, 52 Pac. 122, 65 Am. St. Rep. 147, it was held that in an action for divorce the hearing required by law to be had before the court after entry of a default was not a trial of issues of fact within the meaning of these sections of the Code of Civil Procedure. In the case of Waller v. Weston, 125 Cal. 201, 57 Pac. 892, it was decided that, in an action to foreclose a mortgage where the defendant had defaulted, findings of fact were not required to be filed. By the terms of section 634, courts are not required to make findings in cases where, though an issue has been joined by the pleadings of the parties, either of them fails to appear at the trial, or where by written consent filed with the clerk or oral consent in open court findings are waived. Reading section 131 of the Civil Code in the light of these sections of the Code of Civil Procedure with the construction placed upon them, we are constrained to regard the language of the section of the Civil Code as constituting rather a recital of the rule of procedure laid down in the Code of Civil Procedure than the declaration of a different rule applicable to divorce cases. The phrase "as in other cases" can thus be construed to mean that, in all actions for divorces where issues have been raised by the pleadings of the parties so as to require a trial thereon, findings must be filed unless waived by the parties as provided in section 634 of the Code of Civil Procedure.

[1] We do not give our assent to the meaning ascribed to that phrase in the case of Perkins v. Perkins, 29 Cal. App. 68, 154 Pac. 483, nor to the reasoning or conclusions either of that case or of the case of Nelson v. Nelson, 18 Cal. App. 602, 123 Pac. 1099, as to the proper construction to be placed upon section 131 of the Civil Code. On the contrary, our conclusion is that in divorce cases, as in other cases, findings are required only upon a trial of fact issues raised by the pleadings of the respective parties, and only then in cases where findings have not been waived by the parties as provided in section 634 of the Code of Civil Procedure. It follows that in the instant case findings were not required to be filed by the court upon a denial of the divorce.

[2] The next question presented by the appellant is that the court erred in denying the plaintiff a divorce upon the evidence presented before it. We have carefully read the reporter's transcript of that evidence, and, without attempting to recite or review it, we are of the opinion that the record does not present a case of such clear and satisfactory proof as to take away the discretion of the trial court to determine whether or not the plaintiff was entitled to an interlocutory decree of divorce. This being so, this court cannot interfere with the action of the trial court in refusing to award her such a decree.

Judgment affirmed.

We concur: SHAW, J.; SLOSS, J.

---

178 Cal. 606

In re ROBINETT'S ESTATE. (S. F. 8578.)

(Supreme Court of California. July 31, 1918.)

1. APPEAL AND ERROR ⊂⊃1170(12)—REVERSIBLE ERROR—DECREE OF DISTRIBUTION.
A decree, proportionately distributing the cash on hand, and any proceeds of the estate's cause of action, without continuing the administration, pending suit thereon by the administratrix, did substantial justice, and was not reversible error, in view of Const. art. 6, § 4½.

2. PARTIES ⊂⊃59(3) — SUBSTITUTION — ACTION ON ESTATE'S CAUSE OF ACTION.
The distributees of the proceeds of an estate's cause of action might be substituted as plaintiffs in an action thereon by the administratrix with the will annexed, and might prosecute such action to final judgment.

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

From a decree of distribution in the estate of Margretta Milner Robinett, deceased, made on petition of the legatees filed after the settlement of the final account, the administratrix with the will annexed, as administratrix and residuary legatee, appeals. Affirmed.

Lucius L. Solomons, of San Francisco, for appellant. Helen L. Kaufman, of San Francisco, for respondent.

WILBUR, J. This is an appeal by the administratrix of the estate of Robinett from a decree of distribution made in said estate on petition of the legatees, filed after settlement of appellant's final account. Appellant is the residuary legatee, and takes this appeal both in her capacity as residuary legatee and as administratrix with the will annexed. The cash on hand was insufficient to pay the legacies of the petitioners. They waived claim upon any of

the assets of the estate other than the cash on hand, and requested distribution to them of the money on hand, proportionately to the amount of the legacies bequeathed to them, and requested that the balance of the estate be distributed to the appellant, thus waiving all claim thereto. After the filing of this petition for distribution appellant filed an answer and a petition for partial distribution. In her answer she alleged that the estate was not ready for distribution for the reason that subsequently to the filing of her final account and of the filing of respondents' petition for distribution she had brought a suit "individually and as administratrix" against one of the respondents, R. H. Hazleton, for $500 in money and 500 shares of the National Well Drilling Company, an Arizona corporation, and claiming the right to retain a small amount for notary fees, county clerk's fees, and premium on bond, aggregating $28.25, and also claiming that there is an outstanding bill for music furnished at the funeral. Appellant's petition for partial distribution prayed that $3.20 less be given to each of the three legatees and $2 less to each of three legatees, making a total of $18.60 less than they had petitioned for.

[1, 2] It will be observed, then, that the controversy between the parties concerns the question as to whether or not it was the duty of the court to continue the administration of the estate during the period of the pending litigation. The court found "that the real and personal property (other than cash and the property specifically devised by said will) is of little, if any, value, and cannot be disposed of to the benefit or advantage of said pecuniary legatees." Instead, however, of distributing this lawsuit to the appellant, as had been requested by the petitioners, the court found that the action was for the sum of $1,135, and provided that if there was a recovery therein the first $848.45 should be distributed as follows: Two twenty-sixths to Anna Robinett; two twenty-sixths to Vera Robinett; two twenty-sixths to Edna Robinett Miners; five twenty-sixths to Idella C. Emmons; five twenty-sixths to Adele Harrigan; five twenty-sixths to R. H. Hazleton; five twenty-sixths to Clarence Herrington, and that all in excess of said sum of $848.45 be distributed to Minna Robinett Herrington. It was further provided that, inasmuch as the decree provided for the distribution of $336.80 to the defendant in that litigation, R. H. Hazleton, such sum should be withheld by the administratrix until the termination of that litigation, to be applied to the judgment in the event that the suit was successful. It is difficult to see in what manner the administratrix, either in her official or individual capacity, was injured by the decree of distribution. The estate has been in process of administration for four years, and this litigation was commenced after appellant's final account had been settled. The effect of the decree was to distribute to those entitled thereto in the proportion to which they were entitled, the cause of action, if any, belonging to the estate. The distributees can be substituted as plaintiffs in the action, and can prosecute that action to final judgment. The trial court did substantial justice, and, that being the case, we are prohibited by the Constitution from reversing the decree. Article 6, § 4½.

Judgment affirmed.

We concur: MELVIN, J.; LORIGAN, J.

(178 Cal. 540)

## DIAMOND v. WEYERHAEUSER.
(L. A. 4533.)

(Supreme Court of California. July 18, 1918.)

1. TRIAL ⟸169—DIRECTION OF VERDICT.
It is proper to direct a verdict for defendant where a verdict in favor of plaintiff would have been so contrary to the evidence that trial court would have been bound to set it aside.

2. MUNICIPAL CORPORATIONS ⟸706(6)—COLLISION ON STREET—JURY QUESTION.
In an action for injuries to plaintiff riding on wagon, injured in collision with defendant's automobile, evidence *held* insufficient to take case to the jury.

3. MUNICIPAL CORPORATIONS ⟸706(3)—COLLISION ON STREET—BURDEN OF PROOF.
In an action for injuries sustained in collision with automobile, burden of proof is on plaintiff to show negligence.

4. MUNICIPAL CORPORATIONS ⟸706(3)—COLLISION ON STREET—RES IPSA LOQUITUR.
Where a collision occurred between the wagon plaintiff was riding on and defendant's automobile, causing injury to plaintiff, negligence of defendant is not to be inferred from mere fact of injury.

5. MUNICIPAL CORPORATIONS ⟸706(5)—INJURY ON STREET—EVIDENCE—SPEED OF AUTOMOBILE.
In an action for injuries to plaintiff in collision with automobile, expressions of witnesses that defendant was going "very fast," "pretty fast," "good speed," would not be sufficient evidence that speed was beyond the 20 miles an hour prohibited by ordinance, or in excess of rate demanded by ordinary prudence.

6. APPEAL AND ERROR ⟸995 — REVIEW — WEIGHT OF EVIDENCE.
The appellate court cannot weigh the evidence or resolve conflicts in it.

Department 1. Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Ada Diamond against Charles A. Weyerhaeuser. From a judgment on a verdict directed in favor of defendant, plaintiff appeals. Affirmed.

L. Lieberman and Barstow, Beach & Rohe, all of Los Angeles, for appellant. Gurney E. Newlin, of Los Angeles (Stephens & Stephens and W. W. Hyams, all of Los Angeles, of counsel), for respondent.

SLOSS, J. The plaintiff brought this action to recover damages for personal injuries caused by the collision of defendant's automobile with a milk wagon on which plaintiff was riding. The trial court directed a verdict in favor of the defendant, and plaintiff appeals from the ensuing judgment.

The sole question raised on the appeal is whether there was sufficient evidence of negligence on the part of the defendant's driver to warrant the submission of the case to the jury.

The accident occurred at the intersection of North Broadway and Griffin avenue, in the city of Los Angeles. North Broadway runs east and west, Griffin avenue north and south. Plaintiff was in the employ of the owner of the milk wagon, which was being driven by a coemployé. The wagon, drawn by two horses, was going easterly on North Broadway, and turned at the intersection of Griffin avenue to go northerly into that avenue. As it reached the northerly side of North Broadway, it collided with defendant's automobile, which was being driven by a chauffeur in a westerly direction along the northerly side of North Broadway. The horses ran away, and plaintiff was thrown from the wagon.

The complaint made a general charge of negligent operation of the automobile, and alleged further that the machine was being driven at a speed in excess of the rate, i. e., 20 miles per hour, permitted by a municipal ordinance. The answer denied the allegations of the complaint.

[1] If there was any substantial evidence tending to show that the collision was caused by negligence on the part of defendant's driver, the action of the court in directing a verdict was, of course, erroneous. The existence or nonexistence of negligence is ordinarily a question of fact to be determined by a jury. On the other hand, the court may withdraw the case from the jury and direct a verdict where the evidence is undisputed, "or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it." Davis v. Cal. St. C. R. R. Co., 105 Cal. 131, 38 Pac. 647; Est. of Baldwin, 162 Cal. 471, 123 Pac. 267.

[2-6] We think the evidence in this case was such as to justify the court in taking the action complained of. The burden of proving negligence was upon the plaintiff. In a case of this kind negligence is not to be inferred from the mere fact of injury. Tower v. Humboldt Transit Co., 169 Pac. 227. The testimony on behalf of plaintiff was very indefinite, and, giving it all the weight which it could fairly bear, it went no further than to show that there had been a collision between the wagon and the automobile. There was a total lack of proof of any circumstances from which it might reasonably be inferred that the collision was caused by any want of care on the part of the driver of the automobile, rather than by the negligence of the driver of the wagon, or by accident without fault on the part of any one. Plaintiff herself testified, in effect, that after the wagon had turned to go into Griffin avenue the horses were struck by the automobile, which was coming on North Broadway. She also stated that the wagon had stopped before the left headlight of the automobile caught on the bridle of the right-hand horse. With the exception of a statement regarding the speed of the automobile (to which we shall refer hereafter), this was the extent of her testimony. Another witness testified that he saw the milk wagon as it was crossing North Broadway. The auto came down North Broadway, and the chauffeur endeavored to swing around ahead of the horses, but was unable to do so without running into the curb, and hit the heads of the horses. A third witness did not see the vehicles at the moment of collision, and his testimony, which related to conditions after the impact, throws no light upon the ultimate question of the cause of the accident. Plaintiff's fourth and last witness saw the automobile swing in, "and it took the wagon over near the curbing." So far as the general allegation of negligence is concerned, none of these witnesses testified to any fact or condition which would justify a conclusion that the collision was due to the fault of the driver of the automobile. Nor, looking to the specific averment of violation of the ordinance, did the evidence sustain the charge that the automobile was being propelled at an unlawful or otherwise excessive rate of speed. The plaintiff testified that the machine was coming "very fast"; another witness, that its speed was decreasing before it reached the milk wagon, but that it was still going "at a good speed." The only other witness who testified for plaintiff on the subject said that it looked to him as if the automobile "was going pretty fast." These statements are entirely too uncertain to serve as a basis for a finding that the speed was over 20 miles an hour, or that it was in excess of the maximum rate which would be dictated by the demands of ordinary prudence. Such expressions as "very fast," "pretty fast," and the like are merely relative, and their meaning and effect must depend upon the unknown factor of the witness' personal views regarding standards of speed.

There were five occupants of the automobile. Four of them testified for the defendant, and their versions of the transaction were in substantial accord. They said, in effect, that the machine and the wagon both came to a complete stop, and that as the chauffeur was proceeding to drive his automobile past the wagon, and at a safe distance from it the horses started up and ran into the machine. We cannot of course undertake to weigh the testimony, and resolve conflicts in it. But the clear account of the occur-

rence given by five witnesses for the defendant serves to emphasize the defects in plaintiff's attempt to prove her case. The testimony offered by her, whether taken by itself or in conjunction with the showing made by the defendant, is entirely lacking in elements tending to establish that the collision was caused by the negligence of the defendant's driver. A verdict in favor of the plaintiff would have been so manifestly contrary to the evidence that the trial court would have been bound to set it aside. It was therefore proper to direct a verdict.

The judgment is affirmed.

We concur: SHAW, J.; RICHARDS, Judge pro tem.

---

(178 Cal. 636)

## OPITZ v. SCHENCK. (L. A. 4466.)

(Supreme Court of California. Aug. 2, 1918.)

1. MUNICIPAL CORPORATIONS ⟸706(1)—NEGLIGENCE IN USE OF STREET—PLEADING.
Complaint alleging that defendant drove his automobile with great force and violence against plaintiff and thereby hurled him to the ground, and that this was "done by him carelessly and negligently," sufficiently alleges negligence without specifying the particular acts of negligence which caused the injury.

2. MUNICIPAL CORPORATIONS ⟸706(2)—USE OF STREETS — COLLISION — NEGLIGENCE — PLEADING ORDINANCE.
In action for injuries sustained in collision at street intersection, plaintiff, having made general allegation of negligence, can prove violation of an ordinance without pleading it.

3. MUNICIPAL CORPORATIONS ⟸122(1)—VIOLATION OF ORDINANCE — DAMAGES — PLEADING ORDINANCE.
In action for damages for violation of city ordinance, the ordinance claimed to have been violated must be pleaded.

4. MUNICIPAL CORPORATIONS ⟸122(1) — ACTION TO ENFORCE PENALTY IMPOSED BY ORDINANCE—PLEADING ORDINANCE.
In action to enforce a liability or penalty imposed by an ordinance, the ordinance relied on must be pleaded.

5. PLEADING ⟸11—ALLEGATIONS—MATTERS OF EVIDENCE.
In action for injuries caused by collision at street intersection, alleged due to defendant's negligence, where negligence complained of included violation of city ordinance, it would have been improper to plead the existence and violation of the ordinance; such matter being evidence admissible under a general allegation of negligence.

6. MUNICIPAL CORPORATIONS ⟸706(9)—COLLISION—CONSISTENCY OF JURY FINDINGS.
In action for injuries sustained in collision at street intersection, jury findings that the cutting of the corner by defendant automobile driver without passing to right of center of intersection in passing from one street to the other was the proximate cause of injury, and that driving at greater speed than 15 miles an hour in turning from one street to another was the proximate cause, were not inconsistent.

7. MUNICIPAL CORPORATIONS ⟸705(5)—USE OF STREETS—RATE OF SPEED—NEGLIGENCE.
Driver of vehicle may be negligent in driving at certain rate of speed, although not exceeding speed limit fixed by statute or ordinance.

8. MUNICIPAL CORPORATIONS ⟸705(4)—USE OF STREETS—RATE OF SPEED—VIOLATION OF ORDINANCE—"NEGLIGENCE PER SE."
Violation of speed limit fixed by city ordinance is "negligence per se."
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Negligence Per Se.]

9. APPEAL AND ERROR ⟸907(3) — REVIEW — PRESUMPTIONS.
On an appeal on the judgment roll alone, it must be assumed that there was evidence to sustain the allegations of the complaint.

10. MUNICIPAL CORPORATIONS ⟸706(5) — COLLISION IN STREET—CUTTING STREET CORNER—EVIDENCE.
Where defendant automobile driver cut the corner in turning from one street to another at a speed exceeding 15 miles an hour after dark, jury was justified in finding that he was negligent, although he was not driving in excess of speed limit fixed by ordinance.

Department 2. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Frederick E. Opitz against Paul W. Schenck. Judgment for plaintiff, and defendant appeals. Affirmed.

Paul W. Schenck, of Los Angeles, for appellant. James P. Clark, of Los Angeles, for respondent.

LORIGAN, J. This action is to recover damages for personal injuries sustained by plaintiff in a collision between the motorcycle on which he was riding and an automobile which defendant was driving. Defendant appeals from a judgment entered in favor of plaintiff on a verdict of the jury for $2,000.

The accident happened at the intersection of Washington street and Crenshaw boulevard in the city of Los Angeles, and occurred through the negligent operation by defendant of his automobile over and across the intersection of said streets.

The first point urged for a reversal is that the complaint does not state a cause of action in its allegations of negligence. The complaint charged that about the intersection of said streets above mentioned "defendant negligently and carelessly drove and ran an automobile with great force and violence against the plaintiff, and thereby hurled the plaintiff with great force and violence against the ground, and that plaintiff was by reason of the premises greatly bruised and injured. * * *" It was further alleged that defendant, in driving and operating his automobile over and across the intersection of said streets, did not pass to the right of the center of the intersection of said streets before turning northeasterly on said Crenshaw boulevard, but drove and operated said automobile over and across said intersection in a northeasterly direction to the left and westerly of the center of said streets in violation of an ordinance of the city of Los An-

geles prohibiting it, in other words, that defendant "cut the corner" at said intersection of said streets, and that by reason of the violation of said ordinance in doing so, and the negligent and careless manner in which defendant operated and drove said automobile, the same ran into and against the plaintiff as aforesaid, to his permanent injury.

[1] It is insisted that there is an entire omission in these allegations to specify the particular acts of negligence which caused the injury. But it was not necessary to set the facts out with any more particularity than the complaint did. At common law it was not necessary, in charging negligence in the operation of a vehicle by a defendant whereby a collision with a vehicle operated by plaintiff occurred, to aver anything more than that the collision occurred, and that it occurred through the negligence of defendant. This rule is still the rule of pleading in this state. Here the complaint alleged that the defendant drove his automobile with great force and violence against plaintiff, and thereby hurled him to the ground and that this was "done by him carelessly and negligently." Under the rule obtaining this was all the allegation that was necessary. Smith v. Buttner, 90 Cal. 95, 27 Pac. 29; Crabbe v. Mammoth Channel Gold Mining Co., 168 Cal. 505, 143 Pac. 714; Stephenson v. So. Pac., 102 Cal. 146, 34 Pac. 618, 36 Pac. 407; Cunningham v. Los Angeles Ry. Co., 115 Cal. 566, 47 Pac. 452.

[2-5] It is insisted, as to the ordinance of the city of Los Angeles mentioned in the complaint, that it was not properly pleaded in this that it was not alleged to have been in force at the time of the accident. The complaint, however, was good without any allegations as to the ordinance at all. It alleged negligence in general terms which, as we have just shown, was all that was necessary. If under such an allegation the plaintiff wished to prove the violation of the ordinance, he could do so whether it was pleaded or not. This was not an action for damages for the violation of a city ordinance or to enforce a liability or penalty imposed by one where, of course, it would be necessary to plead the ordinance relied on as the foundation of the action, but was an ordinary suit for damages for negligence pleaded in general terms. Under these circumstances the defective pleading of an ordinance relied on as additional evidence in proof of negligence, or a failure to allege its existence at the time of the accident, or at all is immaterial; its existence and its violation are given in evidence in aid of the general negligence alleged; it is simply evidentiary matter, and as such under our system of pleading it would be improper to plead it. Cragg v. Los Angeles Trust Co., 154 Cal. 663, 98 Pac. 1063, 16 Ann. Cas. 1061.

[6-10] The last point made is that the findings of the jury are inconsistent with each other. This is predicated on the fact that several special questions were submitted to the jury for their answer, and to one of these they replied that the "cutting" of the defendant across the intersection of Washington street to Crenshaw boulevard was the proximate cause of the accident, and to another that the proximate cause of the injury was that defendant was traveling at a speed of more than 15 miles an hour in turning from one street into another. There was no inconsistency in these findings. Both acts of defendant might have been contributing proximate causes of the accident. It is true that the ordinance of the city did not prohibit passing from one street to another at a greater rate of speed than 15 miles an hour, but whether a party is negligent or not is not determined solely by the fact whether at the rate of speed he was making he was violating a city ordinance or not. If he was violating it, it was negligence per se, but he might not be violating it and still be negligent. The rule—speed limitation by ordinance or no speed limitation—is the general and well-established one applying to motor vehicles as to all other vehicles, and is that their operators must use all the care and caution in operating them which careful and prudent men should exercise, having due regard for the safety of the public and the rights of others to the use of the streets. The operator of a vehicle may not escape liability for a collision by simply saying that he was not exceeding the speed limit established by statute or ordinance when it happened. It may appear (the other party being without fault) that though a defendant was not exceeding the limit of speed prescribed by the ordinance, yet that he was operating his vehicle without such control as to speed under the particular circumstances as a careful and prudent man in the exercise of due care and caution would have had. We have not the ordinance before us, and as this is an appeal on the judgment roll alone, we must assume that there was evidence to sustain the allegations of the complaint. It appears therefrom that the collision occurred after dark at the intersection of two streets through the defendant "cutting the corner" at a speed exceeding 15 miles an hour, and the jury may very properly have determined that "cutting a corner" in the dark at that rate of speed was carelessness and negligence on the part of the defendant independent of any ordinance relative to a speed limit at all.

The judgment appealed from is affirmed.

We concur: WILBUR, J.; MELVIN, J.

(178 Cal. 574)

## VANCE et al. v. GILBERT et al.
(L. A. 4556.)

(Supreme Court of California. July 30, 1918.)

1. PARTNERSHIP ⊂=204 — PROCESS — SERVICE UPON COMPANY.
A company being a partnership and its members parties defendant, service of summons on the members would be good against the company.

2. JURY ⊂=13(1)—RIGHT TO JURY TRIAL—EQUITABLE ACTION.
An action being equitable in character, there was no error in denying demand for jury trial.

3. ABATEMENT AND REVIVAL ⊂=47—ASSIGNMENT OF CAUSE OF ACTION.
Where a transfer of a cause of action is made while an action thereon is pending, the action may be continued in the name of the original party, in view of Code Civ. Proc. § 385.

4. MORTGAGES ⊂=461 — EQUITABLE MORTGAGES—FORECLOSURE—FICTITIOUS GRANTEE.
In action to foreclose an equitable mortgage, it being alleged that grantor held title in trust for all parties, it was not error to admit in evidence deed of said grantor to a fictitious grantee, where both grantor and such grantee were made parties defendant and defaulted.

5. PARTNERSHIP ⊂=64—FICTITIOUS NAME—COMPLIANCE WITH STATUTE.
Partnerships having a fictitious name may do business and may be made defendants, although there has been no compliance with Civ. Code, §§ 2466, 2468; the only penalty being that such partnerships may not maintain an action without such compliance.

6. MORTGAGES ⊂=492 — FORECLOSURE — PROTECTING SECURITY.
In action to foreclose equitable mortgage, payment of interest on a prior mortgage to protect the security and prevent foreclosure was recoverable, whether plaintiffs or their predecessor paid the interest.

7. BILLS AND NOTES ⊂=216—ACTION—PARTIES.
Transfer of note in sale of assets of payee company to plaintiff was sufficient to carry title to note and enable plaintiff to sue thereon, although indorsement of payee, a party defendant, was not placed on note until after beginning of action.

8. MORTGAGES ⊂=559(3)—FORECLOSURE OF EQUITABLE MORTGAGE—DEFICIENCY JUDGMENT.
Civ. Code, § 2924, authorizes a deficiency judgment on foreclosure of an equitable as well as an ordinary mortgage, where the property does not sell for a sum sufficient to pay the debt for which it is security.

9. APPEAL AND ERROR ⊂=1047(3)—STRIKING OUT REPETITIONS IN ANSWER—HARMLESS ERROR.
Striking out a number of repetitions in defendant's answer alleging fraud was harmless, where enough remained to make out the charge of fraud.

10. APPEAL AND ERROR ⊂=1078(1)—REVIEW—POINTS NOT ARGUED.
The court on appeal will not discuss or consider points which are not argued by the appellants.

Department 1. Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Warren Vance and another against Clara M. Gilbert and others. From a judgment for plaintiffs, order denying motion for new trial and order denying motion to retax costs, Clara M. Gilbert, Rosina Holmes, and Lawrence Holmes appeal. Affirmed.

Skinner & Skinner, of Los Angeles, for appellants. William Ellis Lady, of Los Angeles, for respondents.

SHAW, J. The above-named appellants appeal from the judgment in favor of the plaintiffs, from an order denying their motion for a new trial, and from an order denying their motion to retax costs.

The complaint states a cause of action upon a promissory note dated October 26, 1910, for $700 executed by the above-named appellants, payable to said Halladay Motorcar Company, four months after date, and to foreclose an alleged equitable mortgage upon a tract of land, for the security of said note. It is alleged that the note was indorsed by the Halladay Motorcar Company to the plaintiffs, and that it is unpaid. With respect to the lien on the real estate, it is alleged that prior to the execution of the note the defendants C. M. Gilbert and Rosina Holmes agreed to exchange an automobile for the said real property, which at that time belonged to said Helen B. Mortimer; that at the request of said Gilbert and Holmes, said Helen B. Mortimer executed a deed purporting to convey said real property to the "Halladay Motorcar Company"; that the said conveyance was executed to enable the said Halladay Company to hold the property as security for the note sued on; and that it was agreed between the parties that the said conveyance should operate as a mortgage upon said property to secure the payment of the said note. It was further alleged that said company was a partnership, that the deed was inoperative because it did not contain the names of the persons composing the same, and that said Helen B. Mortimer holds the title thereto for the benefit of the said appellants and of the holder of the said note, and as security for the payment thereof. Helen B. Mortimer was made a party defendant in the action, as also was the Halladay Motorcar Company and the members thereof, and they suffered default. The answer is extremely voluminous and contains a large amount of irrelevant and rather incoherent matter, a large part of which was stricken out on motion of the plaintiffs and which need not be further referred to. It alleges that the note was given without consideration, and that it was procured by fraud and misrepresentation by said Halladay Motorcar Company. The court made findings that all the allegations of the complaint were true, that the note was given for a valuable consideration, and was not obtained by fraud as alleged. Judgment followed in accordance with the findings.

[1] It was no concern of these appellants whether the summons was properly served on the Halladay Motorcar Company or not. It was a partnership, its members were parties defendant to the action, and a service on them would be good against the company. The motion to quash the service on the company was therefore properly overruled.

[2] The action was equitable in character. Therefore the court did not err in denying the demand for a trial by jury. Downing v. Le Du, 82 Cal. 471, 23 Pac. 202.

[3] A large portion of the record and of the appellants' brief is occupied with objections growing out of a transaction in writing which appellants claim amounted to an assignment of the note by the plaintiffs to William E. Lady, the attorney for the plaintiffs. The action was begun in 1912 and the alleged assignment to Lady was not made until April 1, 1914. Where a transfer of a cause of action is made while an action thereon is pending, it may be continued in the name of the original party. Code Civ. Proc. § 385. The appellants do not show that they would be in any wise benefited if Lady were substituted as plaintiff. The entire controversy upon that subject was and is fruitless and immaterial. It is proper to say, however, that the instrument in question does not assign the note itself to Lady, but merely assigns to him all the plaintiffs' right, title, and interest to any money that may be collected thereon, and it authorized him to prosecute an action therefor in the name of the plaintiffs and to receive any and all moneys obtained by means of such action.

The parties and the judge of the court below appear to have understood so well the transaction in which the note was given and the lien created that little evidence in proof of it was offered. We gather its terms from the briefs and the evidence which appears on the subject. The appellants purchased from the Halladay Motorcar Company a "Halladay" automobile, and paid a small part of the price in cash. At that time they owned a Peerless automobile, which they delivered to the Halladay Company to be sold for their account, the proceeds to be applied on the purchase price of the "Halladay" machine. The Halladay Company sold the Peerless machine to Helen B. Mortimer in exchange for a lot of land which she owned. It was unwilling to take the lot as payment for the "Halladay" machine, and it asked the appellants to execute a note for the price, with the understanding that the lot obtained from Mortimer would be held by it as security for the note. This was agreed to, and thereupon Mortimer executed a deed purporting to convey the land to the "Halladay Motorcar Company," the appellants executed the note sued on, and the company and the appellants executed an agreement to the effect that if the lot should be sold before the note matured, the proceeds should be applied on the note, "but if not sold before that time, then it shall be deeded to the payors upon the payment by them of said note." Afterwards the Halladay Company sold all its business and assets including this note and its interest in the lot, to the plaintiff Vance-Canavan Motor Company. The theory of the plaintiffs' action is, as stated in the complaint, that the deed of Mortimer was ineffectual because of the fictitious name of the grantee, and that in equity she holds the title in trust for all of the parties for the purposes for which the deal was made. This much it is necessary to say to explain what follows.

[4] The court did not err in admitting in evidence the deed executed by Mortimer to the Halladay Company over the objection that it was void because the grantee was a fictitious person. It was duly executed and acknowledged and it was pertinent as evidence to prove the allegations of the complaint and to show that Helen B. Mortimer held the title in trust, if the theory of the complaint that she did was correct. The question whether or not the deed was void for the reason stated is of no importance in the case. Both the Halladay Motorcar Company and Helen B. Mortimer were made defendants to the action, the title was vested in either one or the other, and the allegation is that the title was held in trust as security for the payment of this note. They have each suffered default, and thereby admitted the facts alleged in the complaint. The foreclosure decree will be effectual regardless of the situation concerning the title, inasmuch as all the parties interested are parties to the action, and a sale under the decree against them all will dispose of the whole title.

[5] It was not necessary for the plaintiffs to prove that the defendant Halladay Motorcar Company had complied with the requirements of sections 2466 and 2468 of the Civil Code. Partnerships having a fictitious name may do business without such compliance. The only penalty of a failure is that such a partnership cannot maintain an action until it has complied with those sections. But there is nothing in the sections to prevent such partnership being made defendant to an action.

[6] It is alleged in the complaint that the Mortimer lot was incumbered by a prior mortgage for $600, that after the deed from Mortimer the interest was paid thereon by the plaintiffs in order to protect the security and prevent the foreclosure of said prior mortgage, and that said interest has not been repaid by the appellants. Evidence of these payments was offered, to which the appellants objected on the ground that it was not shown whether they were made by the plaintiffs or by its predecessor, the Halladay Company. So far as these appellants

are concerned it is immaterial which party paid the interest, provided it was paid to protect the security and prevent foreclosure, which does not seem to be disputed. The objection was properly overruled.

[7] The appellants claimed at the trial that the indorsement on the note made by the Halladay Motorcar Company was placed there after the beginning of the action, and the court made some rulings excluding evidence to show that fact. There was evidence as above indicated that this note was transferred to the plaintiff prior to the beginning of the action, in the sale of the assets of the Halladay Company to the plaintiff company. This transfer was sufficient to carry the title to the note and enable the plaintiff company to sue thereon. The payee of the note was a party defendant, and could answer as to any interest it had in the note. It was therefore of no importance whether its indorsement was placed on the note before or after the action was begun.

[8] There was no error in inserting in the decree a provision for the recovery of the deficiency in case the lot did not sell for a sufficient sum to pay the debts for which it was security. There is no distinction in this respect between a transaction which constitutes an equitable mortgage under section 2924 of the Civil Code and an ordinary mortgage. A deficiency judgment is authorized in either. Jones v. Gardner, 57 Cal. 642.

[9] The appellants in their answer alleged that the note and the agreement to accept the lot as security were procured by false representations on the part of the Halladay Motorcar Company to the effect that the lot was clear of all incumbrances and was worth more than the amount of the note. This part of the answer is extremely voluminous, and nearly every allegation was repeated more than once, and upon motion of the plaintiff the court struck out a number of the repetitions. Enough remains, however, to make out the charge of fraud as above stated. The error in striking out the repetitions of the charge was therefore harmless.

The appellants insist in their brief that the note was given without any consideration. The statement we have made heretofore concerning the nature of the transaction in which the note was given was supported by the evidence. The essential facts are really not disputed. The contentions of the appellants relate altogether to the conclusions of law which they claim are to be deduced from the facts. The transaction shows that the note was in fact given for the Halladay automobile purchased by the appellants from the payee of the note. There is no merit in the claim that the note was without consideration.

[10] We have discussed all the points which the appellants have argued in their briefs. A number of rulings are mentioned, and the brief declares that they are erroneous, but no argument whatever is made thereon. There is no argument in support of the appeal from an order denying appellants' motion to retax costs. It is the uniform practice of this court not to discuss or consider points which are not argued by the appellants. Gavin v. Gavin, 92 Cal. 292, 28 Pac. 567; Duncan v. Ramish, 142 Cal. 689, 76 Pac. 661; People v. Glaze, 139 Cal. 163, 72 Pac. 965; People v. Wo, 120 Cal. 297, 52 Pac. 833. For that reason we decline to discuss the questions above mentioned.

The judgment and the orders appealed from are affirmed.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

(178 Cal. 546)

## BANDLE v. COMMERCIAL NAT. BANK OF LOS ANGELES. (L. A. 4526.)

(Supreme Court of California. July 19, 1918.)

1. APPEAL AND ERROR ⊜931(1) — PRESUMPTIONS—FINDINGS.
In reviewing a finding of fact, all the inferences reasonably possible from the evidence favorable to the prevailing party must be indulged by the Appellate Court.

2. FRAUDULENT CONVEYANCES ⊜168 — INTENT OF GRANTEE.
Where there is evidence tending to show that the wife gave full value for conveyance to her by her husband, the husband's fraudulent intent is of no avail to his creditors, unless it is also shown that she participated therein.

3. APPEAL AND ERROR ⊜1010(1)—REVIEW—FINDINGS.
A finding that a wife was not guilty of fraudulent intent in accepting deeds by her husband in payment of his debts to her must be upheld on appeal, where the trial court might have found either way on the evidence.

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by Mary Louisa Bandle against the Commercial National Bank of Los Angeles. From a judgment for plaintiff, defendant appeals. Affirmed.

J. W. McKinley, of Los Angeles, for appellant. G. C. De Garmo, of Los Angeles, for respondent.

SHAW, J. The plaintiff sued to quiet her title to two lots of land situated in Los Angeles county against the claims of the defendant. The plaintiff derived her title to the land by deeds from her husband, Charles W. Bandle, executed on January 24, 1911. The claim of the defendant to the land is based on a sheriff's deed under an execution sale upon a judgment in favor of the defendant against said Charles W. Bandle, the husband, entered in the superior court of the county on January 16, 1912, and on the con-

tention that the deed by him to the plaintiff on January 24, 1911, was fraudulent and void as to his creditors. The defendant set up this claim in its answer and also in a cross-complaint in which Charles W. Bandle is made a party to the action as a cross-defendant. The allegations of fraud and of fraudulent intent were denied, the court made its findings in favor of plaintiff and gave judgment accordingly. The defendant appeals from the judgment.

[1] The evidence is set forth in a bill of exceptions. The sole point urged in support of the appeal is that the findings to the effect that the deeds from Charles W. Bandle to his wife, the plaintiff, were for a valuable consideration, and were not made with the intent to defraud the defendant or other creditors of Charles W. Bandle, is contrary to the evidence. In reviewing a question of this kind, all the inferences reasonably possible from the evidence favorable to the plaintiff must be indulged by this court.

[2, 3] There was testimony to the effect that Mrs. Bandle had from time to time loaned money to her husband out of her separate estate, that on January 24, 1911, when the deeds were made, he owed her about $3,000, that she then requested him to give her something for what he owed her, that he said to her that he could give her these lots, and that thereupon the deeds conveying the lots to her were executed by him as a payment upon his debts to her. This, if true, would sustain a finding that the conveyance to her was for a valuable consideration and without fraudulent intent, unless there was some evidence of intent to defraud creditors, aside from the transaction itself. The conveyance of the lots to the wife occurred about six months prior to the time when the husband became indebted to the Commercial National Bank for the debt upon which its cross-complaint is founded and upon which its claim against the property is based. There was persuasive evidence to the effect that the husband when he incurred the debt had a fraudulent intent toward the bank with respect to this property, that he represented that he was the owner thereof and concealed the fact that it belonged to his wife, and that the loan was made on the faith of that representation. But as there was evidence tending to show that the wife gave full value for the conveyance of the lots by her husband to her, a fraudulent intent on his part is of no avail to his creditors unless it is also shown that the wife participated therein. While there are many equivocal circumstances in the evidence which might give rise to suspicion that the wife had some cause to believe that he had obtained credit from the bank by representing that he owned this property, she herself denied that she had this knowledge, and upon the whole evidence we cannot say that it is of such a character that the court was bound to believe that she was guilty of fraudulent intent in accepting the deeds from her husband and in claiming the property as her own. The finding must be upheld upon the theory that the evidence as a whole was of such a character that the question of fraudulent intent was one which the court might have found either way in its discretion, but one in which its finding cannot be overturned by this court upon appeal.

The judgment is affirmed.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

---

178 Cal. 610

## WOLFSKILL v. CITY COUNCIL OF CITY OF LOS ANGELES. (L. A. 5483.)

(Supreme Court of California. July 31, 1918.)

1. MUNICIPAL CORPORATIONS ⊂⊃33(5)—ANNEXING TERRITORY — PROCEEDINGS — CHARACTER OF ACTS.

In a proceeding to annex territory to a city wherein the council was required to determine whether the requisite number of electors in the territory to be annexed had petitioned for the annexation, the council in making such determination acted in a ministerial capacity.

2. MUNICIPAL CORPORATIONS ⊂⊃33(5)—ANNEXATION OF TERRITORY — PROCEEDINGS — VALIDITY.

In a proceeding to annex contiguous territory to a city, it is competent for the city council to direct the city clerk to compare the petition for the annexation with the register of electors of the county and to report to the council whether the requisite number have signed the petition, and the council's determination thereupon that the requisite number had signed was valid.

In Bank. Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Proceedings by the City Council of City of Los Angeles for the annexation of certain territory to the city, wherein Matt A. Wolfskill filed petition for certiorari to review the determination of the council to annex the territory. From a judgment for defendants, petitioner appeals. Affirmed.

Hartley Shaw, of Los Angeles, for appellant. Albert Lee Stephens, Charles S. Burnell, and C. B. Penn, all of Los Angeles, for respondents.

RICHARDS, Judge pro tem. This is an appeal from a judgment in defendants' favor in a proceeding wherein the plaintiff seeks to review a certain determination of the city council of the city of Los Angeles taken in the course of proceedings for the annexation of certain territory to said city. The proceedings for annexation were instituted under the provisions of the statute of 1913 (St. 1913, p. 587), as amended in 1915 (St. 1915, p. 305), relating to the annexation of inhabited outside territory to an incorporated city. The act contemplates the following steps in the course of such proceedings: Five electors

of the territory to be annexed may file with the city council a notice of their intention to petition for annexation, upon receipt of which the city council may pass a resolution approving the same, and for 30 days thereafter no proceedings shall be taken for annexing the same territory to any other city. Upon receiving such petition, signed by not less than one-fourth in number of the qualified electors residing within said territory, asking for the annexation thereof to the city, the city council must call an election and submit to the electors residing in such territory the question of annexation. If the vote in this territory is favorable the city council must then call an election and submit the proposition to the electors of the city, and if they also vote in favor of the annexation, the result must be certified to the secretary of state and the annexation is then complete.

The proceedings in this matter were properly instituted on March 11, 1916, by the filing of the above notice of intention and by its approval by the city council through the passage of the appropriate resolution on March 14, 1916. On March 23, 1916, a petition for annexation, admittedly in proper form and signed by 120 persons who described themselves therein as being qualified electors of the territory to be annexed and stating their respective places of residence therein was duly filed with the clerk of the city council, and on March 24, 1916, said petition was presented by said clerk to the council in session. Whereupon, on motion of one of its members, duly seconded, a motion was passed instructing the city clerk, who was also the clerk of that body, "to examine said petition and ascertain whether said petition is signed by one-fourth in number of the qualified electors residing within the territory described in said petition as shown by the registration of voters of Los Angeles county." The clerk made such examination and rendered his report in writing to the city council in the following words:

"I beg to report as follows: In accordance with your instructions, I have carefully examined petition No. 973 signed by G. A. Baber and others, filed in my office and presented to the council on March 24, 1916, asking for the annexation to the city of Los Angeles of certain outside territory contiguous to the city on its western boundary, and comprising Westgate and other precincts in Los Angeles county.

"I find and report that said petition is signed by 94 qualified electors residing in the territory described in said petition, and thereby asked to be annexed to the city of Los Angeles, and that said petition is signed by one-fourth (¼) and more of the qualified electors residing in said territory."

Thereupon the city council adopted a resolution as follows:

"That the council of the city of Los Angeles hereby finds and determines that that certain petition asking for annexation of the territory therein and hereinafter described, to the city of Los Angeles, is signed by 94 qualified electors residing in the territory described in said petition, and that said petition is signed by one-fourth (¼) and more in number of the qualified electors residing within the territory described in said petition as shown by the registration of voters of Los Angeles county, within which county said territory is situated, and said petition is sufficient. Said territory is described as follows. * * *"

Here followed the description of the territory sought to be annexed, whereupon the proper ordinance calling a special election and fixing the date thereof was adopted; and the election in accordance therewith was later held, and resulted in a vote favoring the annexation of the proposed territory. The petitioner herein directs his attack upon these proceedings at that portion thereof wherein the city council undertook to determine that a petition signed by the requisite number of the qualified electors of the territory seeking annexation which the statute requires had been duly presented.

It is in the first place contended by the petitioner herein that in the determination of that question the city council acted judicially, and hence that their action thereon is the proper subject of review in this proceeding upon the authority of Imperial Water Co. v. Bd. of Sup., 162 Cal. 14, 120 Pac. 394; Stumpf v. Bd. of Sup., 131 Cal. 364, 63 Pac. 663, 82 Am. St. Rep. 350; Smith v. Strother, 68 Cal. 194, 8 Pac. 852; Bryant v. Bd. of Sup., 32 Cal. App. 495, 163 Pac. 341; and Capuchino Ld. Co. v. San Bruno, 34 Cal. App. 239, 167 Pac. 178.

[1] The appellant's next contention is that the city council had no sufficient evidence before them upon which to base a finding that a sufficient petition for the calling of an election had been presented, and hence its action in making such finding and ordering the election based thereon was in excess of its jurisdiction and hence reviewable in this proceeding. In making this contention the petitioner strongly relies upon the case of Stumpf v. Board of Supervisors, 131 Cal. 364, 63 Pac. 663, 82 Am. St. Rep. 350, to support it. That was a proceeding to review the action of the board of supervisors of San Luis Obispo county in the matter of the attempted creation of a sanitary district under the provisions of the statute of 1891, providing for the formation of such districts. Under that act proceedings were to be initiated by the presentation to the board of supervisors of a petition signed by 25 persons, residents and freeholders within the proposed district. The only showing before the board as to whether the signers of the petition were "residents and freeholders" within the proposed district was the unsworn statement of one of the signers of the petition. This court held that this was an insufficient showing upon which to base its finding and issue the call for an election. There are two essential differences, however, to be noted between the facts of the Stumpf Case and those of the case at bar. In the Stumpf Case the statute required that those signing the petition should be "resi-

dents and freeholders" within the district. In the case at bar all that the statute requires is that those signing the petition shall constitute a certain proportion of the qualified electors of the district sought to be annexed, "as shown by the registration of voters of the county in which such territory is situated." It will be seen at a glance that the quality and extent of proof that the signers of a petition are "residents and freeholders" of a certain district is much greater and requires a much more extended research to ascertain the facts than would be that required to ascertain that the signers of a petition are "residents and qualified electors" within a certain district, especially since the source from which the information in the latter case is to be drawn is specifically pointed out to be the records of the last registration. The second important difference between the Stumpf Case and the case at bar consists in the fact that the only showing made before the board in the former case as to the sufficiency of the petition in the respect indicated was the mere statement of one of the petitioners; while in the latter case the showing made before the city council as to the fact that the signers to the petition were residents and qualified electors of the district was to be found in the written report of the chief ministerial officer of the city council after making the investigation of the registration records prescribed by the statute under the express direction of that body. But aside from these divergencies there are certain expressions in the Stumpf Case upon which the petitioner has laid emphasis which we do not regard as having been essential to the conclusions reached in that case and to which we are not disposed at this time to accord our full approval. It is stated in that case that where the determination of those questions upon which the jurisdiction of the board depended required the exercise of judicial power, and where the statute did not prescribe the character of the proof by which they should be determined, "they must be established in accordance with the rules of evidence recognized by the courts and the common law." We are of the opinion that the trend of both recent legislation and decision has been toward a relaxation of this rigid rule in respect to the procedure before official bodies chiefly political in their character and powers and only occasionally exercising judicial functions, with a view to upholding the action of such bodies, which, though informal in some respect, is taken with a view to advancing the public interest and welfare of the community within the limited range of their jurisdiction. The instant case would seem to furnish an apt illustration of the class of tribunals and of cases to which the more modern and relaxed rule should be applied. The statute under which the proceedings before the city council were taken does not prescribe any procedure to be followed upon the presentation of the resident electors' petition in the way of prescribing a hearing thereon upon notice or in allowing time or opportunity for opposition or contest. The civic body is in no wise limited as to the method to be pursued in informing its members with respect to the sufficiency of the petition, but the statute does expressly limit them to the source of their information and the extent of their inquiry. All that they are required to do is to compare the petition with the last registration of voters of the county in which the designated territory is situated. The county register of electors under the law regulating its contents would contain every fact required to be investigated in order to test the sufficiency of the petition. It would seem apparent therefore that the making of this comparison was the doing of a merely ministerial act. Had this act been done by all of the members of the city council acting individually and even going separately to the place where the register was kept and each reporting to his fellow members the result of his comparisons, it could hardly be contended that this would not have furnished a sufficient basis for a finding as to the facts and for the order calling the election, nor could the insistence upon a rigid rule of procedure go so far as to contend that each member of the civic body having so informed himself must be sworn as a witness in order to properly impart his knowledge to his associates.

[2] The same reasoning would seem to apply to the case where the city council instructs its clerk to perform this ministerial act and report the result to it. Having done this, to insist that this ministerial officer of the board, who has already been sworn as such to the proper performance of his official duties, must go through the formality of being again sworn as a witness before imparting the result of his comparison of the public official records would be to carry a rule of procedure to a ridiculous extreme. We are entirely satisfied that the statute contemplates no such consequence, and that in the case at bar the city council was sufficiently advised by the report of its clerk to make its finding that the petition before that body was sufficient as to the number and required qualifications of its signers and to justify a finding to that effect and to order the special election.

The other points made by petitioner do not merit separate consideration.

Judgment affirmed.

We concur: SLOSS, J.; WILBUR, J.; MELVIN, J.

ANGELLOTTI, C. J. (concurring). I concur. If we concede purely for the purposes

of a decision, as does the opinion, that certiorari will lie in such a case as this (as to which I have great doubt) it is perfectly clear that we are not concerned with any question as to the manner in which the council ascertained the facts upon the existence of which its power to order the election depended. A petition sufficient in form being filed, it was the duty of the council to ascertain in such manner as it found best whether it was sufficiently signed to empower and require it to call the election. If the petition was in fact sufficiently signed, which does not appear to be disputed, the power existed. As said in People v. Ontario, 148 Cal. 635, 84 Pac. 209:

"The duty of a board of trustees to determine whether or not a petition for an annexation election is signed by a sufficient number of electors is entirely implied from the fact that it has no power to order the election except upon a petition signed by that number. The statute nowhere in terms prescribes the necessity of such a determination, or requires any record thereof to be made."

178 Cal. 475

## MENZEL ESTATE CO. et al. v. CITY OF REDDING et al. (Sac. 2377.)

(Supreme Court of California. July 1, 1918.)

1. FERRIES ⟸3—"PUBLIC HIGHWAY."
A ferryboat is not a public highway, though the place in which the boat is used is a "public highway" in the sense that it is a continuation of the highways with which it connects.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Highway.]

2. FERRIES ⟸3 — WAIVER OF FRANCHISE — FREE PUBLIC HIGHWAY—STATUTE.
Where ferryman sold boat, relinquishing franchise, county accepting release and granting new franchise to purchaser in single order of supervisors, waiver of franchise by ferryman was not surrender to county of all his rights and his ferryboat, cable, and appurtenances, and did not make ferry free public highway, even if ferries are "public highways" within Pol. Code, § 4041, subd. 36.

3. FERRIES ⟸15 — GRANT OF FRANCHISE — FINDING OF COST OF MAINTENANCE—STATUTE—"HIGHWAY."
A ferry not being a "highway" within Pol. Code, § 4041, subd. 36, supervisors of county were empowered to grant ferry franchise without preliminary finding that cost of maintaining free ferry was too great for county to assume.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Highway.]

4. FERRIES ⟸18—TRANSFER OF FRANCHISE.
A ferry franchise is transferable.

5. FERRIES ⟸15 — GRANT OF FRANCHISE — COLLATERAL ATTACK.
Franchise for ferry over Sacramento river having been granted by competent authority, supervisors of county of Shasta, collateral attacks, as for failure to advertise franchise for sale, sought to be made in action to enjoin construction of bridge by public authorities, will not be considered by court, though one terminus of ferry was in city of Redding.

6. BRIDGES ⟸10—DISCRETIONARY POWER OF PUBLIC CORPORATION.
A public corporation, as a city, exercises discretionary power in deciding to erect a bridge, which discretion may not be imposed upon an adjoining county or municipality to which the bridge is to run.

7. FERRIES ⟸19 — FRANCHISES — DIVISIBLE ENTITY.
A ferry franchise, made valueless by a free bridge constructed by a city across the river without participation of the county authorities on the other side, was not a divisible entity, and the owners could recover their entire damages from the city.

In Bank. Appeal from Superior Court, Shasta County; James G. Estep, Judge.

Action by the Menzel Estate Company, a corporation, and another, against the City of Redding, a municipal corporation, and J. D. Wright and others, trustees of the City, and the Chico Construction Company, a corporation. From a judgment for plaintiffs, defendants appeal. Affirmed.

C. H. Braynard, City Atty., and Braynard & Kimball, all of Redding, for appellants. McCoy & Gans, of Red Bluff (A. E. Bolton, of San Francisco, of counsel), for respondents.

MELVIN, J. Defendants appeal from a judgment for $3,750 for the detriment caused to the property of plaintiffs in a ferry franchise and equipment by the construction of a free bridge over the Sacramento river connecting a street in the city of Redding with a county road of the county of Shasta. As originally commenced the action was one by which the plaintiffs sought to enjoin the city from completing the bridge. At the time of the trial it was all constructed except the north approach, and the court, believing that all the detriment caused by the erection of the bridge might be compensated by damages, injunctive relief was denied.

There seems to be no serious disagreement between the contending parties regarding the facts, and there is no attack upon the title of plaintiffs to such property as may exist in the franchise issued to their predecessor, C. C. Bush. Appellants contend, however, that the supposed franchise under which Bush operated the ferry was void.

It appears that for many years a ferry has been maintained between the city of Redding and a point opposite on the Sacramento river where that stream runs east and west. The ferryboat was operated on a cable stretching from bank to bank, and the landings were respectively at the place where a street of Redding reached the river bank and a public road of the county of Shasta extended to the opposite bank. Originally the ferry was called "Reid's Ferry." On January 9, 1890, the board of supervisors of Shasta county granted to J. W. Conant, for a term of 20 years, a franchise to operate a ferry for toll at that place. Conant conducted the ferry until 1897, when he sold

the franchise and equipment to C. C. Bush. He then filed a writing with the board of supervisors, setting forth the fact of the sale and Bush's purchase, and asking for a cancellation of his franchise. At the same time Bush made written application for a franchise, and on May 8, 1897, the time noticed for the hearing of the application, the board made an order, declaring Conant's franchise no longer of any effect and granting to Bush a franchise to operate the ferry for the term of 20 years. He conducted the business until 1907 when he conveyed the franchise to Baker, and it has come to plaintiffs by various transfers since that time, and they, like their predecessors, have been operating under a claim of franchise from the county of Shasta at the place where defendants constructed the bridge. It appears that in 1913 the trustees of the city of Redding declared that the public convenience demanded the erection of a free public bridge over the Sacramento river at Reid's Ferry; that after a bond election money was raised for the building of the bridge; and that the defendant Chico Construction Company, having secured the contract, proceeded with the work. During the progress of the building of the bridge the cable was moved, and in 1915, while this action was pending, the boat broke loose during high water and floated down stream, thereby sustaining some damage. The court found that the breaking loose of the boat and cable was proximately caused by the acts of defendants.

The principal attack of defendants is upon the Bush franchise which they insist was void. Their position is that, when Conant filed a relinquishment of the franchise and the supervisors made the order in accordance therewith, the ferry became immediately a free public highway, and that therefore it was necessary before the board could grant a franchise to Bush, that there should be a formal determination by the supervisors that the cost of erecting and the expense of maintaining a ferry was too great for the county to bear. In brief, the appellants contend that: (1) A franchise may expire by nonuser (Sears v. Tuolumne Co., 132 Cal. 167, 64 Pac. 270) and a fortiori by solemn relinquishment of the grantee; (2) when a franchise to collect tolls on a public highway expires by limitation, nonuser, or abandonment, the highway becomes at once a free public highway (Pol. Code, §§ 2618, 2619); (3) a ferry is a public highway, being a continuation of the highway with which it connects (citing authorities, including 19 Cyc. 493; People v. San Francisco & Alameda Railroad Co., 35 Cal. 606–619); (4) when the board of supervisors sought to grant a franchise to Bush that body could only do so effectively by complying with the provisions of section 4041, subd. 36, of the Political Code (formerly subdivision 33 of that section and prior to that esignation in the County Government Act, Statutes of 1893, § 41, p. 359); (5) that statute requires as a jurisdictional prerequisite to action by the board of supervisors a finding that the cost of maintaining the highway was too great to justify its maintenance as a free public highway (Gardella v. County of Amador & County of Calaveras, 164 Cal. 555–560, 129 Pac. 993); (6) no such formal finding on the record of the board of supervisors was proven (Bedell v. Scott, 126 Cal. 675, 59 Pac. 210); (7) therefore, the purported franchise awarded to Bush was void, and he and his successors never acquired any right to operate a ferry.

In analyzing these contentions we will first examine the contention that a ferry is a part of a highway. Undoubtedly a ferry franchise has been so called, as, for example, in the opinion of this court, prepared by Mr. Justice Henshaw, in Vallejo Ferry Co. v. Solano Aquatic Club, 165 Cal. 255, where, at page 271, 131 Pac. 864, at page 871 (Ann. Cas. 1914C, 1197), the following language is used:

"A ferry franchise, emanating from the supreme power of the state or its authorized mandatories, is a grant to a named person, empowering him to continue an interrupted land highway over the interrupting waters."

[1] In 19 Cyc. 493, cited by appellants, a ferry is called "a public highway," but with an important limitation. The definition there given (beginning on page 492) so far as of value to this discussion is as follows:

"A ferry is a liberty to have a boat upon a river for the transportation of men, horses, and carriages with their contents, for a reasonable toll. The term is also used to designate the place where such liberty is exercised. *In the latter sense* a ferry is a public highway, being a continuation of the highway with which it connects." (The italics are ours.)

It has been held in this state that a ferryboat, operated upon a river as a connecting link between parts of a public road and used to convey the United States mails across the stream, is nevertheless private property subject to execution. Lathrop v. Middleton, 23 Cal. 257, 83 Am. Dec. 112. Such property is in the same category as the rolling stock of a street railroad operating under a franchise. Risdon Iron & Locomotive Works v. Citizens' Traction Co., 122 Cal. 94, 54 Pac. 529, 68 Am. St. Rep. 25.

[2] It is clear that the waiver of his franchise by Conant was not a surrender to the county of all of his rights and of his ferryboat, cable, and other appurtenances. The transaction of transferring the property and that of granting the new franchise to the purchaser were intermingled in such a manner that it may not justly be said that the ferry ever became a free public highway. Conant and his wife, it is true, filed with the supervisors a relinquishment of their

franchise, but neither the county nor the public ever acquired the ferryboat and operated it. The essential part of the instrument filed by the Conants was as follows:

"Whereas we have sold and conveyed to C. C. Bush, the said ferry franchise, boat, cable and all appliances, etc., thereto belonging: Now therefore, we do hereby relinquish and abandon the said franchise granted and ask and request that the same shall be canceled and the sureties on the bond given, upon the granting of said franchise be relinquished from all further liabilities in the premises."

This was dated April 8, 1897, but was not filed until May 8th, the day upon which the new franchise was granted to Bush. The acceptance of the release of the Conant franchise, its formal cancellation by the board of supervisors, and the granting of the new franchise to Bush were all contained in a single order. To say that the instant of time elapsing between the cancellation of the one franchise and the granting of the other made the ferry a free public highway would be unduly to exalt a legal fiction. The elimination of the Conant franchise merely left the river for an instant without the formal easement of a right to collect tolls. It did not confer upon the public the right freely to use the boat which Conant had sold to Bush. In short, there was no proper analogy between that transaction and the abandonment of a toll road. Therefore, if it should be conceded that ferries come under the designation of "public highways" as that expression is used in section 4041, subd. 36, of the Political Code, this ferry was never made by abandonment a *free public* highway. That subdivision, which has been in substantially the same form a part of the law of this state since 1893 (Gardella v. County of Amador, supra), gives to boards of supervisors power—

"to grant, on such terms, conditions and restrictions as in their judgment may be necessary and proper, licenses and franchises for taking tolls on public roads or highways, whenever in their judgment the expense necessary to operate or maintain such public roads or highways as free public highways is too great to justify the county in so operating or maintaining them."

But a ferry is not in a strict technical sense under our law a highway. The learned judge of the superior court who presided at the trial of this case covered this point in his very able written opinion as follows:

"And there is no authority in this state that I have been able to find where a ferry and ferry franchise becomes or could become a public highway, and the weight of authority in other states holds only that a ferry is a connecting link between two public highways, and this is borne out especially by the law of this state by section 2618 of our Political Code which defines public highways as 'roads, streets, alleys, lanes, courts, places, trails, and bridges,' but does not cover or include a ferry. Also section 2619 of the Political Code, and one that is relied upon by the defendants as including a toll ferry, reads as follows: 'Whenever the franchise for any tollbridge, trail, turnpike, plank, or common wagon road has expired by limitation or nonuser, such bridge, trail, turnpike, plank or common wagon road becomes a free public highway.' And in this section toll ferries or ferries are not included, and it will be noted that no mention is made in this section of the matter of ferry, and it cannot therefore be successfully claimed that this section has application to the matter of the ferry or to the case in hand, and all of the cases cited by the defendants' counsel to the effect that this ferry became a free, public highway upon the filing of the instrument in writing by Conant and wife were based upon the assumption that a ferry was a public highway."

[3] We conclude, therefore, that the board of supervisors was empowered to grant the franchise to Bush without the preliminary finding that the cost of maintaining a free ferry was too great for the county to assume.

[4] The appellants also contend that a ferry franchise is not transferable, citing in this behalf certain early Californian decisions which seem in a measure to support this contention. All force which those decisions may have had originally has been lost by subsequent legislation and decision. Upon this branch of the case it is sufficient to cite the able and exhaustive opinion of Mr. Justice Hart in People v. Lawley, 17 Cal. App. 331, 119 Pac. 1089, in which the very decisions cited by counsel for appellants in this case are reviewed and a conclusion reached which adversely disposes of a contention identical with that made in the case at bar. This court denied a petition to transfer People v. Lawley.

[5] The franchise for the ferry having been granted by competent authority, namely, the board of supervisors of the county of Shasta, the various collateral attacks sought to be made upon it upon such grounds, for example, as failure to advertise the franchise for sale, and those based upon other objections, will not be considered by the court. Norris v. Farmers' & Teamsters' Co., 6 Cal. 590, 65 Am. Dec. 535; Vallejo Ferry Co. v. Lang & McPherson, 161 Cal. 672, 120 Pac. 421. And this rule is not changed by the fact that one terminus of the ferry is and always has been in the city of Redding. Vallejo Ferry Co. v. Solano Aquatic Club, 165 Cal. 255–265, 131 Pac. 864, Ann. Cas. 1914C, 1197.

[6, 7] Defendants further assert that the city of Redding as a municipal corporation, had power to order the construction of the free bridge as a matter of public convenience; that the city, as one of the state's mandatories, had authority to make a finding to the effect that a free bridge was necessary for public convenience; and that therefore any loss to respondents is damnum absque injuria, at least so far as the detriment to the value of their franchise is involved, because (so runs the argument) every franchise for a toll ferry is taken with the knowledge that the state has authority at any time, in case of

necessity, to provide for competing means of travel, that knowledge becoming, in effect, a part of every contract between the state and the grantee of the privilege to operate a ferry. It will not be necessary here to discuss the exact extent of the state's power through one of its mandatories to violate the franchise of an existing ferry by authorizing the building of a free bridge either entirely within the territory of the governmental agency directing the construction or connecting its territory with that of another agent of the state joining in the declaration of public necessity for the improvement. In this case we have a state of facts involving the construction of a bridge by the city of Redding without authority of the county of Shasta to extend the structure into its road district on the opposite side of the Sacramento river from the city. We can find no statute which confers upon the city of Redding power to declare for another part of the county the necessity for the bridge. It has been held by the District Court of Appeal in respect to this very bridge that the city could not force the county to pay for the part of the structure which is without the city limits, the board of supervisors of Shasta county having declined to participate in the declaration of necessity for the improvement or to appropriate any money to pay for it. See City of Redding v. Shasta County, 171 Pac. 806, a case in which a petition for hearing in this court was denied. A public corporation exercises discretionary power in deciding to erect a bridge (Coffey v. City of Berkeley, 170 Cal. 258, 149 Pac. 559), and that discretion may not be imposed upon an adjoining county or municipality. Therefore the city of Redding may not take whatever benefit might have been derived from a finding of public necessity for a bridge if the river at the place to be spanned had been wholly within the corporate limits; and the city may not escape liability because it had jurisdiction and power to build the part of the bridge within its territory as a declared public necessity. The franchise was not a divisible entity. It was made valueless by the finished bridge. The tangible property also was injured by the bridge, which was virtually then in a completed state. The city of Redding therefore is in essentially the same position which a private individual would occupy, if without warrant of law he had constructed the bridge and injured the property of the respondents.

No other matters discussed in the briefs require discussion or analysis.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; WILBUR, J.; RICHARDS, Judge pro tem.

(178 Cal. 512)

## MERCANTILE TRUST CO. OF SAN FRANCISCO v. SUPERIOR COURT OF CALIFORNIA IN AND FOR KERN COUNTY et al. (L. A. 5681.)

(Supreme Court of California. July 11, 1918. On Petition for Rehearing, Aug. 9, 1918.)

1. NEW TRIAL ⊜163(2)—ORDER—CONSTRUCTION—LIMITED BY SCOPE OF MOTION.
A general order granting a new trial cannot be construed to be any broader than the motion which forms its predicate, nor than the issues which such motion urged had been erroneously determined.

2. PROHIBITION ⊜27—PROCEEDINGS—APPEAL AND ERROR—RETRIAL—PRESUMPTIONS.
In a proceeding on an application for a writ of prohibition, it must be assumed, in the absence of a positive showing to the contrary, that the trial court will be guided in the retrial of a remanded case by the appellate decision.

3. PROHIBITION ⊜20—PROCEEDINGS—PETITION.
In an application for prohibition, *held*, that it is not made to appear, either in petitioner's application or upon the whole record, that the trial court intended to retry the remanded cause, contrary to the clear direction of the appellate decision, or to retry other issues than those actually existing in the case.

4. PROHIBITION ⊜9 — GROUNDS — COURTS — DELAY.
The delay occasioned by the retrial of issues joined by cross-pleadings or the provisions of a trust deed for foreclosure sale in a remanded case are beyond control of an appellate court and cannot be made the subject of a preventive writ.

In Bank. Petition by the Mercantile Trust Company of San Francisco against the Superior Court of California in and for Kern County and Howard A. Peairs, Judge thereof, for a writ of prohibition. Application denied, and writ dismissed.

A. E. Shaw, and Morrison, Dunne & Brobeck, all of San Francisco, for petitioner. A. A. De Ligne, Donzel Stoney, and Denman & Arnold, all of San Francisco, for respondents.

RICHARDS, Judge pro tem. This is an application for a writ of prohibition to be directed to the superior court of the county of Kern and Hon. Howard A. Peairs, judge of said court commanding said court and judge to refrain and desist from taking any further proceedings in the matter of retrying certain issues in the case of Mercantile Trust Company of San Francisco, plaintiff, against Sunset Road Oil Company, Union Oil Company, Citizens' National Bank, Union Lumber Company, King Lumber Company, Kern Valley Bank, M. E. Webster, W. H. Coon, and Stephen Price, defendants, now pending in said court and before said judge. The facts upon which this application is predicated are the following:

The above-named action is one instituted for the foreclosure of a mortgage or trust deed executed to the plaintiff by the defendant Sunset Road Oil Company on July 15, 1905, covering all of its real and personal

properties situate in the county of Kern, which said properties were, by the terms of said instrument, transferred to the said Mercantile Trust Company in trust and as security for a bonded indebtedness of the said Sunset Road Oil Company, to be evidenced by certain bonds issued or to be issued by said last-named company, and which bonds were issued and sold to various persons. Thereafter, and on May 10, 1911, the said plaintiff filed an amended complaint in said action, wherein, after repeating the averments of its original complaint as to the execution of the mortgage or trust deed and the amount due and unpaid thereon by the Sunset Road Oil Company, the plaintiff alleged that, under and pursuant to the provisions of said mortgage or deed of trust providing for a bond issue, the defendant Sunset Road Oil Company had from time to time issued to divers persons bonds aggregating in face value the sum of $1,500,000, which said bonds were outstanding and unpaid. The plaintiff also averred that certain of the defendants other than the Sunset Road Oil Company claimed certain rights or interests in or liens upon the mortgaged properties, which plaintiff alleged to be subsequent, subordinate and subject to the rights of the plaintiff in and to said properties. The plaintiff prayed for a foreclosure of its said mortgage or deed of trust and "that the court fix and determine the number and amount of the bonds of said Sunset Road Oil Company now outstanding and the amount due on each thereof."

The only defendants who appeared in the first instance to set up any interest in the mortgaged premises adverse to that of the plaintiff, existing by virtue of its said mortgage or deed of trust, were the defendant Union Oil Company of California and the defendants Coon and Price. These claimed to have acquired some interest in said mortgaged premises superior to the plaintiff's said mortgage. At some time subsequent to the filing of plaintiff's amended complaint W. R. Williams, state superintendent of banks, appeared for and on behalf of the defendant Kern Valley Bank and filed what purported to be an answer, cross-complaint, and complaint in intervention, from the averments of which it appeared that the Kern Valley Bank had become insolvent, and had been taken possession of by the said W. R. Williams as state superintendent of banks, and was in process of liquidation by him; that the said Kern Valley Bank was the owner or holder of the bonds of the Sunset Road Oil Company to the extent of $459,400, the face value thereof, together with unpaid interest thereon since January 1, 1908, at the rate of 5 per cent. per annum. The answer of the said superintendent of banks, acting on behalf of the Kern Valley Bank, admitted the averment of the plaintiff's amended complaint to the effect that there were $1,500,000 of issued, outstanding, and unpaid bonds of the Sunset Road Oil Company, but denied that any of said bonds other than those owned by Kern Valley Bank, aggregating the sum of $459,400, were issued for any consideration whatever, and affirmatively alleged that each and every one of the said bonds of the Sunset Road Oil Company other than those so held by the Kern Valley Bank were wrongfully and improperly issued, and without any consideration therefor moving to said Sunset Road Oil Company. Whatever other averments the said answer contains upon this subject are mere conclusions of law, based upon its averment that all of such bonds other than those held by the Kern Valley Bank were issued without consideration. By the said cross-complaint and so-called complaint in intervention of the superintendent of banks certain other persons in addition to those already defendants in the action, to wit, W. S. Tevis, C. N. Beal, H. H. Blodgett, Canadian Bank of Commerce, and Western Metropolis National Bank, were brought into the action as defendants; the said cross-complainant alleging as to them a state of facts which it averred rendered the issue of a large block of the bonds of the Sunset Road Oil Company to said later named defendants void.

The cause went to trial upon the issues as thus made up. The only issue which was presented requiring other than merely formal proof on the part of the plaintiff was that joined by the defendants Union Oil Company and Coon and Price, through the claim of these defendants that they held certain leases upon the mortgaged premises which were superior to the plaintiff's mortgage. There was also the question as to the amount in value of bonds actually or properly issued by the Sunset Road Oil Company which the plaintiff's mortgages secured; but this was an issue which arose out of the averments of the so-called cross-complaint and complaint in intervention of the superintendent of banks, representing the Kern Valley Bank, and the answers thereto presented by the defendants which it had caused to be brought in. Upon the trial of the cause the plaintiff presented its formal proofs as to the making and execution of the mortgage or deed of trust to it, and also made its showing as to the superiority of its lien over the alleged rights and interest of the Union Oil Company, Coon and Price. The main battle was between the cross-complainant, W. R. Williams, representing, as superintendent of banks, the Kern Valley Bank, and the defendants it had caused to be brought in. Upon the trial and submission of the cause the court made its findings and rendered its judgment in the plaintiff's favor upon the matter of the making, execution and delivery of the mortgage or deed of trust to it. The court also found and rendered judgment in the plaintiff's favor upon the issue of the priority of its lien over the claims or interest of Union Oil Company, Coon, and Price, who had

answered, claiming that their said rights and interests were superior to the plaintiff's lien. The court also adjudged that the alleged claims or interests of those other defendants who had not appeared were to be subordinated to the lien of plaintiff's mortgage and deed of trust. Upon the issue presented by the cross-complaint as to the amount of outstanding bonds of the Sunset Road Oil Company, which the plaintiff's mortgage or deed of trust secured, the court found that the Sunset Road Oil Company was indebted in the sum of $1,459,000 principal and $368,749.80 interest, $50,000 trustees' and attorney's fees, and $4,082.56 costs and disbursements, all of which was secured by the plaintiff's lien, the foreclosure of which was decreed.

As to this issue, and the finding and decree of the trial court thereon, it is plain that the plaintiff as the mere trustee for the bondholders was not materially affected, but that, on the other hand, the Kern Valley Bank and its representative, W. R. Williams, as superintendent of banks, in charge of its affairs, were the parties actually aggrieved. While it is true that the plaintiff, as a predicate to its asserted right to the foreclosure of its mortgage or deed of trust, stated in its complaint the amount of the outstanding indebtedness of the Sunset Road Oil Company, as the same appeared upon the face of its issued bonds, the fact is that the real issue upon this subject was the one arising upon the cross-complaint, or so-called complaint in intervention, of the Kern Valley Bank and its representative, and the answers thereto filed on behalf of the defendants which it had caused to be brought into the case, and whose holdings of certain of the bonds of the Sunset Road Oil Company it had assailed. Upon the issues thus framed the court found against the Kern Valley Bank and its representative, and decreed that it take nothing by its cross-complaint in intervention. After the entry of the decree of the trial court disposing of these several matters, two separate motions for a new trial were made—one by the Union Oil Company, addressed to that portion of the finding and decree of the court which subordinated its interests in portions of the mortgaged property to the plaintiff's lien; the other by and on behalf of the Kern Valley Bank, wherein the findings and decree of the trial court upon the issues specially tendered by the cross-complaint in intervention were assailed. Both of said motions for a new trial were granted by the trial court on June 16, 1914, its order in each instance being in general terms.

Several appeals were taken from each of the orders by the plaintiff and others, and upon separate hearings upon each of these appeals the order granting a new trial upon the motion of the Union Oil Company was reversed, while the order granting the motion for a new trial made on behalf of the Kern Valley Bank was affirmed; the decision of this court upon each of these appeals being found reported in Mercantile Trust Co., etc., v. Sunset Road Oil Co. et al. (L. A. No. 4128) 168 Pac. 1037, and Mercantile Trust Co., etc., v. Sunset Road Oil Co. et al. (L. A. Nos. 3396 and 4027) 168 Pac. 1033, 1036. The decision of this court upon these several appeals having become final, the cause is again before the superior court of the county of Kern, and Hon. Howard A. B. Peairs, the judge thereof, for a new trial. It is alleged in the petition herein:

> That the said superior court and the judge thereof has "proceeded to and did set the said cause for retrial upon the issues in plaintiff's amended complaint set forth as to each and all of the defendants therein named, and that said superior court and the said judge thereof will, unless restrained by the order of this honorable court, proceed to retry all the issues arising in said cause under plaintiff's said amended complaint as against each and all of the defendants therein named as aforesaid, and that your petitioner as said plaintiff will be compelled to incur large expense in the retrial of said cause."

[1, 2] It is quite clear to this court that upon the facts set forth in its petition herein, which preceded the above-quoted averment, and upon such averment, the petitioner is not entitled to the writ which it seeks to have the court issue in this proceeding. As to the defendants in the case who did not appear, and as to whom defaults were duly entered, followed by the findings and decree of the trial court in conformity with the averments and prayer of the plaintiff's amended complaint, which findings and decree have long since become final, there need be and can be no retrial of the case, for as to these there are no issues which remain to be tried. As to the defendants Union Oil Company, Coon, and Price the same precise condition exists, for the reversal of the order granting the motion for a new trial as to these defendants having become final, and the original judgment as to each of them having thus been restored and having also become a finality, there are no issues as to these defendants to be retried. As to both of the above sets of defendants, the judgment is itself conclusive evidence of every fact which either upon their default or answer or upon appeal has been determined adversely to them.

The only other parties defendants in the action as to whom there exist issues to be tried are the defendants Kern Valley Bank and its representative, the superintendent of banks, and the parties whom it has made cross-defendants by the averments of its cross-complaint or complaint in intervention. The Kern Valley Bank and its representative, the superintendent of banks, have no place in this case, except that which springs from the fact that the former is the holder of bonds of the Sunset Road Oil Company of the face value of $459,400, which bonds are secured by the mortgage or deed of trust by the plaintiff as trustee and sought to be foreclosed in this action. As between the Kern Valley

Bank and its representative, on the one hand, and the plaintiff, on the other, no issue could arise as to the integrity of the latter's lien or as to its right to the foreclosure thereof. The formal allegations of the plaintiff that the sum of $1,500,000 in value of these bonds has been issued and is outstanding and unpaid has not been denied. These bonds, having been thus admittedly issued, import a consideration without further proof, and hence no proofs were or are required on the part of the plaintiff upon this subject. The plaintiff's averment that the proper steps had been taken to declare the whole amount due upon these bonds was also not denied. It was therefore not required, either at the outset or at any other stage of the trial, to sustain these averments with proofs as against these particular defendants. Whatever issues upon these subjects existed or now exist arose out of the dispute between the bondholders themselves as to the integrity, amount, and value of their respective holdings of these bonds. This issue was brought into the case by the filing of the cross-complaint and complaint in intervention of the Kern Valley Bank and its representative, the superintendent of banks, and was joined by the respective answers of the defendants named in these cross-pleadings to them. As to the proofs upon these issues the plaintiff has no interest, and has never had the burden, either upon the original trial or upon any retrial of the cause; and while it is true that the trial court upon the original trial of the cause decided these issues against the contention of the cross-complainant, and that its motion for a new trial as to these issues was granted, and that in granting said motion the trial court made a general order granting a new trial, which general order this court upon appeal has affirmed, still, according to well-settled principles, as well as under the express rulings of this court in these particular appeals, such general order of the trial court granting such new trial is not to be construed or held to be any broader than the motion which forms its predicate, nor than the issues which in said motion it was urged the court had erroneously determined. In the case of Mercantile Trust Co. v. Sunset Road Oil Co. et al. (L. A. No. 4152) supra, this court said:

"No appeal was taken from the decree of foreclosure by the Sunset Road Oil Company, the mortgagor and owner of the property, and the judgment has become final as to it."

In the case of Mercantile Trust Co. v. Sunset Road Oil Co. et al. (L. A. No. 4027) supra, this court said:

"The issues tendered by the Kern Valley Bank and Williams in the cross-complaint do not affect the right of the plaintiff to foreclose the trust deed set forth in its complaint. The question raised related solely to the rights of different holders of bonds purporting to be secured by the trust deed to participate in the proceeds of the foreclosure sale."

[3, 4] To the views expressed in both of the foregoing cases we still adhere, and we must assume, in the absence of a positive showing to the contrary, that the trial court will be guided and governed by them upon a retrial of the cause. The question, therefore, presented by the foregoing state of the record, is as to whether the petitioner herein has either sufficiently shown that the trial court upon a present retrial of the cause is intending to proceed contrary to the clear direction given it by the language of these decisions, or that upon the whole record in the instant proceeding such appears to be the case. Recurring to the language of petitioner's application herein quoted in the earlier part of this opinion, we do not think that it sufficiently appears therefrom that the trial court is proposing to try any other issues than those actually existing in the cases in its present state. It may be stated in this connection that issues in a case do not arise or exist, so as to require trial upon the mere filing of a complaint, but only upon joinder through appropriate denials of the averments of the complaint, or through affirmative defenses or pleas deemed or required to be denied by the plaintiff, or by other defendants, as the case may be. The statement of the petitioner herein that the trial court proposes "to retry all the issues arising in said cause under plaintiff's said amended complaint as against each and all of the defendants therein named" states a condition which could not possibly exist, since no issues thus arose or now exist, with the single exception of the issues which the bondholders have created as between themselves by the cross-pleadings in the case, and with which the trial court was dealing in its order granting a new trial, and which are the only issues before it in the present state of the case. This is made the more apparent by the answer to the petition herein filed on behalf of the trial court and the judge thereof, from which we think it sufficiently appears that the only matters which that court is intending or proceeding to retry are those presented by the cross-pleadings of the defendants in the case. As to these issues the plaintiff herein has not the laboring oar, and has little, if any, concern; nor is it possible to conceive how the plaintiff in that action and the petitioner herein can be put to any appreciable trouble or expense in the presentation of its affirmative case in the present state of the record. That some delay will be occasioned by the retrial of the issues joined by the cross-pleadings in the case is probable, in view of the provisions of the trust deed governing a foreclosure sale. These matters were discussed by this court in the case of Mercantile Trust Co. v. Sunset Road Oil Co. (L. A. No. 4027) supra, and our views therein expressed are instructive to the parties and the court upon the retrial of the cause. Such delay as may occur, however, is beyond our control and could not be made the subject of a preventive writ.

It follows from the foregoing discussion that the application of the petitioner herein should be denied, and the writ dismissed; and it is so ordered.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.; WILBUR, J.

On Petition for Rehearing.

PER CURIAM. The petition for rehearing is denied, but in denying the same we deem it proper to add that the question as to the proper amount to be allowed as counsel fees upon the foreclosure of the mortgage or deed of trust in the case of Mercantile Trust Co. v. Sunset Road Oil Co. et al., out of which this proceeding arose, is involved in the retrial of that cause. Said instrument provides for the allowance of reasonable counsel fees in the event of a foreclosure thereof. The complaint in the foreclosure suit merely asked for the allowance of reasonable counsel fees, without specifying any particular sum as the amount demanded. The answers of the several defendants were silent upon the subject of counsel fees. The trial court allowed counsel fees in the sum of $50,000, basing such allowance evidently upon its finding that the outstanding indebtedness of the Sunset Road Oil Company represented in bonds and secured by said mortgage or deed of trust amounted to the sum approximately of $1,500,000. The Kern Valley Bank, through its representative, the bank commission, assailed this finding upon motion for a new trial, and also upon said motion attacked the reasonableness of the court's finding as to counsel fees, which was predicated upon the foregoing finding as to the amount of outstanding valid bonds. The court granted said motion for a new trial by a general order, which embraced only a retrial of those issues arising between the contesting bondholders as presented in the motion for a new trial made on behalf of the Kern Valley Bank. The most vital of these issues relates to the amount of the actual indebtedness and of the valid outstanding bonds of the Sunset Road Oil Company, and as a necessary incident to this issue the question of what is a reasonable sum to be allowed as counsel fees in the action brought for the foreclosure of the mortgage or deed of trust securing said indebtedness and such bonds. Both of these questions have, therefore, been reopened for examination and decision upon a retrial of the case.

---

178 Cal. 543

BRANDT v. BRANDT. (L. A. 4464.)

(Supreme Court of California. July 19, 1918.)

1. PLEADING ⊜204(3)—DEMURRER TO COMPLAINT IN TWO COUNTS.

A demurrer interposed to a complaint in two counts, based upon grounds of want of sufficient facts and lack of jurisdiction, should not have been sustained if either count be good; such demurrer having been directed to complaint as a whole, not to causes of action severally.

2. HUSBAND AND WIFE ⊜296—SUPPORT—SUFFICIENCY OF COMPLAINT.

A count in a complaint *held* sufficient to entitle wife to maintain an action for support and maintenance without divorce, under Civ. Code, § 137.

3. HUSBAND AND WIFE ⊜283(1)—ACTION FOR MAINTENANCE—PLEADING.

Where wife sues for maintenance for herself and daughter, the fact that the daughter appeared to have been of age when complaint was filed cannot affect the right of the wife to obtain support for herself.

4. DIVORCE ⊜27(9) — CRUELTY — ACCUSATION OF ADULTERY.

Under Civ. Code, § 94, defining extreme cruelty, an unfounded and unjustified accusation of adultery in wife's pleadings must inflict grievous mental suffering to constitute extreme cruelty.

5. DIVORCE ⊜27(9) — CRUELTY — ACCUSATION OF ADULTERY—QUESTION OF FACT.

Whether wife's charges of adultery were unjustified or whether they inflicted grievous or any suffering upon the husband are matters of fact to be determined in a proceeding in which these issues are raised.

6. HUSBAND AND WIFE ⊜296—ACTION FOR MAINTENANCE—PLEADING—SUFFICIENCY OF ALLEGATION TO SHOW DESERTION JUSTIFIED.

An allegation in a wife's complaint support that plaintiff brought divorce action on ground of adultery, but failed to establish the truth of the charge to the court's satisfaction, is insufficient to show that plaintiff was guilty of cruelty justifying defendant in leaving her.

Department 1. Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Clara Brandt against Ferdinand M. Brandt. Judgment for defendant, and plaintiff appeals. Reversed.

Ralph Woods Pontious and D. M. McDonald, both of Los Angeles, for appellant. W. H. Dehm, of Los Angeles, for respondent.

SLOSS, J. The court below sustained a demurrer to the plaintiff's second amended complaint, without leave to amend, and entered judgment in favor of the defendant. Plaintiff appeals from the judgment.

The complaint in question is in two counts. The first alleges that the parties intermarried on the 27th day of July, 1895, and ever since have been husband and wife. On the 20th day of March, 1901, the defendant without any cause left and abandoned the plaintiff against her will and consent and has ever since refused to return to her and live with her. Since June, 1903, the defendant has not contributed in any way to the support or maintenance of the plaintiff or of their child, a daughter, born in May, 1896. Said daughter has at all times resided with and been supported by, the plaintiff. Plaintiff has no means of support, nor has her daughter any such means, other than the earnings of the plaintiff. The defendant owns considerable prop-

erty, and earns from $150 to $200 per month. It is also alleged that $75 per month are necessary for the support and maintenance of the plaintiff and the said child.

[1-3] Before passing to the second count it is to be noted that the demurrer, which is based upon the grounds of want of sufficient facts and lack of jurisdiction in the court, is directed to the complaint as a whole, not to the causes of action severally. If either count be good, the demurrer should not therefore have been sustained. Whiting v. Heslep, 4 Cal. 327; Hand v. Scodeletti, 128 Cal. 674, 61 Pac. 373. The respondent suggests no reason why the first count should be held subject to the grounds of demurrer specified, and we see none. This count sets forth the facts necessary to entitle a wife to maintain an action for support and maintenance without divorce. Civ. Code, § 137. The circumstance that the child appears to have been of age when the complaint was filed cannot affect the right of the wife to obtain support for herself.

These considerations suffice to indicate the necessity for a reversal of the judgment. As a guide to further proceedings, it may be well to add a few words regarding the second cause of action. In that part of her pleading, the plaintiff repeats, in substance, everything contained in the first count, and, in addition, seeks to be relieved from the effect of a decree of divorce obtained against her by the defendant in the circuit court of Cook county, Ill. By her allegations the plaintiff attacks this judgment upon the ground of fraud, it being alleged, in effect, that she had no personal knowledge of the pendency of said action, in which there had been only a constructive service of summons. The fraud relied upon consisted in the defendant's sworn declaration to the Illinois court that the plaintiff herein, his wife, was a resident of the state of New York, she then being, as he well knew, a resident of New Jersey. In consequence of this false statement, process was sent to her by mail to New York, instead of to her true address in New Jersey. The sufficiency of these allegations to make out a case for relief against a judgment on the ground of fraud is not disputed by the respondent. His sole claim is that by reason of further allegations in the second count it appears affirmatively that the plaintiff herself, rather than the defendant, was guilty of desertion. This contention is based upon an averment in the pleading that in 1901, some years prior to the divorce proceedings in Illinois, the plaintiff had brought an action against defendant in a New Jersey court, "alleging adultery and asking for separate maintenance." Said cause was tried, and a final decree was entered by the chancellor of the state of New Jersey, "wherein the court found that the petitioner, Clara Brandt, was not entitled to the relief sought and prayed for in the petition on the proof introduced."

[4-6] The argument is that the making of unfounded charges of adultery by either spouse against the other constitutes extreme cruelty justifying the accused in leaving the accuser, and that therefore the husband was not guilty of desertion. But it is not the law that an accusation of adultery, even though it be not proven, necessarily constitutes extreme cruelty. The most that can be said is that the accusation, if unfounded and unjustified, may amount to such cruelty. To have this effect the conduct complained of must meet the requirements of our statutory definition of extreme cruelty, viz., "the wrongful infliction of grievous bodily injury, or grievous mental suffering." Civ. Code § 94; 9 R. C. L. 345. Whether the charges made by the wife were unjustified, or whether they inflicted grievous or any suffering upon the husband, are matters of fact to be determined in a proceeding in which these issues are raised. MacDonald v. MacDonald, 155 Cal. 665, 102 Pac. 927, 25 L. R. A. (N. S.) 45. The complaint before us merely alleges that the wife did not succeed in establishing the truth of her charge to the satisfaction of the New Jersey court. This falls far short of an affirmative showing that she was guilty of cruelty justifying him in leaving her. We think, therefore, that the second count, equally with the first was good as against the demurrer interposed.

The judgment is reversed.

We concur: SHAW, J.; RICHARDS, Judge pro tem.

---

178 Cal. 458

BINFORD v. BOYD et al. (L. A. 5559.)

(Supreme Court of California. June 29, 1918.)

1. CONSTITUTIONAL LAW ⇐81 — POLICE POWER IN GENERAL.

The exercise of police power is available only for purpose of promoting general welfare of public, and cannot be used for private gain or advantage except so far as such use may also promote public interest and welfare.

2. CONSTITUTIONAL LAW ⇐89(1)—LIBERTY OF CONTRACT—POLICE POWER.

Right of contract is subject to such reasonable police power as Legislature may enact to promote public good.

3. CONSTITUTIONAL LAW ⇐89(1)—LIBERTY TO CONTRACT—POLICE POWER—CONSTRUCTION OF STATUTE.

A statute invoking police power in restraint of freedom of contract will be construed to effect only such change in the right of contract as is necessarily implied from language of the statute and which is reasonably calculated to secure the legitimate objects for which the police power is exercised.

4. LICENSES ⇐11(4) — ARCHITECTS — CONSTRUCTION OF STATUTE—CORPORATIONS.

St. 1901, p. 641, § 5, making it a misdemeanor to practice architecture without a certificate, applies to persons only, and not to cor-

porations, and does not preclude a corporation from doing an architectural business and engaging in the selling of plans and specifications where plans so sold are prepared by certificated architects.

5. LICENSES ⟸11(4) — ARCHITECTS — CONSTRUCTION OF STATUTE.

St. 1901, p. 641, § 5, making it a misdemeanor to practice architecture without a certificate and providing that a person who is not a certificated architect may furnish people with plans and building data provided he informs them that he is not a certificated architect, does not preclude sale of plans by a person to whom such plans have been sold by the certificated architect preparing them.

6. LICENSES ⟸11(4) — ARCHITECTS — STATUTES.

St. 1901, p. 641, § 5, making it a misdemeanor to practice architecture without a certificate but providing that a person who is not a certificated architect may furnish other persons with plans provided such persons are told that he, having drawn the plans, is not a certificated architect, permits a person to freely contract to furnish other persons with plans provided he inform them that he is not a certificated architect.

7. ASSIGNMENTS ⟸73—ACTIONS BY ASSIGNOR—DESCRIPTION OF DEBT.

An assignment of a claim for plans furnished "between July, 1912, and September, 1912," *held* to give assignee a good right of action on a debt arising by sale of plans between May, 1913, and September, 1913; the description in the assignment being sufficient where assignor had furnished but one set of plans to debtor.

8. CORPORATIONS ⟸619 — DISSOLUTION — ASSIGNMENT OF CLAIM BY DIRECTORS AS TRUSTEES.

An assignment of a claim of a dissolved corporation executed by its directors as trustees is sufficient to give assignee right of action thereon.

9. PLEADING ⟸406(9) — DEFECTS — WAIVER.

In action by assignee of a claim of a dissolved corporation where assignment was executed by directors as trustees, an objection to petition because of failure to plead manner in which persons making assignment on behalf of corporation became trustees is waived, where proclamation of forfeiture of charter and assignment are received in evidence without objection; the assignment showing persons executing same to be directors, and the statute making directors the trustees to wind up affairs of dissolved corporation.

10. JUDGMENT ⟸143(17) — VACATION — ABSENCE OF PARTY.

Failure of defendant to personally appear at the trial was not due to excusable neglect justifying vacation of judgment, where the reason for failure to appear was that plaintiff's attorney told defendant's attorney about two months before the trial that he intended to amend his complaint.

In Bank. Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by Joseph R. Binford against Lucile Boyd and others. From a judgment for plaintiff and from an order denying motion to set aside judgment, named defendant appeals. Affirmed.

Alfred H. McAdoo, of Los Angeles (A. C. Lawson, at the trial), for appellant. Earl Curtis Peck, of Los Angeles, for respondent.

SHAW, J. The defendant has appealed from the judgment in favor of plaintiff, and from an order denying her motion to set aside said judgment on the ground that it was taken against her by surprise, inadvertence, and excusable neglect.

The action is maintained by Binford, as assignee of the Dutro-Wren Construction Company, a corporation. The object of the action was to recover $775 claimed to have been owing to the plaintiff's assignor for the preparation of certain plans and specifications for the construction of a building to be erected for the defendant and certain other parties who were made defendants, but who have not appealed. The answer denies the assignment of the claim to the plaintiff. It also denies that the defendants are, or were, indebted to the plaintiff's assignor, and denies that they ever requested said assignor to furnish any plans and specifications for them, or that they agreed to pay the value thereof to said assignor, and pleads the bar of the statute of limitations as prescribed in section 339 of the Code of Civil Procedure.

It appears from the evidence that the Dutro-Wren Construction Company offered to make plans and specifications for the building to be erected by the defendants; that in accordance with such offer it prepared such plans and specifications; that the same were accepted by Lucile Boyd on behalf of herself and the other parties interested; and that, owing to their inability to obtain sufficient money wherewith to erect the building, they did not go on with the enterprise, and did not use the plans and specifications.

The main defense is based on the proposition that the contract was unlawful because it violates provisions of the act of 1901 entitled "An act to regulate the practice of architecture." Stats. 1901, p. 641. The act establishes a state board of architecture, and empowers said board to examine persons who desire to follow the profession of an architect, and to issue to them licenses for that purpose. Section 5 makes it a misdemeanor, punishable by fine, "for any person to practice architecture without a certificate in this state," and further provides:

"That nothing in this act shall prevent any person from * * * furnishing plans or other data for buildings for other persons, provided the person so furnishing such plans or data shall fully inform the person for whom such plans or data are furnished, that he, the person furnishing such plans, is not a certificated architect."

The evidence shows that the officers of the Dutro-Wren Construction Company who made the contract with Lucile Boyd for the plans in question, did not inform her that said company or the persons whom they had employed to prepare such plans and specifications were not certificated architects; that they said nothing at all to her on that subject. The company did in fact employ one Teepel, a duly certificated architect, to pre-

pare said plans and specifications for the said building. He prepared for said company the plans and specifications which the defendant accepted. The claim of respondent is that the statute of 1901 does not apply to the facts of this case.

[1-3] The exercise of the police power is available only for the purpose of promoting the general welfare, the interests of the public as distinguished from those of individuals or persons. It cannot be used to promote private gain or advantage, except so far as the same may also promote the public interest and welfare, and it is the latter, and not the former, effect which forms the basis of the power and warrants its exercise. The Constitution declares that all men are by nature free and independent and have certain inalienable rights among which are those of acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness. Article 1, § 1. These rights are invaded if the individual "is not at liberty to contract with others respecting the use to which he may subject his property, or the manner in which he may enjoy it. The Legislature may prescribe the form in which contracts shall be executed in order that they may be valid or binding, but it cannot limit the right of parties to incorporate into their contracts respecting property, otherwise valid, such terms as may be mutually satisfactory to them. * * * The right of the owner of land to contract with a builder for its improvement and to compensate him therefor * * * is the same, and as inalienable, as the right of the owner of any other property to contract respecting the payment for any improvement thereof." Stinson Mill Co. v. Braun, 136 Cal. 125, 68 Pac. 481, 57 L. R. A. 726, 89 Am. St. Rep. 116. This right of contract, however, is subject to such reasonable police regulations as the Legislature may enact tending to promote the public good. In determining the effect of a statute having such object, and which purports to change or limit the right of contract for that purpose, the rule is that the changes which it effects in such right are those only which it expressly declares or which are necessarily implied from the language used. The invasions it makes on constitutional rights are not to be carried farther than is necessary to protect the public from the evils intended to be removed, unless the language compels such meaning and such effect is reasonably calculated to secure the legitimate objects for which the power is exercised. Prior to this statute there was no restriction upon the right of any person to contract for or to furnish plans and specifications for another, or to follow the profession of architecture. All persons were at liberty to form corporations for any lawful purpose, and such corporations, when formed, had full capacity and power to make all contracts necessary or convenient for the carrying out of their lawful powers. The statute cannot be upheld as a police measure on the ground that it tended to promote the prosperity of those following the profession of architecture by giving such persons, who could obtain a license, an advantage over others.

[4-6] It can only be upheld upon the theory that the Legislature believed that it was injurious to the public interest to allow unskilled and unqualified persons to prepare plans and specifications for the erection of buildings, owing to the dangers which might arise from defects in plans or construction. The terms of the act show clearly that it was directed only to individuals as distinguished from corporations. It requires an examination of the person who applies for license, and its language shows that a license can be given only to human beings and not to artificial creations such as corporations. As a corporation could not obtain a license to engage in the profession of architecture, and as it must act wholly by human agency, it could engage in that art or business only by employing individuals who would carry on that business as its officers, agents, or employés. The act is effective upon corporations only to this extent that, if it undertakes to do business of that character, either the persons whom it engages therein must be certificated architects under this statute, or, when contracting for plans and specifications for the erection of buildings for other persons, such persons must be informed that the plans and specifications will be prepared by some one who is not a certificated architect. The act does not prohibit a corporation from contracting to furnish to another person plans and specifications which are to be prepared by a third person who is a certificated architect. Nor is there anything in the object of the act, or the evils to be removed thereby, which would raise the necessary implication that it was intended to prevent such practice. The main object of the act, so far as furnishing plans and specifications alone is involved, was to secure the erection of buildings from plans prepared by those who were sufficiently schooled in the profession to secure a license from the state board and who had complied with the state law by securing such license. But it was deemed best to qualify the absolute prohibition of the law by allowing the owners of property and persons who were not certificated architects, to contract freely with each other for furnishing such plans and specifications, provided the person furnishing the same informed the owner that he was not a certificated architect. It is obvious that, if such plans and specifications have been prepared by certificated architects, there could be no object in which the public are concerned which should prevent the sale thereof by the person who prepared them, or by some one to whom he has sold them. The act as a whole shows that it was not intended to prevent the sale

of plans prepared by a qualified person, but to prevent their preparation by an unqualified person, unless the purchaser was informed of that fact. The act does not forbid a corporation to employ certificated architects, have them prepare plans and specifications, and then furnish such plans and specifications to other persons. Either a corporation or an individual could do this without transgressing the terms of the act when interpreted in the light of its object and purpose. The corporation was therefore acting lawfully in the matter.

We are therefore of the opinion that the objections to the validity of this contract are not well taken, and that the plaintiff was entitled to recover the value of the plans and specifications so furnished.

[7, 8] It is claimed that the evidence does not show an assignment to the plaintiff of the claim of the Dutro-Wren contract sued on. The assignment was offered in evidence and describes the assignment as the claim of said corporation, naming it, against the defendants, naming them, "arising out of certain plans and specifications furnished to them by the said Dutro-Wren Construction Company between July, 1912, and September, 1912." The defect in the proof, as claimed, arises from the fact that the plans and specifications were not furnished in 1912, but were furnished in 1913, some time between May and September, and it is argued that the assignment must therefore cover some other claim and not that which constitutes the cause of action sued on. There is no pretense that the said company ever furnished any other plans and specifications to the defendants. From this fact it is plain that the description in the assignment could only be interpreted to refer to those which were furnished, and the description would be sufficient, but for the dates given, which are erroneous. The dates should therefore be deemed a false call in the description. The other parts of the description sufficiently identify the demand. It further appears that the corporation had ceased to exist at the time the assignment was made by reason of the fact that it had failed to pay the corporation tax and that its corporate franchise had therefore been forfeited, but that its affairs were carried on by its directors as trustees under the statute providing for the forfeiture, and that this assignment was made by such directors as trustees. This was sufficient to carry to the assignee all the property of the said corporation in the said demand.

It is further contended that the action is barred by the two-year statute of limitations. Code Civ. Proc. § 339. The action was begun on August 20, 1915. The finding of the court is that the defendant Lucile Boyd became indebted to said corporation for the plans and specifications in question, on September 30, 1913. This was within the two years prescribed by the statute of limitations. There is no specification that this finding is not sustained by the evidence. Hence the claim that the evidence shows that the action is barred cannot be considered.

[9] The further claim is made that the complaint does not state facts sufficient to constitute a cause of action; the particular defect assigned being that, although the complaint alleges that the corporation had forfeited its charter prior to the making of the assignment to the plaintiff, and that the third persons who made the assignment on behalf of the corporation were at that time trustees of the property of the corporation, and that as such trustees they made the assignment of the demand, there is no allegation respecting the manner in which they became or were the trustees. The defendants demurred to the complaint upon general grounds, but did not specify any ambiguity or uncertainty in this respect. The answer denied that said persons were the trustees of the corporation. At the trial evidence of the Governor's proclamation, declaring the forfeiture of the company's charter, was received without objection, and the assignment introduced in evidence declares that the persons named were the directors of such corporation. The statute makes such directors the trustees for the purpose of closing its affairs. The court finds that the said persons were such trustees. Under these circumstances, we think that the defect in the complaint, if any there be, was waived, and the defendants cannot now take advantage thereof.

[10] There was no error in refusing to vacate the judgment on the ground that it was taken through surprise, inadvertence, or excusable neglect of the defendant. The defendants filed their answer in the case and were represented by their attorney at the time of the trial. The failure of the defendant Lucile Boyd to be personally present was due to her neglect, it is true; but the neglect was not excusable. The main point in support of this claim is that some two months before the trial the plaintiff's attorney stated to the defendants' attorney that he intended to amend his complaint, and that for some unexplained reason the defendants' attorney, because of this statement, did not expect the trial to take place at the time set and did no prepare therefor. The excuse is wholly insufficient to justify any neglect to prepare for the trial.

These comprise all the points made in support of the appeal. We find no error in the record.

The judgment and order are affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; WILBUR, J.; LORIGAN, J.; RICHARDS, Judge pro tem.

(178 Cal. 649)

## PEZZONI v. GREENWELL et al.
(L. A. 4595.)

(Supreme Court of California. Aug. 2, 1918.)

1. BILLS AND NOTES ⟸525—ASSIGNMENTS—CONSIDERATION—EVIDENCE.

Evidence *held* not to warrant finding that a note was assigned without any valuable consideration.

2. BILLS AND NOTES ⟸358—ASSIGNMENTS AS SECURITY—EFFECT.

An assignment of negotiable instruments before maturity as collateral security for a preexisting debt is an indorsement for valuable consideration, sufficient to protect the purchaser under the law merchant against defenses of which he has no notice at the time of the indorsement.

3. BILLS AND NOTES ⟸358—ASSIGNMENTS AS SECURITY—EFFECT.

Where the purchaser of an automobile on installments, with title retained pending payment in full, secured another's note by fraud, and on default in payment of one installment the sellers accepted the note as security for the debt already due, having no notice of any defense against the note, were entitled to judgment against the maker thereof for at least the amount of the one installment.

Department 1. Appeal from Superior Court, Los Angeles County; P. R. Parker, Judge.

Suit by Emma Pezzoni against Henry Greenwell and others, wherein defendants Smith filed a cross-complaint. Judgment for plaintiff, and cross-complainants appeal. Reversed.

Leo V. Youngworth, of Los Angeles, for appellants. John L. Fleming and Robert J. Gardner, both of Los Angeles, for respondents.

SHAW, J. The defendants C. F. Smith and S. W. Smith appeal from the judgment in favor of the plaintiff. They are partners doing business under the firm name of Smith Bros.

The plaintiff sued the defendants to obtain a decree canceling a certain promissory note signed by her, dated August 18, 1914, for $625, due 60 days after date, payable to the order of Henry Greenwell, and by him indorsed to the defendants C. F. Smith and S. W. Smith. The basis of her action was that her signature to the note was obtained without consideration and by the device of leading her to believe that she was signing a different instrument, and not a promise to pay money. The appellants filed a cross-complaint, alleging the execution of the note, its indorsement to them in due course of business and for a valuable consideration before maturity, and asking judgment for the amount thereof. The plaintiff answered the cross-complaint, denying that the indorsement of the note by Greenwell to the appellants was in due course of business or for a valuable consideration.

On the subject of the indorsement the court found:

"That the said note was not received by the said defendants Smith Bros. in due course of business and for a valuable consideration, in that the court finds that the said defendants and cross-complainants, Smith Bros., did not, at the time of receiving the said note or otherwise, part with anything of value on account thereof, and that they gave no credit on account thereof, nor did they otherwise change their legal status in any particular by reason thereof."

The appellants claim that this finding is contrary to the law and the evidence. The evidence on this subject consists of the testimony of S. W. Smith and Henry Greenwell. It appears that about the time of the execution of this note Smith Bros. and the defendant Greenwell executed an agreement whereby Greenwell promised to pay Smith Bros. the sum of $1,250 in installments of $100, payable on the 18th of each month thereafter, and Smith Bros. agreed that they would immediately give to Greenwell the possession and use of a certain automobile, and that if each of the said payments was promptly made when due, until the whole was paid, they would then sell to Greenwell the said automobile, but that title thereto should remain in Smith Bros. until after they should make the sale referred to, upon payment of the principal and interest of the sum to be paid by Greenwell. The next payment upon this contract became due on September 18, 1914. S. W. Smith testified that in September, immediately after this payment became due, he demanded of Greenwell the possession of the automobile, or some additional security for the payment of the sum agreed to be paid by the contract; that Greenwell desired to keep the car, and offered to indorse this note to Smith Bros. as collateral security for moneys owing on the contract; that Smith accepted this offer, and Greenwell thereupon indorsed said note to Smith Bros. Greenwell, on the other hand, testified that he was unable to make the $100 payment of September 18th; that Smith demanded payment thereof; that he told Smith that he was unable to pay it then, and that he would rather Smith would take back the car, and offered to let him do so; that Smith refused the car, and thereupon Greenwell offered him this note as collateral for the monthly payment of $100 then due; and that Smith agreed to this and accepted the note for that purpose, whereupon he indorsed it as above stated and delivered it to Smith. The evidence shows that the $100 was never paid. The automobile was wrecked within a few days after the transfer of the note, and it was taken by Smith Bros. some five or six months thereafter, and sold for the sum of $300, which was credited on the money due under the contract of lease for the automobile. Smith testified further that he gave credit on that contract for the whole amount of the note, namely, $625, and that this $300 was credited as an additional payment on the contract. There was no other testimony on the subject of these credits.

[1, 2] The court was warranted upon the evidence of Greenwell in finding that the note was indorsed to Smith Bros. as collateral security for the payment of the installment of $100 and for no other claim, but it was not warranted in finding that it was assigned without any valuable consideration. Under the rule established in this state, an assignment of a negotiable instrument before maturity as collateral security for a pre-existing debt constitutes an indorsement for a valuable consideration sufficient to protect the purchaser thereof under the law merchant against defenses to the note of which he has no notice at the time of the indorsement. Sackett v. Johnson, 54 Cal. 109; Russ, etc., Co. v. Muscupiabe, etc., Co., 120 Cal. 532, 52 Pac. 995, 65 Am. St. Rep. 186; Robinson v. Smith, 14 Cal. 94; Naglee v. Lyman, 14 Cal. 450; Payne v. Bensley, 8 Cal. 260, 68 Am. Dec. 318.

[3] The note signed by the plaintiff, payable to Geenwell, was negotiable in form, and the evidence shows without conflict that Smith Bros. had no notice of any fraud in procuring the signature, or any other defense to the validity of the note. Even if the court gave full credit to the statements of Greenwell regarding the consideration for the indorsement, the appellants would be entitled to recover at least the sum of $100, with interest, costs, and attorney's fees on their cross-complaint. The finding is therefore contrary to the evidence, and the judgment should have been in favor of the cross-complainants for the amount we have stated, if no more.

The judgment is reversed.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

---

(178 Cal. 616)

## HANTON v. PACIFIC ELECTRIC RY. CO.

(L. A. 4583.)

(Supreme Court of California. Aug. 1, 1918.)

1. CARRIERS ⟸320(1)—JURY QUESTION—INJURIES TO PASSENGER.
In an action for personal injuries sustained by plaintiff while attempting to board defendant's street car, it was for the jury to judge the credibility of the witnesses and the weight of their testimony.

2. APPEAL AND ERROR ⟸1002 — REVIEW — QUESTIONS OF FACT.
The court on appeal will not review verdict based on conflicting evidence.

3. WITNESSES ⟸379(3) — IMPEACHMENT — INCONSISTENT STATEMENT — EXPRESSION OF OPINION.
In an action for personal injuries sustained by a passenger while attempting to board defendant's street car, where a witness had testified that the car started 15 seconds after plaintiff had disappeared from her sight behind the car, a written statement, made by the witness immediately after the accident, that she was sure the car was moving before plaintiff could have gotten to it, was inadmissible as an expression of opinion.

4. WITNESSES ⟸386 — IMPEACHMENT — CONTRADICTORY STATEMENTS.
To render a statement of a witness admissible in contradiction, it is not necessary that there should be contrariety in terms, but only that the statement should have a tendency to contradict or disprove the testimony, or any inference to be deduced from it.

5. WITNESSES ⟸379(4) — IMPEACHMENT — INCONSISTENT STATEMENTS.
In an action for personal injuries sustained by a passenger while attempting to board a street car, where a witness had testified that the car started 15 seconds after plaintiff disappeared from her view behind it, a written statement, made by her immediately after the accident, that she was sure the car was moving before plaintiff could have gotten to it, was admissible in contradiction.

6. TRIAL ⟸62(1)—EVIDENCE—REBUTTAL.
In action for injuries to street car passenger, evidence that a witness had been called on a former trial for defendant was properly excluded, where permission to introduce it in rebuttal was not asked until after all the testimony was in; it not being in rebuttal to anything.

7. APPEAL AND ERROR ⟸1047(4)—REVIEW—HARMLESS ERROR.
In an action for injuries to street car passenger refusal to allow evidence in rebuttal that a certain witness had been called by defendant on a prior trial, if error, *held* harmless.

8. TRIAL ⟸237(5) — INSTRUCTIONS — "PREPONDERANCE OF PROOF."
Instruction that the jury was to bear in mind the number of witnesses in determining the preponderance of proof, and that by preponderance was not necessarily meant the greater number of witnesses, was not erroneous as instructing the jury to determine disputed facts by a consideration of the greater number of witnesses.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Preponderance.]

9. TRIAL ⟸251(8) — INSTRUCTIONS — PLEADING.
In an action for injuries to street car passenger, an instruction that if plaintiff attempted to board a moving car and was injured he was guilty of contributory negligence was not erroneous for failing to insert the word "negligently" before the word "attempted," plaintiff not alleging that with due care he attempted to board a moving car.

10. TRIAL ⟸191(9)—INSTRUCTIONS—ASSUMPTION AS TO FACTS.
In an action for injuries to street car passenger, an instruction that if plaintiff attempted to board a moving car he was guilty of contributory negligence was erroneous as importing some degree of negligence on defendant's part.

11. APPEAL AND ERROR ⟸1064(2)—REVIEW—HARMLESS ERROR.
In an action for injuries to street car passenger, an instruction that, if he attempted to board a moving car he was guilty of contributory negligence, *held* harmless error, though negligence was thereby imputed to defendant.

12. NEW TRIAL ⟸105 — GROUNDS — NEWLY DISCOVERED EVIDENCE.
Newly discovered evidence, offered solely to impeach a witness, is not ground for new trial.

Department 2. Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by N. P. Hanton against the Pacific Electric Railway Company. From a judgment for defendant, and a denial of a new trial, plaintiff appeals. Affirmed.

E. B. Drake, of Los Angeles, for appellant. Frank Karr, R. C. Gortner, and A. W. Ashburn, all of Los Angeles, for respondent.

LORIGAN, J. This is an action for personal injuries. The case was twice tried before a jury; the first trial resulting in a mistrial, the second, in a verdict and judgment in favor of the defendant; and plaintiff appeals from both this judgment and an order denying his motion for a new trial. The accident in which plaintiff was permanently injured by being run over by one of the cars of the defendant which he was endeavoring to board occurred in the city of Venice, Los Angeles county.

The grounds urged for a reversal are that the evidence was insufficient to justify a verdict for defendant, that the court erred in its rulings on the admissibility of evidence and respecting certain instructions, and further erred in refusing to grant a new trial on the ground of newly discovered evidence.

Upon the first point of alleged insufficiency of the evidence to sustain the verdict, it appears that plaintiff desired to take a car from Venice to Los Angeles, and started towards a train of the defendant, which had just come in and was about to return. It was at rest when plaintiff, who walked with a defective leg, rapidly approached it. He testified that the train was at rest when he reached it, and he had partially ascended the lower step of one of the cars, having one foot on it, and was about to pull the other foot up, when the train started suddenly, throwing him off and under the train, which passed over his foot, permanently injuring it. On the part of defendant it was insisted that the injury to plaintiff was occasioned through an attempt on his part to board the train while it was in motion. The jury evidently accepted this defense as sustained by the evidence, and returned a verdict in favor of defendant. It is unnecessary to spend much time on the point of the appellant that the evidence did not justify this conclusion of the jury. There was the testimony of the plaintiff and of another party, a disinterested witness, who corroborated him, that the plaintiff was trying to get on the car while it was at rest in the manner as stated above, and that while so attempting to board it, the train was started up, throwing plaintiff under it and injuring him. On the part of defendant a disinterested witness testified that as the plaintiff approached close to the car steps, proceeding hurriedly and as rapidly as his lamed condition would permit, the car started and was in movement when the plaintiff reached it, and that while it was in motion plaintiff endeavored to board it and was thrown under it and injured. These were the only eyewitnesses to the accident, but there were minor facts and circumstances produced on either side which supported the claim of one party or the other. It is quite apparent that this testimony raised a substantial conflict of fact which it was exclusively the province of the jury to determine.

[1, 2] It was for them to judge the credibility of the witnesses and the weight and effect to be given to the testimony on one side and the other, and in this condition of substantially conflicting evidence, the jury having determined that the truth of the matter was in favor of the defendant, this court is precluded from reinvestigating the subject.

[3-7] It is claimed that the court erred in a ruling on the admission of testimony. One Mrs. C. A. Brown was called by plaintiff. She testified that she was standing near the rear end of the train of cars and on the opposite side of it when the plaintiff approached; that at the time the cars moved up or started she could not see the plaintiff; that she saw him going towards the car till the "view of the car shut him off, and I could not see him any more after he got there behind the car"; that from the time the plaintiff went out of her sight, in her judgment, "the car started up in something like fifteen seconds"; that while in her view plaintiff was going just like a person who is crippled; he was walking a good gait, quite fast. On cross-examination counsel for defendant produced a written statement which the witness had signed immediately after the accident containing the following:

"The car had started, and I am sure it was moving before he could have gotten to it"

—which latter portion of the statement the court, over the objection of plaintiff, admitted, and its admission is assigned as error on the ground that it was no contradiction of anything the witness had testified to on direct examination, and, being solely an expression of opinion of the witness, was inadmissible on any theory. Certainly, the statement objected to, under the circumstances, was but an expression of opinion, and as a general rule witnesses must testify to facts and not to opinions or inferences. But even opinions expressed by a witness may sometimes be given in evidence if their tendency be to impeach the testimony of the witness given on the stand. It is not necessary that there should be contrariety in terms between the testimony given and the asserted impeaching statement. It is only necessary in order to render it admissible that the statement should have a tendency to contradict or disprove the testimony or any inference to be deduced from it. The obvious purpose of counsel for plaintiff in producing the testimony of the witness to the effect that 15 seconds after she had seen the plaintiff within 30 or 35 feet of the steps and moving rapidly towards them the train started was to have the jury draw the inference that the plaintiff had time enough, at the rapid gait he was moving, to go that distance and proceed to board the train be-

fore it started. This is the only conceivable purpose for which it could have been offered. Now, it was perfectly proper that defendant should be permitted to show a statement made by the witness that she was sure plaintiff did not have time to reach the steps and get on the car before it started. It was in direct opposition and contradiction to the inference which counsel for plaintiff desired drawn by the jury from the testimony offered by him, and was therefore admissible. In this connection appellant claims that it was error to have denied him permission to show that this same witness was on the first trial called as a witness for defendant. This permission was not asked until after all the testimony in the case was in, and its admission was asked as rebuttal. It was not rebuttal to anything, and was properly denied for that reason. It may be observed, too, that if it were error it was harmless. Such testimony would neither add to nor detract from anything which the witness testified to in the case.

[8] Complaint is made of some instructions given by the court. The first complaint is of one relative to the preponderance of the evidence. After instructing the jury that the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact in the case, the court proceeded to state by instruction No. 6 that:

"While one witness is sufficient to establish a fact in a civil case, as I have said to you, you are nevertheless to bear in mind the number of witnesses testifying for or against any issue of fact in determining where the preponderance of proof lies."

The court also in this connection gave the following instruction:

"By a preponderance of the evidence is not necessarily meant a greater number of witnesses, and if the plaintiff has proven his case by such evidence as constitutes and produces conviction in the mind of the jury, then he has proven his case by a preponderance of the evidence."

The complaint of the appellant as to instruction No. 6 is that it practically instructed the jury that they should determine disputed propositions of facts in the case by a consideration of the greater number of witnesses on one side than on the other. But there is no warrant in the language of the instruction for any such construction. Taking the two instructions together, they inform the jury that a preponderance of the evidence in establishing any contested fact does not necessarily mean a greater number of witnesses on one side than on the other, but that, as an element in determining the matter of preponderating evidence, they might take into consideration the number of witnesses testifying on one side or the other. We preceive nothing improper in this instruction. All the cases cited by appellant, taking Wastl v. M. U. Ry. Co., 17 Mont. 215, 42 Pac. 772, Bierbach v. Goodyear Rubber Co., 54 Wis. 213, 11 N. W. 514, 41 Am. Rep. 19, and Christman v. Ray, 42 Ill. App. 111, as a sample, condemn instructions which told the jury that greater weight was to be given to the greater number of witnesses on one side or another in a contested question of fact. The instruction here is not open to any such criticism. In fact, the only criticism it is subject to is that it is idle for a court to give a jury such an instruction. It is a mere commonplace and common sense proposition. In everyday life disputed facts are determined by taking into consideration various elements which go to determining the weight to be given statements of parties on one side or on the other of a controversy—their opportunities for observation, mental capacity, standing, credibility, and numbers—and to instruct a jury that they may take into consideration the numerical element with the other elements in determining the weight of testimony on one side or another of a controversy is simply telling them they may do as jurors what they properly and logically would do as men without the instruction.

[9] The court further instructed the jury that:

"If plaintiff attempted to board a moving car and was injured as a direct or proximate consequence thereof, then he was guilty of contributory negligence and cannot recover herein."

It is contended that the instruction is erroneous because the court failed to insert before the word "attempted" the word "negligently," the reasoning of appellant being that the attempt to board a moving car is not as matter of law contributory negligence per se; that an ordinarily prudent person might attempt to board a slowly moving train, and it would be for the jury to determine from all the circumstances whether it was contributory negligence or not. Finkeldey v. Omnibus Cable Co., 114 Cal. 28, 45 Pac. 996. We have no fault to find with the contention of appellant as a proposition of law, but the instruction as appellant claims it should have been given was not warranted either under his complaint or the case as made. Instructions are properly addressed to the theory of the case as pleaded and made. Plaintiff did not allege in his complaint that with due care and caution he attempted to board a moving train and for some alleged reason was injured through the negligence of defendant. Plaintiff specifically alleged as his cause of action that he attempted, as a passenger, to board a standing car of defendant, and that when he had partially done so the car was negligently started forward, and he thrown from it and injured. The defense of the defendant was that plaintiff attempted to board a moving car and fell while making the attempt. The entire evidence in the case was addressed to this issue, and the instruction complained of was properly addressed to this issue. Plaintiff, having alleged that the

car was standing still and that defendant negligently started it up while he was boarding it, would not have been permitted to prove that in fact the car was moving when he attempted to board it, because to do this would be to permit him to sue on one theory and recover on another. Necessarily, if the car was moving when he tried to board it, this disproved the allegation of the complaint that it was standing still, and swept away the only alleged negligence upon which the cause of action of plaintiff was predicated. Neither the pleading nor the evidence warranted instructing the jury as plaintiff contends it should have been, but on the contrary, the instruction that was given was entirely proper under both. Chicago City R. R. v. Gates, 135 Ill. App. 180; Peterson v. Metropolitan St. Ry. Co., 211 Mo. 498, 111 S. W. 37; Patterson v. Westchester Electric Ry. Co., 26 App. Div. 366, 49 N. Y. Supp. 796; Haralson v. San Antonio Traction Co., 53 Tex. Civ. App. 253, 115 S. W. 876.

[10, 11] In this connection it may be said, although the error was harmless, that the court should not have instructed the jury in the instruction complained of that if they found that plaintiff had attempted to board a moving train, "then he was guilty of contributory negligence." The court should have instructed the jury that if they so found, then it was negligence on the part of plaintiff, and that he could not recover. But to say that plaintiff by such an act was guilty of contributory negligence necessarily imported that the defendant was in some way also negligent. This, of course, was not true, because the defendant had a legal right to have its cars moving when plaintiff tried to get on, and so could not be negligent.

[12] As to the motion for a new trial on the ground of newly discovered evidence, the asserted newly discovered evidence was all to be offered to impeach one of the witnesses for defendant. A new trial on the ground of newly discovered evidence is not granted where the only value of the newly discovered testimony is as impeaching evidence. Chalmers v. Sheehy, 132 Cal. 459, 64 Pac. 709, 84 Am. St. Rep. 62.

The judgment and order appealed from are affirmed.

We concur: WILBUR, J.; MELVIN, J.

(37 Cal. App. 465)

WONG AH SURE v. TY FOOK. (Civ. 1796.)

(District Court of Appeal, Third District, California. June 5, 1918. Rehearing Denied by Supreme Court Aug. 1, 1918.)

1. APPEAL AND ERROR ⟹757(3)—BRIEF—EVIDENCE.

If the appellant in good faith claims that there is no evidence whatever in support of a particular finding, a statement to that effect is sufficient, on appeal by the alternative method, and the duty then devolves upon the respondent to point out the evidence.

2. APPEAL AND ERROR ⟹762—RECORD ON APPEAL—EVIDENCE.

It is not proper procedure for the appellant, having failed in his opening brief to comply with Code Civ. Proc. § 953c, as to printing the evidence and the record, to discuss the evidence in the reply brief.

3. VENDOR AND PURCHASER ⟹109—"EXECUTED CONTRACT"—DESTRUCTION OF PROPERTY—RIGHTS OF PARTIES.

Where the purchaser, having paid part consideration, went into possession, title being reserved until full payment, and the building was destroyed by fire, he could rescind and recover the money paid, the contract not being executed, since an "executed contract," under Civ. Code, § 1661, is one the object of which is fully performed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Executed Contract.]

4. VENDOR AND PURCHASER ⟹109—EXECUTED CONTRACT.

Where defendant by oral contract purchased land and a building on installments and went into possession, the contract, though taken out of the statute of frauds by the delivery of possession, was nevertheless not executed.

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by Wong Ah Sure against Ty Fook. Judgment for plaintiff in part and for defendant in part, and plaintiff appeals. Affirmed.

J. M. Fulweiler, of Auburn, for appellant. Meredith, Landis & Chester, of Sacramento, for respondent.

CHIPMAN, P. J. This is an action to quiet title to certain land, being a portion of section 19, township 12 north, range 8 east, near the town of Newcastle, and for other relief. Defendant filed an answer and cross-complaint; denied that plaintiff was at the commencement of the action or is now the owner of the land, "except as hereinafter set forth"; denied that defendant claims an interest in the whole of said premises, but avers that he claims an interest in a certain portion hereof (describing it); denied that defendant's claim is without right. By way of cross-complaint, alleged: That about the ——— day of March, 1914, plaintiff and defendant entered into an agreement whereby "defendant agreed to buy and plaintiff agreed to sell the following described land and premises [description]," the consideration being $950, payable $400 May 20, 1914, and the balance within six months from said last-mentioned date; that defendant went into possession, and has ever since been and now is in possession; that about June 22, 1914, a store building situated on said premises was partially destroyed by fire; that immediately thereafter it was agreed by plaintiff and defendant that defendant should cause said store building to be repaired "at the sole expense and cost of

plaintiff and the amount of the said cost to be charged against and deducted from said purchase price of said land"; that defendant has paid to plaintiff the entire consideration, to wit, May 20, 1914, paid cash $400; July 17, 1914, paid out for cost of repairing said store building $505; sold and delivered to plaintiff merchandise of the reasonable value of $40, and paid plaintiff the sum of $50 in cash, making in all $995; that defendant has demanded of plaintiff "that he execute and deliver to defendant the said deed, conveying said land and premises to defendant in accordance with said agreement," but plaintiff has refused, and still refuses, to comply with said demand. The prayer is that plaintiff take no relief; that plaintiff be required to specifically perform said contract; that it be decreed that plaintiff has no estate or interest in said premises; and that he be debarred from asserting any claim in or to said land.

Plaintiff, answering the cross-complaint denied that plaintiff agreed to sell to defendant the strip of land described in said cross-complaint, except a strip described as follows (description) on which "there was a building and porch of the dimensions heretofore stated of 19x70"; that said agreement "was not in writing, but oral and the price to be paid was $950, payable $400 cash and the balance within a reasonable time thereafter, and not to exceed one year, and at said final payment a deed was to be made to defendant." Plaintiff admits that he surrendered possession to defendant, and that, while defendant was in possession "the upper or wooden portion of said building was destroyed by fire, but for which plaintiff was in no respect responsible or liable"; denied that it was agreed that said building should be repaired at plaintiff's cost; admitted the payment of $400 cash, but alleged that plaintiff let defendant "have back" from said $400 the sum of $175, leaving due $625; denied that defendant sold plaintiff merchandise of the value of $40, or any other sum or at all, and denied that defendant paid plaintiff $50 in cash or any sum in excess of $40; denied that defendant has demanded of plaintiff a deed, and alleged that plaintiff has tendered to defendant a sufficient deed on payment of the unpaid balance of said purchase price. Plaintiff prays that it be adjudged that defendant has no interest in said land, and that plaintiff have a vendor's lien on said premises as security for the payment of said balance due plaintiff.

The cause was tried by the court without a jury and findings of fact were made by the court substantially in accordance with defendant's answer and cross-complaint; and as conclusions of law the court found that plaintiff is entitled to a decree quieting his title to the strip of land claimed by him except that portion particularly described as claimed by defendant and as to such portion that defendant is the owner and entitled to possession; that defendant is entitled to the decree that plaintiff convey the said strip of land to defendant. Judgment was entered accordingly. Plaintiff appeals from the judgment, and brings the record here under the alternative method.

It is stated in appellant's brief that, pending the appeal plaintiff, Wong Ah Sure, conveyed his interest in the premises to Sing Kee Jan, and later died, and Sing Kee Jan has, upon suggestion of counsel, been substituted as appellant.

[1, 2] Respondent invites attention to the failure of appellant in his opening brief to comply with the provisions of section 953c of the Code of Civil Procedure, and asks that the rule be enforced, which is to affirm the judgment without examining the typewritten transcript in search for error upon which to base a reversal. In the present instance, there was an entire disregard of the requirements of the Code section. Appellant, however, has made a fairly successful effort to comply with the statute in his reply brief. The statute reads:

"In filing briefs on said appeal the parties must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court"

—and appellant makes the point that the statute does not require compliance therewith in the opening brief, and that he has sufficiently complied with the statute by calling attention to the portion of the record on which he relies in his reply brief.

It is due to the respondent that the appellant should state fully his points and authorities in his opening brief; and, if he challenges the sufficiency of the evidence to support the findings he should, in his opening brief, point out the evidence which he claims should have demanded a different finding. Of course, if the claim is made in good faith that there is no evidence whatever in support of a particular finding, a statement of such fact would be sufficient, and the duty would then devolve upon the respondent to point out the evidence. The respondent is entitled to know on what points appellant relies, and they should be stated in the opening brief in order that he may meet them in his answering brief. The practice of allowing appellant to reserve his discussion of the sufficiency of the evidence to support the findings to his reply is illogical, and devolves upon the respondent the necessity of filing an additional brief which would be unnecessary where appellant complies with the statute in his opening brief. Orderly procedure precludes appellant from making new points in his reply, and to defer compliance with the statute until he files his reply brief is in effect introducing an entirely new point which respondent could not anticipate and answer in his answering brief. For these, among other reasons, we think appellant has not

complied with what we believe to be the intention of the statute. As the question has not hitherto arisen, we have treated the reply brief of appellant as sufficient compliance with the statute.

Appellant states in his opening brief, and reiterates it in his reply brief, that:

"There is really but one issue to be determined in the case, and that is the 'agreement or contract to pay for the rebuilding of the store.' "

The finding of the court is that:

"Immediately upon said fire occurring and said damage and detriment resulting to said structure, building, and improvement, as in these findings heretofore found, plaintiff agreed with defendant to alone stand and bear said loss, and agreed with defendant that, if defendant should restore said structure, building, and improvement and pay the cost therefor, the amount paid therefor should be deducted from the final payment to be paid by defendant to plaintiff, as in these findings elsewhere found, for said land, premises, structure, building, and improvement in these findings elsewhere described." Also, "the court finds that the risk or loss and destruction of said structure, building, and improvement on said land and premises agreed to be sold and conveyed by plaintiff to defendant was on the plaintiff, and that the damage and injury to said structure * * * by reason of fire occurred * * * without the fault, omission, or negligence of the defendant."

[3] It appeared that defendant went into possession of the premises under an oral contract of sale. Part payment was made, the balance to be paid at a future date, and when and not until paid, plaintiff was to convey the premises to defendant by a good and sufficient deed of bargain and sale. Before the time had arrived for payment of deferred installments, the building was partly destroyed by fire. As we understand the cases of Potts Drug Co. v. Benedict, 156 Cal. 322, 334, 104 Pac. 432, 25 L. R. A. (N. S.) 609, and Conlin v. Osborn, 161 Cal. 659, 666, 120 Pac. 755, defendant could have rescinded and recovered the money paid on account of the purchase price. The principle applicable to the situation is stated in the Potts Drug Co. Case:

"Where there is a mere agreement to sell, and title therefore has not passed, the loss falls on the vendor."

Appellant answers that the sale was not an executory contract, but was an executed agreement. "An executed contract is one, the object of which is fully performed. All others are executory." Civ. Code, § 1661.

[4] The contract was taken out of the statute of frauds by part payments of the purchase price and delivery of possession. The agreement was partly executed, but title had not passed to defendant. There was evidence that the value of the building was about $800 or $850 and the value of the lot $150. It is obvious that the property for which defendant was to pay $950 consisted principally of the building. The fact that he went into possession does not make the rule any the less applicable. It became impossible, through no fault of defendant, for plaintiff to convey the property he had agreed to convey. "Where the contract relates to the use or possession or any dealing with specific things in which the performance necessarily depends on the existence of the particular thing, the condition is implied by the law that the impossibility arising from the perishing or destruction of the thing, without default in the party, shall excuse the performance, because, from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the subject of the contract." 9 Cyc. 631.

But if this be not the law, the parties were certainly competent to agree as to which of them should bear the loss; and there was evidence that, immediately after the fire occurred, plaintiff told defendant to go ahead and repair the building, and to deduct the cost from the unpaid purchase price for the property. We find no prejudicial error in any of the rulings of the court.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

(37 Cal. App. 489)

HEITMAN v. BRUNS et al. (Civ. 2397.)

(District Court of Appeal, First District, California. June 8, 1918. Rehearing Denied by Supreme Court Aug. 5, 1918.)

1. DEEDS ⊂=56(3)—DELIVERY.
Where a grantor did not relinquish all control over a deed, but specifically reserved the right to recall it at any time, there was no delivery of the deed.

2. EVIDENCE ⊂=584(1) — REJECTION — POWER OF JUDGE OR JURY.
A judge or jury has no right to arbitrarily reject testimony, though that may be done when the testimony does not produce conviction.

3. EVIDENCE ⊂=584(3) — REJECTION — POWER OF JUDGE OR JURY—NUMBER OF WITNESSES.
The rule prescribed by Code Civ. Proc. § 2061, subd. 2, that jurors are not to decide in conformity to declarations of any number of witnesses which do not produce conviction in their minds applies alike to judge and jury.

4. EVIDENCE ⊂=313 — WEIGHT AND SUFFICIENCY—CONVERSATION WITH DECEDENT.
No weaker kind of testimony can be produced than that of a person as to a conversation between himself and a deceased person.

5. WITNESSES ⊂=311—CONTRADICTION.
A witness may be contradicted by the facts he states as completely as by direct adverse testimony.

6. DEEDS ⊂=208(1)—DELIVERY—EVIDENCE.
In an action by the administrator of his deceased wife to set aside her deed to defendants, evidence *held* to sustain the trial court's finding that the deed had never been delivered.

7. DEEDS ⊂=210—CONSIDERATION—EVIDENCE.
In an action by the administrator of his deceased wife to set aside her deed to defendants, evidence *held* to sustain the trial court's finding that there was no consideration for the deed.

8. DEEDS ⊂=211(1)—VALIDITY—EVIDENCE.
In an action by an administrator to set aside his deceased wife's deed alleged by the grantees to have been made upon their contract to provide and care for the grantor, evidence *held* to sustain the trial court's finding that the deed was void.

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Action by Ernest H. Heitman, as administrator of the estate of Martha Lena Heitman, deceased, against Henry C. Bruns and others, with cross-complaint by defendants. Judgment for plaintiff, and defendants appeal. Affirmed.

Mastick & Partridge, of San Francisco (Alan C. Van Fleet, of San Francisco, of counsel), for appellants. J. E. Rodgers, of Martinez, and M. R. Jones, of San Francisco, for respondent.

KERRIGAN, J. This action was brought by plaintiff, as administrator of the estate of his deceased wife, to set aside a deed made by her in her lifetime to defendants. The complaint is in two counts. It is alleged in the first that the deed was procured by the undue influence of defendants, that there was no consideration therefor, and that it lacked delivery. The second count alleged that the grantor at the time of the execution of the deed was of unsound mind, and that there was no consideration and no delivery. The answer denied these allegations, and set forth a cross-complaint praying that defendants' title to the land be quieted against plaintiff. The case was tried with an advisory jury. Special issues were submitted upon the questions of undue influence, unsoundness of mind, and delivery. The jury found against the defendants on all of these issues. The trial court, however, adopted only the finding that the deed in question had never been delivered. It further found that no consideration was paid by defendants, or any of them, for the property, and that its value was in excess of the sum of $20,000, and that the deed made by the grantor was null and void. Judgment was thereupon entered canceling said deed, and quieting the title of plaintiff and the estate of decedent to the property. The appeal is from such judgment.

The question here presented is whether or not the evidence sustains the findings of the trial court

Appellants claim on the question of delivery that the evidence is clear, uncontradicted, and unequivocal; and that therefore this question has resolved itself into one of law; and accordingly they contend that the conclusions of law and the judgment thereon are "against law." A discussion of the evidence, therefore, becomes necessary.

From the facts surrounding the execution of the deed in question it appears that in the latter part of November, 1912, Martha L. Heitman was living on her farm, near Byron, in Contra Costa county, the property which is the subject-matter of this litigation. She was a woman advanced in life, being over 80 years of age. She had, in 1907, married a man much younger than herself, with whom she lived intermittently and who was her third husband. In November, 1912, she left her farm and went to the home of Henry Bruns, one of the defendants herein; and she thereafter lived with the Bruns family until her death, which occurred on December 30, 1913, some 13 months after her advent into this household. During her stay, Mrs. Bruns, aided by her daughters, two of the defendants herein, performed some service for Mrs. Heitman contributing to her comfort. The Bruns family were neighbors and in no manner related to Mrs. Heitman. Within a week after her arrival, according to the testimony of Mrs. Bruns, Mrs. Heitman expressed a desire to convey her property to the defendants herein. Thereupon, Henry Bruns, the father, and William Bruns, his son, went to Brentwood, a town close by, to get Robert Wallace, a justice of the peace and notary, to make a deed of Mrs. Heitman's property. Mr. Wallace did not come as soon as he was sent for, and thereafter, on December 4, 1912, William Bruns, one of the grantees named in the deed, again went after and brought him and one Shafer to

the Bruns home. On that day Mr. Wallace drew two deeds, one conveying from Mrs. Heitman to the Bruns children, all of whom were adults, her real property in Contra Costa county, valued at more than $20,000, which is the deed in controversy; and the other purporting to convey to the same persons her real property in Alameda county, consisting of 160 acres. After these deeds were executed, Mrs. Heitman told Mr. Wallace to keep them until she called for them or until she died, and in that event to hand them to Bruns, Sr. Wallace at this time stated to Mrs. Heitman that whenever she wanted the deeds back she could get them. Wallace then took these deeds away with him and continued to hold them until after the death of Mrs. Heitman, when, according to her instructions, he gave them to Bruns, who thereupon requested Wallace to record them, which he did.

[1] It is conceded, as indeed it must be, that up to the time Wallace took the deeds away there was no delivery of them, for the grantor did not then relinquish all control over them, but, on the contrary, she specifically reserved the right to recall them at any time. Appellants, however, seek to show a delivery some two or three months thereafter, based on the testimony of Henry Bruns, Sr., and his son, William, to the effect that Mrs. Heitman requested that the deeds be recorded. It is in evidence that Bruns, Sr., attempted about this time to have Wallace record them, but this he refused to do as being contrary to his instructions. No further attempt was made during Mrs. Heitman's lifetime to have the deeds recorded. This testimony of Bruns and his son was uncontradicted, and it is by reason of this fact that the claim is made that under these circumstances the question of delivery is one of law and not of fact.

[2, 3] While it is true that a judge or jury have no right to arbitrarily reject testimony, this may be done when it does not produce conviction. By section 2061, subd. 2, of the Code of Civil Procedure, jurors are to be instructed that they are not to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds, as against a presumption or other evidence satisfying their minds. This rule applies alike to judge and jury.

[4] It has been said that no weaker kind of testimony can be produced than the testimony of a person or persons as to a conversation between themselves and a deceased person. Mattingly v. Pennie, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87; Byrne v. Byrne, 113 Cal. 294, 45 Pac. 536. Here, too, the alleged oral direction of Mrs. Heitman to have the deeds recorded rests solely upon the evidence of Bruns and his son, who are interested parties.

[5] A witness may be contradicted by the facts he states as completely as by direct adverse testimony. Bellus v. Peters, 165 Cal. 112, 130 Pac. 1186; Prewett v. Dyer, 107 Cal. 154, 40 Pac. 105; Clark v. Tulare Dredging Co., 14 Cal. App. 432, 112 Pac. 564; Phillips v. Huffaker, 170 Pac. 431.

[6-8] The circumstances connected with the transaction were certainly such as justified the court in rejecting and disregarding the testimony of Bruns and his son. After the alleged instructions, Mrs. Heitman lived some nine months, and no attempt was made by her thereafter to have these instructions carried out. In addition thereto, there is no evidence that any of the grantees named in the deed ever exercised any right whatever over this land, or ever claimed to own it, or had it assessed to them, or did anything whatever which would indicate any claim of title in them. On the contrary, the testimony shows that there was no intention on the part of Mrs. Heitman to vest title in the grantees until after her death. A reading of the testimony of Bruns, Sr., and especially that portion relating to the claim that he attempted to collect rents from the property, does not carry conviction.

The claim that the transfer was made in consideration of an oral agreement by the grantees to support the grantor during her life in no manner strengthens the case of appellants. It is in evidence that, shortly after the execution of the deeds, Mrs. Heitman transferred to these same grantees all of her stock, farming implements, and other personal property in consideration for this very support. From all the circumstances and from a consideration of the entire evidence in the case, it is difficult to imagine how the jury or the court could have reached a different conclusion than they did. Within two weeks after the arrival of this aged and infirm woman in their midst—a woman found by the advisory verdict of the jury to be of unsound mind, upon evidence that would have supported a finding based thereon—the Bruns family dispossessed her of all her real and personal property amounting to a very substantial sum, and they seek to retain the same upon an alleged oral contract to provide and care for her, where the evidence shows that no such contract was ever entered into.

The findings of the trial court that the deed in question had never been delivered, that there was no consideration for the same, and that it was null and void, that Mrs. Heitman was the owner and in the possession of the lands in question at the time of her death, were all questions of fact, and the findings thereon find full and complete support in the evidence.

Judgment affirmed.

We concur: BEASLY, Judge pro tem.; ZOOK, Judge pro tem.

37 Cal. App. 506

## HAMMOND v. JUSTICES' COURT OF LOS ANGELES TP. et al. (Civ. 2706.)

(District Court of Appeal, Second District, California. June 12, 1918. Rehearing Denied by Supreme Court Aug. 8, 1918.)

COSTS ⊜128—PROSECUTION IN FORMA PAUPERIS.

Township justices' courts are vested with power to, and should upon a proper showing, admit parties to sue in forma pauperis; the statutory provisions as to costs not being applicable to the exceptional cases of indigent suitors who at common law were entitled to sue without payment of such costs.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Application by Alletha P. Hammond for writ of mandate directed against the Justices' Court of Los Angeles Township, County of Los Angeles, State of California, and others. From an order granting the writ, defendants appeal. Affirmed.

A. J. Hill, County Counsel, and David R. Faries and E. T. Bishop, Deputies County Counsel, all of Los Angeles, for appellants. Walton J. Wood, Public Defender, of Los Angeles, for respondent.

SHAW, J. The sole question involved herein is petitioner's right, upon a conceded showing, made in the justices' court of Los Angeles township, that she was destitute and unable to pay the cost, to prosecute in forma pauperis an action brought by her in said court. The trial court held that she was so entitled to sue and made its order granting a peremptory writ of mandate directed to the justices' court, requiring it to proceed with the trial without the payment of such cost. The appeal is from this order.

In our opinion, the decision in Martin v. Superior Court, 168 Pac. 135, L. R. A. 1918B, 313, must be regarded as conclusive in support of the order made by the trial court. In that case the right to prosecute the action in forma pauperis was upheld upon the ground that such right existed at common law, which, in the absence of any statutory modification thereof, must be deemed the rule of decision in the courts of this state. The only distinction between that case and this is that in the former the action was pending in the superior court, while in the instant case it is pending in the court of a township justice. The essential facts are identically the same, since in each case an indigent plaintiff, unable to pay the cost, and upon a sufficient showing thereof, sought a civil remedy in a court having jurisdiction of the subject-matter of the action. Upon the authority of what is said in the opinion in the Martin Case, we are constrained to hold that the township justices' courts of this state are, as were courts at common law, vested with power to, and should upon a proper showing, admit parties to sue in forma pauperis, unless such power is restricted by statute. As to this, the statutory provisions with reference to prepayment of costs in justices' courts are, in substance, the same as those applicable to payment of costs in the superior courts, and as to which it was said in the opinion to which we have referred that such statutes, being general in their nature, are not applicable to cases where the court has, in the exercise of its power, remitted the payment of the fees on behalf of a poor suitor; that "in every instance the court's order to this effect is sufficient warrant to every officer charged with the collection of fees to omit the performance of that duty in the specified case." In other words, the statutory provisions as to costs were not intended to, and do not, apply to the exceptional cases of indigent suitors who at common law were entitled to sue without payment of such costs.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

37 Cal. App. 664

## ROSE v. CRAWFORD et al. (Civ. 2430.)

(District Court of Appeal, First District, California. June 26, 1918. Rehearing Denied by Supreme Court Aug. 22, 1918.)

1. WITNESSES 219(3)—PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT—WAIVER.

Defendant's motion to set aside judgment being supported by her affidavit, to effect that her former attorney had no authority to stipulate that judgment should be entered against her, affidavit of such attorney, to effect that defendant admitted her default, that she was satisfied with the judgment, etc., was properly read at the hearing.

2. WITNESSES ⊜219(3)—PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT—WAIVER.

Where a client voluntarily testifies as a witness to confidential communications made by him to his attorney, he waives the privileged character of such communications, and both he and his attorney may be fully examined in relation thereto.

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by J. Leonard Rose against Mayflower Crawford and others. From an order denying a motion to vacate two judgments, one interlocutory and the other final, defendant named appeals. Affirmed.

C. W. Eastin, of San Francisco, for appellant. A. F. St. Sure, of Oakland, for respondent.

KERRIGAN, J. This is an appeal from an order denying a motion to vacate two judgments, one interlocutory and the other final, in an action by which the plaintiff sought to foreclose all the rights of the defendants under a written agreement to purchase an improved parcel of land situated in Alameda county.

On the 3d day of June, 1914, plaintiff's assignor, L. D. MacDonald, and the appellant

entered into a written contract whereby MacDonald agreed to sell to the appellant the real property described in the complaint for the sum of $12,500, subject to a mortgage of $5,000. $2,000 was to be paid at the time the contract was executed, and upon the balance of the contract the appellant was to pay the sum of $100 per month until the whole contract price should be paid. There was a provision in the agreement to the effect that if the appellant failed to comply with its terms she should forfeit all rights thereunder.

Upon the execution of the contract the appellant went into possession of the premises, and when this action was commenced about 18 months later she was, according to the plaintiff's testimony, about $600 behind in her payments. The action was commenced in November, 1915, and the summons and complaint served upon the appellant and her husband. Thereafter no answer having been made by the defendants, a judgment by default was taken against them. Forty-eight days later, by virtue of a stipulation entered into between the parties, the default was set aside. The defendants thereupon filed an answer, denying only that portion of the complaint which gave to the appellant credit on account of the monthly payments under her contract of $1,002.20, and averring that she had paid on account thereof the sum of $1,102.20; also praying that the court would fix a reasonable time within which she might pay the balance due. On January 21, 1916, a judgment by stipulation was rendered against the appellant, in which it was declared that she owed the defendant on account of the contract a specified sum, and decreed that all her rights in the property under the agreement be canceled and forfeited unless within 30 days from the entry of such decree she should pay to the plaintiff the amount then specified to be due.

On February 19, 1916, appellant changed her attorney, and two days later her new representative served and filed a notice of a motion to vacate the interlocutory judgment, and for permission to file a demurrer, answer, and cross-complaint. On February 23d, it appearing to the court from evidence taken at the hearing of said motion that the appellant had not complied with the condition of the interlocutory judgment, a final decree was entered against her in conformity to the prayer of plaintiff's complaint. Thereafter, and on March 2, 1916, appellant served and filed a notice of motion to set aside this final judgment. This motion, as in the case of that previously made, was based upon section 473 of the Code of Civil Procedure. According to the affidavit filed by appellant in support of her motions, she was not in arrears in her payments when this action was commenced, and she claimed that, had she been credited with all amounts paid by her, the account between the parties would have disclosed that all payments due at that time had been made, that she desired to defend the action, and that her former attorney was wholly without authority to stipulate that judgment should be entered against her. In opposition to her motion there was offered an affidavit by this attorney, from which it appeared that the appellant had freely admitted to him that she was in default under her contract, and that the allegations of the complaint were substantially true; that he thereupon told her, in the presence of her husband, and on other occasions, that the best he could do for her was to get as much time as possible within which she might endeavor to find a purchaser for the property; that upon the rendition of the interlocutory decree he informed her of what had been done; that she declared herself satisfied, and stated that she would be able to dispose of the property within the 30 days allowed her in the decree within which to pay the amount in default.

Other affidavits and oral evidence introduced by the plaintiff, together with the weak explanation of the defendant and the attendant circumstances, tend strongly to show that she was in fact in default in her payments on the contract as recited in the judgment, and that she was aware that an interlocutory decree had been entered against her, and of its purposes and terms, and that she was, in accordance with the advice of her attorney, doing her utmost to find a purchaser for the property as before mentioned. It thus appears that the appellant had no substantial defense to the action, and that the attorney who was at that time advising her took the course which to him seemed best calculated to conserve her interests in the property.

[1, 2] We are also of the opinion that the court committed no error in permitting to be read at the hearing upon the motions the affidavit of appellant's former attorney. The conversations between client and attorney therein related were not privileged, for where, as here, a client voluntarily testifies as a witness to confidential communications made by him to his attorney, he thereby waives the privileged character of such communications, and both he and his attorney may then be fully examined in relation thereto. Continental B., etc., Ass'n v. Woolf, 12 Cal. App. 726, 108 Pac. 729.

In the case of Security Loan & T. Co. v. Estudillo, 134 Cal. 166, 66 Pac. 257, the facts are quite similar to those in this case. There it appeared that an attorney, employed for the defendant in an action to foreclose a mortgage, secured all the time he could for the defendant, having done which he waived further right to answer, and stipulated that a default judgment might be entered. It was there held, upon an appeal from an order refusing to set aside the judgment thereupon entered that all presumptions are in favor of the order of the trial court, and that, where the evidence is conflicting as to the authority of the attorney to stipulate for

the judgment, the order must be affirmed. The court also held in the same case that no error was committed in allowing the defendant's attorney to testify as to his authority to enter into the stipulation, the court upon this point saying:

"Defendant denies that any such authority was ever given. The attorney was the principal witness as to his authority and the purposes for which he was employed. The employment was not a privileged communication within the meaning of the statute."

The order appealed from is affirmed.

We concur: BEASLY, Judge pro tem.; ZOOK, Judge pro tem.

---

(37 Cal. App. 515)

PEOPLE v. EANTOSCA. (Cr. 419.)

(District Court of Appeal, Third District, California. June 14, 1918. Rehearing Denied by Supreme Court Aug. 12, 1918.)

1. HOMICIDE ⟸257(1)—ASSAULT WITH INTENT TO KILL—EVIDENCE—SUFFICIENCY.
Evidence *held* to sustain conviction of assault with deadly weapon with intent to commit murder.

2. CRIMINAL LAW ⟸1170(1)—HARMLESS ERROR—EVIDENCE.
In prosecution for assault with intent to kill where prosecuting witness positively identified accused and stated that he was absolutely certain about it, accused was not prejudiced by excluding answer to the question whether witness would be as sure about identification if the trial were one for murder.

3. CRIMINAL LAW ⟸404(3)—DEMONSTRATIVE EVIDENCE—ADMISSIBILITY.
Where the sheriff identified a broken shovel and a club as having been found at the place of the assault and the prosecuting witness stated that he thought he was struck with such weapons, which bore blood stains, such weapons were admissible as exhibits.

4. CRIMINAL LAW ⟸1169(1) — APPEAL — HARMLESS ERROR.
In prosecution for an assault committed by two men, the one on trial was not prejudiced by admission of testimony of his brother, not shown to have been the other assailant, in answer to question why he had left one job and come to the place of the assault, to the effect that he could get better pay at the new job, the question having been asked in an effort to show that he changed jobs for the purpose of committing the assault, the matter being immaterial.

Appeal from Superior Court, Amador County; Fred V. Wood, Judge.

Nick Eantosca was convicted of assault with a deadly weapon with intent to commit murder, and, from the judgment and an order overruling motion for new trial, he appeals. Affirmed.

Ernest B. D. Spagnoli, of Jackson, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was convicted of the crime of assault with a deadly weapon with intent to commit murder. He moved for a new trial, which was denied, and he was thereupon sentenced to imprisonment in the state prison for the term of 14 years. Upon the facts, the defense was an alibi. The proof of the alibi consisted of the testimony of the defendant and his brother, both of whom testified that they were at their cabin not far from the scene of the assault the entire evening and until after 10 o'clock of the 26th day of April, 1917. The assault was made about 15 minutes before 10 o'clock. If the evidence was sufficient to support the verdict, it necessarily disposes of the alibi adversely to defendant. The evidence, we think, justified the verdict.

[1] The prosecuting witness, August Chiesa, was a minor and was working on the night shift, from 10:30 p. m. until 6:30 in the morning, at the Bunker Hill mine, Amador county. He testified that he left his lodging place about 15 minutes to 10 on the night of the assault and reached a point about 100 feet from the mine:

"Q. Just tell the jury what happened then. A. When I was there by the mine, Nick Eantosca was in front of me and I recognized him well. As soon as I raised my head up, I looked at him and I saw it was him, and he hit me right away. The first hit that he gave me, I did not fall. I raised my hand up and hit him in the face, but I don't know what point I got him in the face. At the same time I hit him with my hand in the face, I had my lunch basket. The lunch bucket go out of my hand and it go on the ground. When I left my bucket fall on the ground, I turned and saw somebody behind me, and at the same time they hit me with something; I thought it was— Mr. Spagnoli: We ask that that be stricken out, a conclusion of the witness. Mr. Snyder: It was the witness' best judgment. The Court: Do you know what he hit you with? A. I was not sure; it was only I heard something fall on the ground and I thought it was the sound of— The Court: That may go out as to what he thought it was. Mr. Snyder: Then what happened? A. Then I fell on the ground, and then I saw that both of them was there, and both of them hit me. I did not holler or I did not talk. When I was down on the ground, I had my face looking at the ground, on the ground, and my arm like this (indicating), and then they used something, maybe a ——— and they hit me on the back four or five times. Mr. Spagnoli: I ask that answer stricken out, a conclusion of the witness. A. I think they hit me with a ———, because I felt the hit right on my back. Mr. Spagnoli: I think the witness should be instructed not to give his conclusions. The Court: What he thought may go out. A. When I remained there about a minute like a dead man, I saw the partner of Nick Eantosca going away, and Nick Eantosca, when I had my arm like this (indicating), I was not unconscious, I saw Nick Eantosca take the razor out of his pocket and cut me right here (indicating neck). When I was there and I know what I was doing, I raised my arm up so he could not cut me down lower. Q. Did he cut you with the razor? A. Yes, he did. Q. Where? Show the jury where you were cut with the razor. A. (Indicates.) The Court: Q. You say the defendant here is the one that cut you? A. Yes, I am sure it was Nick Eantosca. Q. You say there were two men there; did each of them hit you with something? A. Yes, both of them hit me, but who used the razor was Nick Eantosca. Q. The defendant in this case is the one who used the razor? A. Yes, this fellow (indicating Nick Eantosca)."

Dr. G. L. Lynch was called to treat Chiesa that night:

"Q. State what you found in the way of wounds? A. I found a long cut on the left side of the neck and a number of bruises on his back and his right arm, and one or two on the top of his head."

Witness Cassassa testified that he saw defendant and another man going towards the Bunker Hill mine and in the vicinity of the place of the assault, after 9 o'clock. The witness was cross-examined at considerable length, the purpose being to discredit his testimony that he was where he testified he was and recognized Eantosca:

"Q. Now, you are absolutely sure that this is the man you saw? A. Sure, he is him. Q. You are absolutely certain about it; no possibility about it being some one else? A. I no make a mistake. Q. Is there any possibility of your making any mistake? The Court: He can't make it any more definite. A. If this man was on trial for murder, would you be just as sure? Mr. Snyder: I object. This is arguing with the witness and going into speculation. The Court: Objection sustained."

[2] The ruling is assigned as error. The defendant was on trial for assault with intent to commit murder. It is not at all likely that the witness could have been less certain of identifying defendant had the trial been for murder. It seems to us that the learned counsel subjected the witness to all reasonable tests to discover whether or not he was sure he was not mistaken. We do not think defendant was prejudiced by not having the benefit of an answer to the question.

[3] Sheriff Lucot went to the scene of the crime about 20 minutes after 10 o'clock. He found there "a broken shovel and a club about 2½ or 3 feet long." He found on both the shovel and club what he described as "blood on them dried up," the blood stains plainly visible. The club was broken in three pieces. The witness put the pieces together "and tied them to keep them together." Over defendant's objection, the court admitted in evidence the shovel and pieces of the club. The place where the assault was committed was first pointed out to the sheriff by a witness who was not present at the time the assault was made, but was there shortly after, and Chiesa the next morning took the sheriff to the spot. The evidence was sufficient to show that the pieces of the club and the shovel were found at the place where the assault occurred. The character of the wounds inflicted and the admitted testimony of Chiesa as to the circumstances and as to what he observed and heard sufficiently justified making these articles exhibits in the case.

[4] On the cross-examination of defendant's brother, who testified for defendant, the district attorney was permitted, over defendant's objection, to inquire of the witness why he had quit work at the Kennedy mine at Jackson (six miles from Amador City) to come to the Bunker Hill mine where his brother, the defendant, was working. The inference which the district attorney claimed might be drawn from the circumstance was that defendant's brother changed his place of work to be where he could aid defendant in making the assault. The witness, however, testified that he made the change because he could get better pay at the Bunker Hill mine than at the Kennedy. As there was no evidence that the witness was the "other man" in making the assault, the testimony was immaterial; but we cannot see that defendant was prejudiced by the ruling.

The judgment and order denying motion for a new trial are affirmed.

We concur: HART, J.; BURNETT, J.

---

37 Cal. App. 657

## BURTON AUTO TRANSFER CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 2521.)

(District Court of Appeal, Second District, California. June 26, 1918.)

MASTER AND SERVANT ⊂⊃375(2)—WORKMEN'S COMPENSATION ACTS—ACCIDENT "ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT."

A transfer truck driver, whose hours were uncertain and who had no regular lunch hour, who had loaded his truck and left it, as customary, in the street adjacent to the office during the noon hour, while waiting for the freight depot to open, and who in obeying instructions to go get the truck and go to the depot, and while crossing the street, was struck and killed by an automobile, received an injury "arising out of and in the course of his employment."

Original application for a writ of review by the Burton Auto Transfer Company, employer, and the Employers' Liability Insurance Corporation, Limited, of London, England, insurer, to annul an award of the Industrial Accident Commission for workmen's compensation in favor of Mrs. Hattie Fickett, mother of George Fickett, deceased employé. Award affirmed.

George H. Moore, of Los Angeles, for petitioners. Christopher M. Bradley, of San Francisco, and Warren H. Pillsbury, of Oakland, for respondents.

WORKS, Judge pro tem. This proceeding was instituted for the purpose of annulling an award allowing the mother of George Fickett a certain sum of money because of his death, said to have been caused by an accident occurring in the course of as well as arising out of his employment by the petitioner, Burton Auto Transfer Company. The employer was engaged in the transfer business, and Fickett was a driver of one of its automobile trucks. The business was operated from an office, in Los Angeles, where orders were received from patrons who required the service of the company, and the drivers of its vehicles were accustomed to remain about the office awaiting orders, at

all times during working hours when they were not engaged in the operation of their trucks in the performance of their actual work. The owner of the company testified that Fickett's working hours were "any time from half past 6 until he got through at night. Sometimes it was four; sometimes it was 10; sometimes it was morning." No luncheon time was provided by the employer for the drivers. The owner said on this subject:

"We leave that to the men. If they are in a hurry, or out in the country, it ain't no object to them to sit around for an hour. They eat their lunch and go on, and lots of times they take it with them and eat it on the truck going along."

He was then asked if that condition of affairs was changed to any degree when the men were in town and he said it was not. In response to a question as to whether the men could take longer than an hour for lunch if they desired, he said:

"If they wished, if they weren't busy; no rules about that at all."

On the day that the accident occurred which cost Fickett his life he had been ordered, at about 11 in the morning, to haul a load of pipe from a certain establishment to the Southern Pacific depot. He procured his load and trucked it as far as the employer's office, where he arrived at 12 o'clock noon; the place being directly on his way to the depot. The depot was closed from noon until 1 o'clock, and Fickett stopped at the office on that account, instead of proceeding to his destination and being compelled to await the opening of the depot for the delivery of his load. He went into the office, leaving his truck on the opposite side of the street, where it was headed toward the depot and stood on the right side of the way. Moreover, the owner of the transfer company testified that, during the day, it was the custom of the drivers to park their trucks on either side of the street, in front of the office, and that space was reserved for that purpose on both sides. Trucks were run into the employer's yard at night only. Fickett remained in the office at least a part of the time from 12 to 12:45; but the record does not show whether he ate luncheon there, or at his home, which was near at hand, or whether he went to a restaurant for it, or, in fact, whether he partook of lunch that day at all. At any rate, he was at the office at 12:45. At that time, the owner of the company said to him:

"Georgie, you better start along, and you will be at the S. P. at the time they open the doors, and get away a little quicker."

Fickett then left the office, started to cross the street toward his truck, and was run down by a passing automobile.

The petitioner relies upon the many cases to the effect that one is not entitled to compensation under the Workmen's Compensation Act, if he is injured while on the way toward or from his employment. These cases are not in point, for the reason that, at the time he was stricken, Fickett was not on the way to his employment. He had never left it. Under the facts above stated, he was within the hours of his employment, he was in a place where he had a right to be, and he had left his truck in a place where he had a right to leave it, in the regular and usual discharge of the duties he owed his employer. We are satisfied, and we need not cite authority in support of our view, that Fickett's death was occasioned by an accident that happened in the course of his employment, and that it arose out of the employment.

The award is affirmed.

We concur: CONREY, P. J.; JAMES, J.

---

37 Cal. App. 607

## LOS ANGELES COUNTY v. CLINE, Sheriff.

(Civ. 2717.)

(District Court of Appeal, Second District, California. June 22, 1918. Rehearing Denied by Supreme Court Aug. 19, 1918.)

SHERIFFS AND CONSTABLES ⊂⊃71—SALARY AND FEES—ACCOUNTING TO COUNTY.

An ordinance of board of supervisors of the county of Los Angeles, operating under a freeholders' charter adopted under Const. art. 11, § 7½, fixing the sheriff's salary required him to account to county for moneys received from the state, under Pol. Code, §§ 4175, 4176, for delivering prisoners and insane persons to state institutions.

Petition for writ of mandate by the County of Los Angeles against John C. Cline, Sheriff of the County of Los Angeles. Alternative writ of mandate made peremptory.

A. J. Hill, Co. Counsel, and David R. Faries, both of Los Angeles, for petitioner Frank Dominguez, Geo. Sanders, and Milton M. Cohen, all of Los Angeles, for respondent.

SHAW, J. In mandate. Respondent is sheriff of Los Angeles county, having been elected to said office at the general election in 1914. At the time of his election, and ever since, Los Angeles county has operated under a freeholders' charter, which provides that the board of supervisors shall by ordinance fix the compensation of all elective officers, which includes the sheriff. On June 2, 1913, said board, by an ordinance duly passed pursuant to the power so granted, fixed the salary of the sheriff of said county at the sum of $4,000 per year, which, as therein declared, was in full compensation for the performance of all official services required by law. The charter provided:

"That all fees collected by any county officer, board or commission shall be paid into the county treasury on the first Monday of each calendar month, together with a detailed statement of the same in writing, a duplicate copy of which shall be filed with the auditor at the same time."

In the month of February, 1918, for services rendered by respondent as such sheriff, covering the time necessarily consumed in delivering prisoners and insane persons to state institutions, he received from the state the sum of $496. The question involved is whether or not respondent is, as he claims, entitled to retain said sum so received for his own use, or required to turn the same into the county treasury and file therewith a detailed statement of the same in writing, and also file a duplicate copy thereof with the auditor. Respondent's refusal to comply with said provision of the charter is based upon sections 4175 and 4176 of the Political Code, which provide that there shall be allowed to the sheriff by the state, to be retained by him for his own use, a per diem of $5 for the time necessarily consumed in delivering prisoners and insane persons to state institutions to which they have been legally committed. On the other hand, petitioner insists that the ordinance is the measure of respondent's right to compensation, and that, since the ordinance fixes his salary at $4,000 per year in full compensation for his services, and the charter requires all fees earned or collected by him for official services rendered to be turned into the county treasury, such fees so earned and received belong to the county.

In our opinion, petitioner's contention must be sustained. The charter, adopted under and pursuant to the provisions of section 7½, article 11, of the Constitution, in express terms authorizes the board of supervisors by ordinance to fix the compensation of such sheriff, and under the power so granted the board did fix such salary, declaring it to be in full compensation for all services which the sheriff was required by law to perform, and, as declared by the charter, all fees received by him from any source for services which he was required to perform should be paid into the county treasury. Under the provisions of the Constitution, charter, and ordinance, there would seem to be no question as to the county being entitled to the fees so received by the sheriff for the services rendered. Hence, while the sheriff is still entitled, under said sections 4175 and 4176, to collect from the state the per diem therein provided for his time consumed on behalf of the state in performing the duty imposed, the moneys so received belong to the county. Under the ordinance passed pursuant to charter provisions, the time of the sheriff consumed in the performance of his official duties belongs to the county, and his earnings in the performance thereof, like those of any other employé, belong to the employer. This conclusion finds ample support in cases decided by the courts of this state, among which are those of Adams v. San Francisco, 50 Cal. 117, County of Santa Clara v. Branham, 77 Cal. 592, 20 Pac. 75, In the Matter of Dodge, 135 Cal. 512, 67 Pac. 973, and County of San Diego v. Schwartz, 145 Cal. 49, 78 Pac. 231, all of which involved like questions, and which were decided in accordance with the views herein expressed.

The alternative writ of mandate heretofore issued is made peremptory.

We concur: CONREY, P. J.; JAMES, J.

---

(37 Cal. App. 590)

ERSKINE v. MARCHANT et al. (Civ. 2399.)

(District Court of Appeal, First District, California. June 19, 1918. Rehearing Denied July 19, 1918; Denied by Supreme Court Aug. 15, 1918.)

1. PRINCIPAL AND AGENT ⟸76(1) — COMPENSATION—FORFEITURE—ESTOPPEL.
In an agent's action on a contract of employment for the sale of calculating machines, providing for forfeiture if he did not sell 50 machines the first year, where defendants repudiated the contract 2½ months after it had been executed, they were estopped to claim forfeiture for nonsale of the requisite number of machines.

2. DAMAGES ⟸184 — MITIGATION — EMPLOYMENT CONTRACTS.
In an action by an agent under a contract of employment to sell calculating machines, profits made by plaintiff on sales of machines purchased by him from another firm are not available in mitigation of damages, in the absence of evidence as to the capital invested by plaintiff or how many he sold.

3. DAMAGES ⟸120(7)—SPECULATIVE DAMAGES—AGENT'S COMPENSATION.
While contracts between commercial agents and their principals embody many elements of uncertainty, damages for breach thereof are not speculative or remote, and such compensation will be awarded as the evidence shows with reasonable certainty that plaintiff is entitled to.

4. APPEAL AND ERROR ⟸931(1)—REVIEW—DAMAGES.
Courts may find damages in a lump sum and any uncertainty in the findings will be construed to support the judgment, rather than to defeat it.

Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action by W. W. Erskine against R. H. Marchant and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Henry C. McPike, of Oakland, for appellants. Alexander D. Keyes and Herbert W. Erskine, both of San Francisco, for respondent.

PER CURIAM. This is an appeal from a judgment awarding plaintiff $7,839.46 for breach of contract. The contract, which was in writing and attached to and made a part of the complaint, was made on the 17th day of May, 1913, and appointed plaintiff the defendants' agent for the sale of its calculating machines, called the "Marchant," for a period of 5 years, with the privilege of renewing the contract for 5 years, and with the exclusive right of sale on commission in the state of California, save to certain designated firms to which the defendants reserv-

ed the right to sell its machines. The contract contained a clause that the plaintiff would forfeit all rights under the contract if 50 sales were not made in the state of California during the first year of the agreement. On the 3d day of August, 1913, defendants notified plaintiff that they had sold their business to a corporation, and that the corporation would not accept the agreement between them and the plaintiff. On receipt of a letter from the corporation a few days later, the plaintiff with his attorney called at the office of the corporation, where he was told by some of the officers of the corporation that they would not proceed under the written contract, but that they would permit him to go on selling the Marchant machine, and would pay him a commission on such sales as he made. Plaintiff accepted that arrangement upon the express understanding that by so doing he was not waiving his rights under the original contract. Before the repudiation of the written contract plaintiff had sold 7 machines, for which he had received his commission in full from defendants. After the repudiation he continued to sell machines for the corporation until April, 1914, selling in all 11 machines, for which he was paid his commissions by the corporation. The evidence showed that between May 17, 1913, and May 17, 1914, 18 machines were sold by plaintiff and 20 by the Marchant Company.

[1] Appellants claim that as the contract provided that it should be forfeited if 50 machines were not sold within the first year, and as the combined sales of the plaintiff and the other agents of the corporation did not total 50 machines, the plaintiff's damages should have been limited to the loss of his commission for the first year of the contract. Inasmuch as the defendants repudiated their contract 2½ months after it had been executed, they are estopped to claim the benefit of the forfeiture clause for the non-sale of 50 machines. Schiffman v. Peerless, etc., Co., 13 Cal. App. 600, 110 Pac. 460. Moreover, the fact that plaintiff continued to sell the Marchant machine after the repudiation of the contract by defendants, and that he did not sell the amount required in the forfeiture clause, is not proof that he would not have sold the requisite number, had he been acting under the original contract as the exclusive agent, actively interested in the sale of that machine.

[2, 3] The contention that an allowance should have been made in mitigation of damages of profits made by plaintiff, after the breach of the contract, in the purchase and sale of a similar machine, known as the "Dactyle," is without merit. There was evidence to the effect that plaintiff purchased some Dactyle machines in Paris; that he was not the agent for the sale of the Dactyle machine, but merely purchased and sold them. But how much available capital he had to invest in the purchase of these machines, how many he purchased, or how many he sold, was not shown. In order to mitigate damages, it was incumbent upon the defendants to introduce evidence from which plaintiff's profits in the sale of Dactyles could be estimated with some degree of certainty. While contracts between commercial agents and their principals embody many elements of uncertainty, the damages for breach thereof are not speculative or remote, and courts award such compensation as the evidence shows with reasonable certainty the wronged party is entitled to. Sutherland on Damages, § 69; Wakeman v. Wheeler & W., etc., Co., 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676.

[4] It is further contended that in awarding damages the court did not take into consideration the difference between the entire commission for each sale and what it would cost the plaintiff to make the sale. While it does not appear what elements the court considered in ascertaining the amount of damages, there was nothing in the court's finding to show that these costs and expenses were not taken into consideration. The court found that by reason of defendants' breach of the contract plaintiff had been damaged in the sum of $7,839.46. It has been held that courts may find damages in a lump sum, and that any uncertainty in the findings is to be construed so as to support the judgment rather than to defeat it. Murphy v. Stelling, 8 Cal. App. 702, 705, 97 Pac. 672; Foley v. Martin, 142 Cal. 256, 261, 71 Pac. 165, 75 Pac. 842, 100 Am. St. Rep. 123. The trial court had before it evidence of the sales made by the plaintiff and the defendants prior and subsequent to the breach of the contract from which it could form a judgment as to the amount of plaintiff's loss, and from the record before us we cannot say that the trial court erred in estimating the damages.

Judgment affirmed.

---

(37 Cal. App. 432)

## GRANGE v. AMERICAN NAT. BANK OF SAN FRANCISCO. (Civ. 2427.)

(District Court of Appeal, First District, California. June 4, 1918.)

1. REPLEVIN ⊂⊃100(1)—CLAIM AND DELIVERY —JUDGMENT.

In action in claim and delivery, judgment for plaintiff for delivery of securities sued for, or for their value if delivery could not be had, *held* not reversible, for failure to specify clearly, what was to be done, on account of recitals as to proceeds of certain bonds which it was stipulated might be sold pending litigation.

2. APPEAL AND ERROR ⊂⊃1013 — REVIEW — FINDING.

In action in claim and delivery, appellate court is concluded by finding that value of securities sued for is as alleged, no segregation of different securities being made, and defendant appellant cannot take advantage of clerical error in recital of value of a portion.

---

Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by Clarence Grange against the American National Bank of San Francisco. From a judgment for plaintiff, defendant appeals. Affirmed.

A. Heynemann, of San Francisco, for appellant. R. P. Henshall, of San Francisco, for respondent.

PER CURIAM. This is an action in claim and delivery, brought for the recovery of certain securities. Plaintiff had judgment for the delivery of the same, and, in the event that such could not be had, then for the sum of $3,155, the alleged total value thereof. The appeal is taken on the judgment roll alone.

[1] Appellant claims that the judgment should be reversed, for the reason that it does not clearly specify what is to be done. There is no merit in the appeal. The claimed uncertainty is based upon recitals with reference to the proceeds had from the sale of certain bonds which it was stipulated might be sold pending the litigation. With this change the findings follow the complaint, and judgment is given for the return of the unsold specific personal property described therein, together with the sum of $1,764.33, the amount received from the sale of the bonds. In case delivery of the specific personal property cannot be had, then the alternative portion of the judgment provides for an amount which constitutes the full value of the property sued for, included in which is the sum derived from the sale. There is no uncertainty in the judgment.

[2] Appellant further seeks to take advantage of a clerical error in the recital of the value of a portion of the securities sued for. The complaint recited that all of the securities were of the value of $3,155. The answer alleged their value to be not greater than the sum of $2,000. The findings and judgment determine that the value of the personal property sued for is as alleged; no segregation of the different securities being made. On the question of value we are concluded by the finding.

Judgment affirmed.

---

37 Cal. App. 332

## NAVE v. GRAHAM et ux. (Civ. 2274.)

(District Court of Appeal, Second District, California. May 22, 1918.)

1. APPEAL AND ERROR ⊜757(1)—BRIEFS.
On an appeal by the alternative method, the appellate courts will not examine typewritten matter, and parties must print in their briefs portions of record to which they desire to call the court's attention.

2. PLEADING ⊜122—DENIAL ON INFORMATION AND BELIEF.
In an action for slander, defendant cannot deny using the words alleged upon information and belief, as positive knowledge of that matter is presumed, under Code Civ. Proc. § 437.

3. PLEADING ⊜121(1)—ANSWER—DENIAL.
An answer containing denials of the allegations of the complaint, based upon lack of information of defendants "sufficient to form a belief," is insufficient, under Code Civ. Proc. § 437.

4. APPEAL AND ERROR ⊜1042(4) — HARMLESS ERROR.
In a slander case, where answer contained denial of use of words alleged, and also allegations that statements were true, it was harmless, if error, to refuse to strike out the denial, where court instructed that defendant admitted using the words, and the only issue was that arising upon the defense as to the truth of the matter.

5. APPEAL AND ERROR ⊜981—MOTIONS FOR NEW TRIAL—REVIEW.
Adverse ruling on motion for new trial on ground of newly discovered evidence will not be disturbed on appeal, in absence of plain showing of abuse of power of court.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Katie Nave against David Graham and wife. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Affirmed.

E. M. Barnes, of Los Angeles, for appellant. F. W. Allender, of Los Angeles, for respondents.

JAMES, J. Action for damages alleged to have been suffered by reason of slanderous statements made by the defendant Mary Graham. Judgment was for the defendants. The appeal purports to be taken both from the judgment and from an order denying to plaintiff a new trial.

The appeal from the order is unauthorized by the Code (Code Civ. Proc. § 963), although all the questions sought to be presented thereunder are proper to be considered on the appeal from the judgment. It is stated in the brief of appellant that the action was brought to recover damages because of false and malicious statements made by defendant Mary Graham concerning the condition of a dwelling house owned by the plaintiff, by reason of which statements plaintiff was prevented from finding a tenant for the house.

[1] Appellant first complains that the court erred in refusing to strike out portions of the answer; also in refusing to sustain a demurrer interposed to the answer. The appeal is presented under the alternative scheme, a choice of method which requires the parties to print in their briefs the portions of the record to which they desire to call the court's attention. Many members of the bar, in presenting typewritten transcripts allowed on appeal by the alternative method, evidently assume, and erroneously, that the appellate courts will examine the typewritten matter. The Code provision is plain and imposes no such burden upon these courts, as has been repeatedly held in recent deci-

sions. Barker Bros. v. Joos, 171 Pac. 1085, with collection of cases. In so far as the text of the answer of defendants, which appellant prints in her brief, can be considered as sufficiently illustrating the points, it may be examined.

[2, 3] The answer first contained denials of the allegations of the complaint based upon lack of information of defendants "sufficient to form a belief." Examining the order of the court as counsel has set it forth in his brief, we cannot tell just what parts of the motion to strike out were granted, and which denied. However, appellant does state that two paragraphs containing denials in the qualified form above noted were stricken out. They embrace allegations denying the use of the words said to have been employed by defendants, the using of which could not be denied upon information and belief, as positive knowledge of that matter would be presumed against defendants.

The particular objection urged against other denials couched in similar form is that it is insufficient to state that a party "has not information or knowledge sufficient to form a belief" and so deny assertions of the opposite pleader. The Code provides that:

"If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground." Section 437, Code Civ. Proc.

We are prepared to agree with appellant that the denials of the answer in the form in which they were phrased were not those authorized by the Code; but, for reasons which will be stated hereinafter, no prejudice could have come to the plaintiff because of the refusal of the court to strike them out. In a separate count of the answer defendants set up facts showing that the alleged false statements were true, and we think, as to this defense, the demurrer for uncertainty was properly overruled.

[4] When we examine the instructions given by the court, we find that the trial judge directly advised the jury that the speaking of the alleged slanderous words was admitted by the defendant charged with having uttered them, and that the only issue remaining for determination was that arising upon the defense as to the truth of the matter, which the jury was told the defendants were required to show by a preponderance of the evidence. The instruction, therefore, took from the jury any question as to issue being raised by the denials objected to by the motion to strike out and assumed the facts in favor of the plaintiff. It is made plain, then, that the court's ruling on the motion to strike out portions of the answer, if erroneous, was without possible prejudice to the appellant.

[5] On the motion for a new trial affidavits of various persons were presented as showing alleged newly discovered evidence. An adverse ruling on such a motion and on such grounds will not be disturbed on appeal, in the absence of a plain showing of abuse of the power of the court. The question as to whether diligence had been used, which might have enabled the moving party to have furnished the evidence at the trial, and whether a different result would be probable had such evidence been produced, were matters which the court had discretion to determine either way under the statements made in the affidavits. Oberlander v. Fixen Co., 129 Cal. 690, 62 Pac. 254; People v. Buckley, 143 Cal. 392, 77 Pac. 169.

We find no error pointed to in the brief of appellant involving rulings of the court on the admission of testimony or refusal to give pertinent instructions offered.

The judgment is affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

---

37 Cal. App. 720

MACKNIGHT v. DAVITT. (Civ. 2412.)

(District Court of Appeal, First District, California. July 3, 1918. Rehearing Denied Aug. 2, 1918; Denied by Supreme Court Aug. 29, 1918.)

1. EVIDENCE ⊂⊃460(3) — PAROL EVIDENCE — BROKER'S CONTRACT — CURING DEFECTIVE DESCRIPTION.

Parol evidence is admissible to cure a defective description in a contract to employ a broker to sell or exchange real estate.

2. BROKERS ⊂⊃43(3)—CONTRACTS TO SELL OR EXCHANGE—DEFECTIVE DESCRIPTION.

Much greater liberality is allowed in construing and curing defective descriptions in a broker's contracts than in a deed of land, and such contracts will not be declared void merely because of a defect, uncertainty, or ambiguity in describing property to be sold or exchanged, where the defect can be cured by allegation and proof of extrinsic facts and circumstances.

3. EVIDENCE ⊂⊃460(7) — PAROL EVIDENCE AFFECTING WRITING—CURING DEFECTIVE DESCRIPTION.

Where, in an action to recover a commission for securing an exchange of real property, it appears that defendant represented himself in the contract as owner of a "lot on the N. line of E. street, feet west from W. street," etc., and that his wife then owned a lot on E. street corresponding to dimensions given, and that both parties understood and intended to designate a lot on that street 100 feet west of W. street, inadvertently omitting the figures, such facts warrant resort to parol proof to cure the defective description.

4. CORPORATIONS ⊂⊃432(4)—EXECUTION OF CONTRACT—AUTHORITY OF OFFICERS—PRESUMPTION.

A written acceptance and offer to a corporation to exchange real property being signed by the vice president and secretary and sealed with the corporate seal, the officers are presumed not to have exceeded their authority; the seal being prima facie evidence that it was affixed by proper authority.

Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

---

Action by J. Macknight, administrator of the estate of J. P. H. Wentworth, deceased, against J. B. Davitt. From a judgment for plaintiff, defendant appeals. Affirmed.

Tum Suden & Tum Suden, of San Francisco, for appellant. Pringle & Robbins, of San Francisco, for respondent.

PER CURIAM. In this action to recover a commission claimed to have been earned for securing the acceptance of an offer to exchange real property, the trial court gave judgment for the plaintiff, from which judgment defendant appeals.

On the 27th day of February, 1917, plaintiff and defendant entered into a written agreement in which defendant represented himself as the owner of certain property on Eddy street in San Francisco and appointed plaintiff his agent to act in negotiating an exchange of that property for certain other property on Oak street, both properties being described in the agreement, and defendant agreed to pay plaintiff the sum of $375 as commission when he secured an acceptance of the proposition to exchange the said property. The trial court found that plaintiff had secured an acceptance in accordance with the terms of the contract and that defendant had failed to perform his part of the agreement, and accordingly gave judgment for the plaintiff.

[1-3] It is contended that the trial court erred in permitting the plaintiff to remedy by oral testimony a defective description of the property in the contract. In a contract to employ a broker to sell or exchange real estate a defective description of land can be cured by parol evidence. Proulx v. Sac., Valley, etc., Co., 19 Cal. App. 529, 534, 126 Pac. 509. Much greater liberality is allowed in construing and curing defective descriptions in brokers' contracts than in a deed of grant of land, for, so far as the statute of frauds is concerned, the terms of the employment are the essential part, and such contracts will not be declared void merely because of a defect, uncertainty, or ambiguity in the description of the property to be sold or exchanged when such defect can be cured by the allegation or proof of extrinsic facts and circumstances. Maze v. Gordon, 96 Cal. 61, 30 Pac. 962; Proulx v. Sac. Val., etc., Co., supra. The circumstances disclosed here were that Davitt represented himself in the contract in question as the owner of a "lot on the N. line of Eddy street, feet west from Webster street, thence running west 53 feet and 6 inches"; that Davitt's wife then owned a lot on Eddy street corresponding to those dimensions; that both parties to the contract understood, and intended to designate, by the description, a lot on Eddy street beginning 100 feet west of Webster street; and that the figures "100" were inadvertently omitted from the description. These facts suffice, we think, to warrant a resort to parol proof to cure the defect in the description contained in the contract. See Anderson v. Wilstrup, 34 Cal. App. 771, 168 Pac. 1150.

[4] It is further contended that it was not shown that the acceptance of the Matilda Long Estate, a corporation, was made under the authority of its board of directors, and that the trial court erred in refusing to make an order for the production of the corporation's books. The written acceptance contained the signatures of the vice president and the secretary and the corporate seal. It is therefore to be presumed that the officers did not exceed their authority, the seal itself being prima facie evidence that it was affixed by proper authority. So. Cal., etc., Ass'n v. Bustamente, 52 Cal. 192; McKee v. Cunningham, 2 Cal. App. 684, 84 Pac. 260. Moreover, the court ultimately admitted the written acceptance in evidence pending the production of authorities and subject to a further ruling. This in effect was a ruling subject to a motion to strike out. The record discloses that the objection to the written acceptance was not renewed and that no motion to strike out was made.

Judgment affirmed.

---

(37 Cal. App. 409)

PRINGLE v. ASTON. (Civ. 2353.)

(District Court of Appeal, First District, California. June 1, 1918.)

1. TRIAL ⟸395(9)—FINDINGS—EFFECT OF IMMATERIAL FINDINGS.

That, after finding against the defense of no consideration and the cross-complaint for services in action on note by payee against maker, the court found true the immaterial allegation of answer to cross-complaint that loan was made on defendant's representation that it would be paid when he recovered on a cause of action, and that he had not recovered, will not prevent judgment for plaintiff as having sued prematurely, since to so hold would permit variance of note by parol.

2. EVIDENCE ⟸420(7)—NOTES—PAROL EVIDENCE.

Where a note was payable on a certain date, it cannot be shown by parol that payment was not to be made until a certain action was won.

Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by J. R. Pringle against Taggart Aston. Judgment for plaintiff, and defendant appeals. Affirmed.

Vincent Surr, of San Francisco, for appellant. J. R. Pringle, of San Francisco, for respondent.

BEASLY, Judge pro tem. Pringle sued Aston on a promissory note for $300, dated July 17, 1913, and payable 30 days after date. Aston defended, alleging in his answer that he had been employed by Pringle and Richard Hart Keatinge as an engineer,

and authorized to secure the services of certain help in his work, whom Pringle and Keatinge were to pay; that he secured the $300 from Pringle for this purpose, and paid the same to the employés accordingly; that a bank, of which Pringle was the attorney, was a creditor of this partnership between Pringle and Keatinge, but that the bank did not know of Pringle's connection therewith; that to cover this up, and hide Pringle's connection with this partnership from the bank, Aston gave Pringle the note in suit. Aston also filed a cross-complaint, in which he averred that he had performed services for the partnership of the value of about $3,000 upon a contingent fee, to be derived from the sale of the properties upon which he had performed the engineering services, and that Pringle had without cause thwarted the sale, and thus prevented Aston from securing pay for his services. Pringle answered this cross-complaint, and, after denying its allegations, averred, among other things, that:

"Cross-complainant appealed to plaintiff for financial assistance, alleging actual want and suffering on the part of cross-complainant and of the family of cross-complainant, and cross-complainant did then advise and state to plaintiff that the cross-complainant had a certain cause of action against the Sacramento Valley Electric Railway, and he promised and agreed with plaintiff that, in the event that plaintiff rendered to cross-complainant financial assistance, he, cross-complainant, would pay the moneys so advanced as and when he recovered on his cause of action against said Sacramento Valley Electric Railway; and thereupon, and for no other reason, plaintiff made the advance set forth in the complaint on file herein."

The court found against Aston on all the allegations of his answer and cross-complaint, but also found this last quoted and entirely immaterial allegation of Pringle's answer to be true, and that the defendant never recovered any money from the Sacramento Valley Electric Railway prior to the commencement of this action. Defendant's counsel, pursuant thereto, now asks this court to say that this action was therefore prematurely brought.

[1, 2] We cannot see it so. Pringle's allegation as to the promise of Aston to pay when he recovered upon the judgment was nothing more than a statement of the representations of Aston which induced Pringle to lend him the money, and was not, taken in connection with the other findings in the case, a condition precedent to a right of action upon the promissory note. Indeed, to hold that it was so would be to permit this verbal representation to vary the terms of the note as to the date of payment thereof, which we are not prepared to do, in order to save Mr. Aston from paying what is evidently a just debt.

The judgment is affirmed.

We concur: KERRIGAN, J.; ZOOK, Judge pro tem.

(37 Cal. App. 569)

## HUBERMANN v. NATIONAL SURETY CO.

(Civ. 2265.)

(District Court of Appeals, Second District, California. June 17, 1918.)

1. JUDGMENT ⟸704 — CONCLUSIVENESS—CO-PARTIES.

The finding of nonperformance of the contract in a mechanics' lien foreclosure against the owner and the contractor's surety, wherein neither defendant prayed for or was granted relief against the other, is not conclusive as between them in the owner's suit against the surety.

2. APPEAL AND ERROR ⟸907(2)—PRESUMPTIONS—FINDINGS.

In the absence of showing in the briefs to the contrary, it must be assumed that the trial court had before it evidence to support its finding of fact.

3. PRINCIPAL AND SURETY ⟸159—BURDEN OF PROOF.

An owner suing the surety on the contractor's bonds has the burden of showing nonperformance of the building contract.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Max L. Hubermann against the National Surety Company. From a judgment for defendant, plaintiff appeals. Affirmed.

E. W. Forgy, of Los Angeles, for appellant. Bennett, Turnbull & Thompson, of Los Angeles, for respondent.

WORKS, Judge pro tem. This is an action to recover on two bonds, given concurrently with a contract for the construction of a building for the appellant. One of the bonds was executed pursuant to the provisions of section 1183 of the Code of Civil Procedure, relating to mechanics' liens, and the other was a common-law bond, given to secure a faithful performance of the building contract. There had been prosecuted to final judgment, before the trial of the present action, certain consolidated actions for the foreclosure of mechanics' liens on the building agreed to be constructed under the contract. Both the appellant and the respondent were parties defendant in those actions, and neither prayed for or was granted any relief against the other. In those cases the trial court found that there was not a substantial performance of the building contract. The appellant, at the trial of the present action, offered in evidence the judgment roll in the mechanics' lien cases; but the evidence was excluded. The trial court found that an allegation of the complaint to the effect that the building contract had not been performed was not true, and rendered judgment for the defendant, and the plaintiff appeals.

[1] The appellant contends that the court ruled erroneously in excluding the judgment roll in the lien cases and asserts that the finding of nonperformance in those actions is conclusive upon the parties in this. The respondent takes the attitude that the judgment

in the lien cases is not res adjudicata as between the present parties for the reason that they were aligned together as defendants in that litigation. The position of the respondent is correct. Code Civ. Proc. §§ 1908, 1910; Robson v. Superior Court, 171 Cal. 588, 593, 159 Pac. 8.

[2, 3] The appellant also contends that there is no evidence to support the finding of the trial court that the allegation of the complaint that there was no performance of the building contract was not true. Certain testimony which is quoted by the appellant in his brief is to the effect that there were certain departures from the strict terms of the contract in the performance of the work under it; but the trial court, having before it the evidence as to the cost and character of the building—as we must assume it did, there being no showing in the briefs to the contrary (Paine v. San Bernardino V. T. Co., 143 Cal. 654, 77 Pac. 659)—might very well have held that these departures were trivial and that they did not affect the question of substantial performance of the contract. The burden was upon the appellant to show that the contract was not performed, and we cannot say, from the very meager reproduction of the evidence in the briefs, that the burden was sustained.

This appeal comes to us under the alternative method. It is provided by section 953c of the Code of Civil Procedure that, in presenting appeals under that method, the parties shall print in their briefs "such portions of the record as they desire to call to the attention of the court." We have been in much doubt whether the appellant has presented to us, under the terms of that section, enough of the record of the trial court to enable us to consider the point first discussed in this opinion (Barker Bros. v. Joos, 171 Pac. 1085); and whether we ought not to affirm the judgment on that ground. As, however, the question is a close one and as an affirmance results in any event, we have determined to concede, as a basis for the discussion of the point first considered in the opinion, that the compliance with the terms of section 953c is sufficient.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

---

37 Cal. App. 503

SMITH v. MACDONALD. (Civ. 2400.)

(District Court of Appeal, First District, California. June 12, 1918.)

CONTRACTS ⇐127(1) — COVENANT NOT TO SUE.

Where, in an instrument in which one party acknowledged and agreed to pay an indebtedness to the other, it was recited as part of the consideration that the instrument should be void should legal steps of any kind be taken to force payment, the latter provision was a valid and enforceable covenant not to sue, and the promise to pay constituted merely a moral obligation.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Ernest N. Smith against W. G. MacDonald. From judgment for defendant, plaintiff appeals. Affirmed.

Denson, Cooley & Denson, of San Francisco, for appellant. Louis Ferrari, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from a judgment sustaining a demurrer to the complaint, without leave to amend. The action was based upon a written instrument which the trial court held to constitute only a moral obligation. The instrument reads as follows:

"May first, 1912.

"I, W. G. MacDonald, hereby acknowledge my indebtedness to Ernest N. Smith in the sum of five thousand dollars ($5,000).

"I agree to pay Ernest N. Smith interest at the rate 7 per cent. per annum on this amount ($5,000) with the understanding that the indebtedness may be retired in installments; in the event that installments are paid interest is to be computed only on balance due.

"In view of the fact that W. G. MacDonald and Ernest N. Smith were equal partners in the MacDonald Sales Company up to the signing of this acknowledgment and attached agreement, and that W. G. MacDonald voluntarily agreed to release Ernest N. Smith from his partnership with attending possibilities of considerable financial loss, and agrees to pay Ernest N. Smith ultimately a sum considerably greater than his actual partnership interest, it is part and parcel of this acknowledgment of indebtedness that it shall be void should legal steps of any kind be taken to force payment, or should the indebtedness be transferred without the permission of W. G. MacDonald.

"[Signed] W. G. MacDonald.

"Accepted: [Signed] Ernest N. Smith."

We think the clause in this unusual document, that if suit should be brought to enforce collection the obligation shall be void, is a valid and enforceable covenant not to sue, and that the promise to pay the sum agreed constituted merely a moral obligation.

The parties to this agreement were of age and of competent understanding; and as the contract appears to have been freely and voluntarily entered into, and is one that is not against public policy in any respect, it should be upheld. It would be a grave injustice to defendant to hold that an action would lie to enforce the payment of the amount mentioned in this instrument, when it appears that a part of the consideration for the promise to pay was the stipulation on the part of the payee that the obligation should be void if suit should be brought thereon. The right to enforce any obligation which the plaintiff may have had against the defendant was his, and he could do with it as he saw fit—could agree to relinquish it, or insist on preserving it. Whichever course plaintiff deemed proper to adopt was no matter of public concern, and

affects no question of public policy. Gitler et al. v. Russian Co. et al., 124 App. Div. 273, 108 N. Y. Supp. 793; 9 Cyc. 335; Richardson v. Thomas et al., 28 Ark. 387.

In the case of Barnard v. Cushing, 4 Metc. (Mass.) 230, 38 Am. Dec. 362, the payee of a note, at the time it was signed by the maker, indorsed thereon a promise not to compel payment thereof, but to receive payment when convenient for the maker to pay. At page 235 of 4 Metc. (Mass.) (38 Am. Dec. 362) of the opinion the court used the following language:

"The result is that no action can be maintained upon this promise. Taking it with all its stipulations, it is only an honorary engagement —a memorandum by which the promisees may remind the promisors * * * of an honorary obligation outstanding against them."

In Greenhood on Public Policy and the Law of Contracts, p. 469, it is said:

"An agreement by which a creditor deprives himself of the power to enforce a debt, but confides the question of payment to the discretion of the debtor, is not void."

In Nelson v. Van Bonnhorst, 29 Pa. 352, the court, in passing upon a similar case, said:

"If it is reasonable for a man to release a debt altogether, surely it is reasonable to release the remedies of a debt, not itself released, as is done in covenants not to sue; and, even if it be not reasonable, we cannot set up our reasons or the public reasons for that of the contracting parties, and make a contract for them that is contrary to their plain intention, without violating the first principles of freedom and the very nature of contract relations. We cannot read this contract at all as a legal obligation, as the right to enforce the obligation is by mutual consent expressly withheld; thus the obligation is merely a moral one."

The judgment is affirmed.

We concur: BEASLY, Judge pro tem.; ZOOK, Judge pro tem.

---

37 Cal. App. 285

## MORNEAULT v. NATIONAL SURETY CO.

(Civ. 2194.)

(District Court of Appeal, Second District, California. May 17, 1918.)

1. ATTACHMENT ⟹347—SUIT ON BOND.
Suit will lie upon attachment bond given by attaching plaintiff when judgment for defendant for costs has been satisfied by such plaintiff in view of Code Civ. Proc. § 1049, as to when an action is pending.

2. ATTACHMENT ⟹351—MEASURE OF DAMAGES.
Where attachment defendant kept automobile for sale only, depreciation in value during time it was held under attachment would be a proper basis for damages, in suit on attachment bond, and rental value should have been eliminated.

3. ATTACHMENT ⟹350—SUIT ON BONDS—DAMAGES—EVIDENCE.
In suit on attachment bond for damages for detention of automobile which plaintiff, attachment defendant, kept for sale only, it was incumbent upon plaintiff to show the market value of the automobile both when taken and when returned to him.

4. ATTACHMENT ⟹350—SUIT ON BOND—DAMAGES—EVIDENCE.
In suit on attachment bond for damages for detention of automobile, judgment, as to depreciation in value $500, *held* to lack support in evidence.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Felix R. Morneault against the National Surety Company. Judgment for plaintiff, and defendant appeals. Reversed.

Benjamin E. Page and Arthur C. Hurt, both of Los Angeles (Arthur F. Coe, of Los Angeles, of counsel), for appellant. Eugene A. Holmes, of Los Angeles, for respondent.

JAMES, J. This is an appeal from a judgment entered in favor of the plaintiff and against the defendant for the principal sum of $500. The alleged liability of the defendant to the plaintiff arose by reason of the following facts: On about the 15th of April, 1915, one Dennis commenced an action against respondent herein, seeking to recover the sum of $1,000. Dennis took out a writ of attachment in the action, giving a bond in the sum of $500 to indemnify the plaintiff for any damages which he might suffer by reason of the issuance of the writ. The undertaking on attachment was in the usual form and was conditioned that:

"The said plaintiff will pay all costs that may be awarded to the said defendant and all damages which the said defendant may sustain by reason of the said attachment, not exceeding the sum of five hundred and no/100 ($500.00) dollars. * * *"

Upon receiving the writ of attachment the sheriff proceeded to levy upon an automobile owned by respondent here, who was the defendant in the case mentioned, and the automobile was held under attachment from April 16, 1915, to August 2d of the same year. On the latter date judgment was entered in favor of this respondent in the attachment suit, which judgment was that the plaintiff should take nothing and that defendant recover costs in the sum of $20.75. The costs were paid and the judgment was thereby satisfied. This action, brought to recover from the surety on the attachment bond damages alleged to have been sustained by the defendant in the attachment suit by reason of the attachment, was commenced on October 25, 1915.

[1] Appellant's first point is that this action cannot be maintained because the time allowed within which an appeal might be taken from the judgment in the attachment suit had not expired when the complaint of this plaintiff was filed. We have already noted that the judgment in the attachment suit was in favor of the defendant for costs and that the costs were paid and the judgment satisfied. We do not think that after voluntarily satisfying the judgment the plaintiff in the attachment suit could have maintained an appeal from that judgment. If he could

not, then the judgment was final upon satisfaction being entered. Section 1049, Code of Civil Procedure, provides that an action is deemed to be pending from the time of its commencement until its final determination upon appeal, "or until the time for appeal has passed, unless the judgment is sooner satisfied."

The main contention urged on the part of the appellant goes to the question of the sufficiency of the evidence to sustain the findings made by the court. The trial judge found that plaintiff had been deprived of the use of the automobile from April 16 to August 2, 1915, and that said use during said period was reasonably worth the sum of $545. He found that plaintiff was damaged further by reason of the attachment in the amount of $500, that sum representing the depreciation in value of the automobile during the period just mentioned. The total amount of damages found to have been sustained was the sum of these two items, to wit, $1,045. As the maximum of the undertaking was $500, judgment was entered for that sum.

[2] It seems very clear to us that plaintiff could not be allowed compensation for being deprived of the use of his automobile and also for the amount of depreciation in value of the machine. We think that the damages to be recovered in an action of this kind depend upon the use to which the owner of the property would put the same had his possession of it been undisturbed. If the evidence in this case shows that the plaintiff was using his automobile for his convenience or in his business, then the rental value of the same would seem to be a proper basis upon which to estimate the damages for its detention. On the other hand, if the evidence shows that the plaintiff held the automobile for sale, making no such use of it as has been described, then any depreciation in its value might properly furnish a like basis for the estimation of damages. Under conditions first instanced, it would not appear that the attachment defendant would have sold his machine had he had it in his possession, with liberty so to do; hence he would have lost nothing by reason of depreciation, because he would have continued to retain the machine. We think the evidence in this case negatives any claim for the value of the use of the automobile and that the evidence shows that defendant at the time the vehicle was taken from his possession was holding it for purposes of sale only. On this point he said:

"I did not drive the car much during the first part of the year 1915, you know, because I wanted to sell it, but I left it in the garage a while for sale. I left it there two or three weeks, I guess. I took it out one time, I got an opportunity and took it out. I went down to see a piece of real estate at Monrovia. I was trying to exchange some property I had north and went down there to see about an exchange of the property for the autuomobile. * * * I always borrowed a license when I was using the car. I think three times was all that I used it while I had it in the garage. When I took it from the garage I used their number. I had different parties looking at it and I put it on sale. I was not using it the first part of the year otherwise than demonstrating it and showing it to customers. I did not use it otherwise prior to April, 1915. I was offering it for sale; I wanted to sell it as I was getting short of money. The Court: What was the value of the car when the sheriff took it? A. I refused $850 for it just a few days before they took it, they offered me in the garage for the car. I wouldn't take it; I wanted a thousand dollars and all they offered me was $850, and I didn't take it. I sold it for $450 cash and a lot in Santa Monica. I was figuring the lot was worth $200. * * *"

Plaintiff nowhere testified that had he remained in possession of the car he would have made use of it in any way at all except to offer it for sale. That he had no such other use for it is corroborated by the fact that upon regaining possession of it he proceeded to sell it. The result of this testimony, we think, must be to eliminate from consideration altogether the finding of the court as to what the rental value of the machine was during the period from April 16th to August 2d. The fact, of course, is to be noted that as the maximum liability on the bond was $500, if either item of damage as found by the court is sustained by the evidence, the judgment will be supported, for the value of the use is fixed at $545 and the depreciation in value at $500 in the court's findings. We then turn to a consideration of the evidence touching the value of the property.

[3, 4] It was necessary for the plaintiff to show both the value of the automobile when taken under the writ and its value when returned to him. As to that matter the court made this finding:

"That the said automobile belonging to said Morneault and so attached was upon the 16th day of April 1915, worth $1,150. That upon the 2d day of August, 1915, the date when said automobile was returned to the possession of the plaintiff herein, it was worth $650 and no more."

It must be said that there is some evidence to sustain the finding as to the value of the automobile as fixed by the court as of the date when the attachment was made as being $1,150. Plaintiff's witnesses were contradictory upon that point. A witness, who had long experience in handling the particular kind and manufacture of machine as that of the plaintiff, testified that the machine when he saw it before the attachment was levied was worth $850. A witness who had never seen the machine stated that, basing his opinion upon a description of the car as given by the first witness, he would say it was worth about $1,150. Considerable testimony was given as to the rate of depreciation of the machine, but an examination of that testimony will show that it all had reference to a machine in use, a large element of depreciation being "wear and tear." There was no testimony fixing the

value of the automobile at the time it was received back by the plaintiff, except that given by the plaintiff himself and which we have already quoted. That testimony referred to the amount received by the plaintiff when he finally traded the car for $450 cash and a lot. There is nothing in that testimony which indicates what the market value of the machine was at the time the attachment was released. What the plaintiff actually received for it may have been more or less than its market value. And so, we think, that the finding as to depreciation in value of the car being $500 lacks support in the evidence.

The judgment appealed from is reversed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

---

(37 Cal. App. 493)

J. & H. GOODWIN, Limited, v. FRANICH et al. (Civ. 2335.)

(District Court of Appeal, First District, California. June 11, 1918. Rehearing Denied by Supreme Court Aug. 8, 1918.)

1. EVIDENCE ⊜448 — PAROL EVIDENCE AS TO CONTRACT—ADMISSIBILITY.
Where evidence indicated that letters constituted the contract, parol testimony as to oral negotiations prior to the written contract was admissible, for the purpose of showing the circumstances and situation of the parties under Code Civ. Proc. §§ 1856, 1860.

2. APPEAL AND ERROR ⊜204(3)—SCOPE—PRESERVATION OF EXCEPTIONS.
Where defendants raised no objection to the admission of oral testimony as to oral negotiations preliminary to written contracts, for the purpose of showing the circumstances of the parties, they could not complain on appeal of such admission.

3. APPEAL AND ERROR ⊜995—REVERSAL—GROUNDS.
That plaintiff's case was not made out by a preponderance of the evidence is not sufficient reason for disturbing the judgment for plaintiff, since it must be upheld, if supported by any substantial evidence.

Appeal from Superior Court, Santa Cruz County; Benj. K. Knight, Judge.

Action by J. & H. Goodwin, Limited, against John Franich, Martin Franich, and Peter Scurich, copartners doing business as Scurich Bros. Judgment for plaintiff, and defendants appeal. Affirmed.

Geo. W. Smith, of Santa Cruz, for appellants. Wyckoff & Gardner, of Watsonville, for respondent.

PER CURIAM. In this action plaintiff sought and recovered judgment in the sum of $959.85, claimed and found by the lower court to be due plaintiff for a balance of $4,000 loaned to defendants on the 17th day of October, 1912, pursuant to the terms of a contract previously entered into by said plaintiff and defendants.

[1, 2] The contract and the negotiations between the plaintiff and the defendants were evidenced by letters. The court permitted, over plaintiff's objection, testimony as to oral negotiations relative to the transaction prior to the date of the letters which contained the terms of the contract, limiting its admission, however, to the purpose of enabling the court to determine whether or not the contract was contained in the letters. The defendants made no objection to the court's ruling at that time, but urge for the first time upon appeal that the testimony should have been admitted generally. Inasmuch as the evidence showed that the letters dated October 12 and October 16, 1912, constituted the contract between the parties, it was not error, we think, to admit the testimony as to oral negotiations prior to the written contract for the limited purpose of showing the circumstances and situation of the parties. Code Civ. Proc. §§ 1856, 1860. But, however this may be, since the defendants raised no objection to the limited purpose for which the testimony in question was admitted, they cannot now be heard to complain. Morgan v. Hugg, 5 Cal. 409; Mott v. Smith, 16 Cal. 534.

[3] The only other point attempted to be made by appellant is that plaintiff's case has not been made out by a preponderance of the evidence. Were this true, it would not be a sufficient reason for disturbance of the judgment. If the judgment is supported by any substantial evidence—and in the instant case there is abundant evidence—the judgment must be upheld.

Judgment affirmed.

---

(37 Cal. App. 519)

UHTE v. ROSENTHAL et al. (Civ. 2428.)

(District Court of Appeal, First District, California. June 14, 1918.)

1. MUNICIPAL CORPORATIONS ⊜184(5)—POLICEMEN—PROMOTION—"MERITORIOUS ACTS"—"ASCERTAINED MERIT."
Where police commissioners under St. 1913, p. 1613, art. 13, § 8, providing for promotion under civil service based on ascertained merit, gave notice of examination wherein rating would be "upon meritorious acts," there was no distinction between the terms "ascertained merit" and "meritorious acts," and the commission did not by omission indicate intent not to promote on basis of ascertained merit.

2. MUNICIPAL CORPORATIONS ⊜184(5)—POLICEMEN—PROMOTION.
In arranging for promotion of policemen under St. 1913, p. 1602, a member of the department could not complain that the commissioners required, as prerequisite to promotion, that a claim of meritorious acts in writing be filed and verified by the chief of police, since it was proper for the board to investigate acts of policemen seeking promotion, since State Civil Service Act, directing the state civil service commission to keep record of the efficiency of employés, does not apply to municipal police departments.

3. MUNICIPAL CORPORATIONS ⊜184(5)—POLICEMEN—PROMOTIONS.
Under San Francisco Charter, art. 13, § 10, permitting commissioners to strike names of candidates for promotion from the register after

they have remained thereon more than two years, one whose name had remained on the register for six years could not complain that his name was unlawfully stricken therefrom.

4. MUNICIPAL CORPORATIONS ⟸184(5)—POLICEMEN—PROMOTIONS.

San Francisco Charter, art. 13, § 10, permitting the civil service commission to strike names from the lists for promotion after they have remained thereon for two years, is not in conflict with the other charter provisions as to civil service.

5. STATUTES ⟸206—CONSTRUCTION.

The rule that all parts of a statute must be so construed as to be effective applies in construction of a municipal charter relating to civil service and promotions thereunder.

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Suit by Charles Uhte against B. B. Rosenthal and others. Judgment for defendants on plaintiff's refusal to amend his complaint after demurrer thereto was sustained, and plaintiff appeals. Affirmed.

Edward F. Moran, of San Francisco, for appellant. George Lull, City Atty., and M. T. Dooling, Jr., Asst. City Atty., both of San Francisco, for respondents.

BEASLY, Judge pro tem. The plaintiff is a policeman of the city and county of San Francisco. Pursuant to a civil service examination which he passed on January 22, 1910, his name was placed on the eligible list for promotion from policeman to corporal of the police force. He participated in another examination conducted by the respondents, who are members of the civil service commission of the city and county, on January 8, 1916, and he brings this suit to enjoin the commission from removing his name and that of seven other policemen in whose interest he prosecutes this action, from the existing eligible list for corporals, without notice and hearing, and to restrain the commission from examining and rating the papers of the applicants who participated in the examination of January 8, 1916, and from adopting an eligible list based on that examination.

It must be conceded that by the charter of San Francisco the civil service commissioners must provide for promotion in the classified service on the basis of ascertained merit and standing upon examination. Charter, § 8, art. 13, Stats. 1913, p. 1602. It is contended by plaintiff, who is the appellant here, that the commission threatens to ignore the element of ascertained merit in placing names on the new eligible list for promotion. "The plan of promotion," says appellant, "is fully outlined in the notice of examination, and nothing is said therein of an allowance in any way for ascertained merit of applicants, and the commission do not propose to make any such allowance."

[1, 2] In this notice, under the head of "Meritorious Public Service," it is provided that credits not exceeding 20 will be allowed for acts of merit as in the judgment of the commission may seem just and proper; 80 credits will be allowed for a clean record as a member of the department, subject to deductions, according to a carefully prepared and elaborate schedule, for exceeding authority, insubordination, neglect of duty, assault, cowardice, intoxication, and other minor offenses. The appellant seems to contend that meritorious acts, as used in connection with this notice of examination, are not equivalent to "ascertained merit" as used in the charter. But we can see no distinction between the meaning of those terms as used in the two instruments; and undoubtedly the purpose of those statements in the notice was to provide a method for ascertaining the merit of the candidate for a place upon the eligible list for promotion. It is also provided in this notice that the applicants claiming credits for meritorious acts must present their claims before 1:30 p. m. of the day of the examination, namely, on January 8, 1916, in writing, so that they may be verified by the chief of police. Of this the petitioner complains. We can see no merit in his objection to this method of checking up his statement as to his merits. It is argued that a fund is provided by the city for the commission to use in determining "ascertained merit," presumably by some sort of surveillance of members of the police force who may become or are applicants for positions upon the eligible list. Even so, this does not preclude the verification of the statement of the applicant as to his merits by the chief of police for the benefit of the commission.

Appellant also contends that "ascertained merit" is fully defined in the fifth subdivision of the State Civil Service Act (Stats. 1913, p. 1035; Deering's General Laws, p. 182), and that, in the absence of a better definition, this is binding upon, or at least should be adopted by, the civil service commission in the premises. "That subdivision," says appellant, "directs the state commission to establish in all offices and places of employment, records of individual efficiency of holders of positions in performing their duties." This section of the Civil Service Act is not binding upon the civil service commission of the city and county of San Francisco; but, even assuming that this would be a proper method of procedure, the records of the chief of police of San Francisco, and of the police department thereof open to him, will undoubtedly furnish material for a report by the chief upon any claim of merit made by any police officer seeking promotion to the position of corporal, or that his name be placed upon the eligible list for such promotion; and, as we have said, there is no reason why the commission may not use the chief of police, his knowledge, and his ac-

quaintance with the records of his department, to assist it in ascertaining, in connection with the statement of the applicant himself, his merit to a place upon the eligible list. Of course, we do not mean to hold that the chief's report would be necessarily and absolutely binding on the commission.

In view of what we have said, there is no merit whatever in the contention of petitioner that the civil service commission have announced negatively by omission that no consideration will be given to ascertained merit, and that an eligible list will be adopted without that important factor as a basis. The published conditions of the examination show that the commission intends to give full weight to ascertained merit, the same to be learned by the commission under a system and to be marked according to a schedule of credits which seem to be perfectly fair and just.

[3] Another contention of appellant is that the civil service commission have no right to strike names from the eligible register arbitrarily. The present eligible list, upon which appellant's name appears and from which he alleges that the commission threatens to remove it, was made up in the year 1910 upon an examination by the commission conducted in that year. This appears from plaintiff's complaint herein. Article 13, § 10, of the charter, contains the following provision:

"The commissioners may strike off names of candidates from the register after they have remained thereon more than two years."

[4, 5] This eligible list being more than two years old, the commission had authority, under this provision of the charter, to strike appellant's name therefrom.

It is contended that this provision of section 10 is in conflict with the provisions of other sections of the charter. We have examined these other provisions, and see no necessary conflict between the power given to the commission by the words quoted from section 10 and the limitations upon the authority of the commission contained in other sections of the charter. The well-recognized rule of statutory construction that all parts of a statute must be construed so as to be effective applies here; and the case of Bannerman v. Boyle, 160 Cal. 197, 116 Pac. 732, relied upon by appellant in this behalf, has no application to the authority of the commission in the case at bar.

Finally, we see no abuse of discretion in the proceedings of the board of commissioners as indicated by the allegation of the complaint in this action. A general demurrer to this complaint, on the ground that it does not state facts sufficient to constitute a cause of action, was correctly sustained; and the judgment against appellant following his refusal to amend his complaint after the order sustaining this demurrer was therefore correct, and is affirmed.

We concur: KERRIGAN, J.; ZOOK, Judge pro tem.

---

37 Cal. App. 444

## SEA v. LORDEN. (Civ. 2261.)

(District Court of Appeal, Second District, California. June 5, 1918. Rehearing Denied by Supreme Court Aug. 1, 1918.)

1. APPEAL AND ERROR ⊜757(1)—ALTERNATIVE METHOD—PRINTING RECORD IN BRIEF—STATUTE.
Under Code Civ. Proc. § 953c, on an appeal under the alternative method, the parties must print in their brief such portions of the record as they desire to call to the attention of the court.

2. INTEREST ⊜39(5) — OPEN ACCOUNT FOR GOODS—ASCERTAINMENT OF BALANCE.
In an action for the reasonable value of goods on an open account, interest is allowable only from the date upon which the balance is ascertained.

3. INTEREST ⊜39(2)—DATE OF JUDGMENT—STATUTE.
Plaintiff is allowed interest by operation of law (Civ. Code, § 1920; Code Civ. Proc. § 1035) from the date of the judgment.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by William Sea, Jr., against J. P. Lorden. From judgment for plaintiff, defendant appeals. Modified and affirmed.

H. L. Welch, of El Centro, and B. S. Gregory, of San Francisco, for appellant. William Sea, Jr., of Calexico, pro se.

WORKS, Judge pro tem. [1] This is an appeal prosecuted under what is known as the alternative method, a method characterized by Mr. Justice Shaw, in Estate of Gamble, 166 Cal. 253, 135 Pac. 970, as "a pitfall for the unwary." Such it has been, and such it continues to be; but the virtue of continually calling the attention of the profession to the repeated departures from proper procedure under the method has had little more reward than that which is said to be virtue's own. These remarks are prompted by the fact that the present case exhibits another instance of a failure to observe the provisions of section 953c of the Code of Civil Procedure, to the effect that, on an appeal under the alternative method, the parties must print in their briefs "such portions of the record as they desire to call to the attention of the court." In a recent opinion we have cited many cases to the proposition that:

"Appellate courts will not look to the typewritten transcripts filed under the alternative method of appeal for the purpose of determining whether ground exists for the reversal of the judgment appealed from." Barker Bros. v. Joos, 171 Pac. 1085.

In the present case there has been some effort to comply with the rule requiring a printing in the briefs of the necessary parts

of the record; but enough does not appear to enable us to pass upon the questions which the appellant seeks to present upon the appeal, with the exception of the one which we discuss below.

[2, 3] The statements of facts in the briefs of the respective parties agree in showing, and extracts from the findings of fact indicate, that the action is one to recover the reasonable value of goods sold and delivered. The statements of fact made in the brief of the respondent, and the direction for judgment as stated in the findings, printed in appellant's brief, show that the trial court in its judgment allowed interest upon the claim sued on from the date of the last delivery of goods; but in an action for the reasonable value of goods on an open account interest is allowable only from the day upon which a balance is ascertained. Erickson v. Stockton & T. C. R. Co., 148 Cal. 206, 82 Pac. 961; Merchants' Coll. Agency v. Gopcevic, 23 Cal. App. 216, 137 Pac. 609. The judgment itself is not before us in the printed briefs, but we may safely direct a modification of it by striking out any language it contains making an allowance of interest from any date. Under the decisions above cited, the respondent is entitled to interest only from the date of the judgment, and he is allowed that by operation of law. Civ. Code, § 1920; Code Civ. Proc. § 1035.

The judgment is modified, by striking therefrom such part thereof as allows interest on the principal sum for which judgment is awarded the respondent, and, as so modified, it is affirmed.

We concur: CONREY, P. J.; JAMES, J.

---

(37 Cal. App. 344)

## In re THOMPSON. (Cr. 430.)

(District Court of Appeal, Second District, California. May 27, 1918.)

1. ATTORNEY AND CLIENT ⟸48 — DISBARMENT OF ATTORNEY—NOTICE.

Under Code Civ. Proc. § 287, providing that an attorney may be suspended upon his conviction of a crime involving moral turpitude, "in which case the record of conviction shall be conclusive evidence," an attorney may be suspended, without notice or hearing, upon production of the record of conviction of a foreign court.

2. ATTORNEY AND CLIENT ⟸39—DISBARMENT OF ATTORNEY—CONVICTION OF CRIME.

Under Code Civ. Proc. § 287, providing that an attorney may be suspended on the ground that he has been convicted "of a felony or misdemeanor involving moral turpitude," it is immaterial whether the crime is a felony or misdemeanor as defined by Pen. Code, § 17.

3. ATTORNEY AND CLIENT ⟸39—DISBARMENT OF ATTORNEY—CONVICTION OF CRIME—"MORAL TURPITUDE."

An attorney convicted under U. S. Rev. St. § 5470 (U. S. Comp. St. 1916, § 10364), of receiving and concealing $15,000 stolen from the mails, and sentenced to pay a fine of $1,000 and imprisonment in a United States penitentiary for four years at hard labor, was convicted of a crime involving "moral turpitude," and hence was properly suspended under Code Civ. Proc. § 287.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Moral Turpitude.]

4. ATTORNEY AND CLIENT ⟸61—DISBARMENT OF ATTORNEY—REINSTATEMENT.

Evidence *held* insufficient to warrant reinstatement of an attorney disbarred under Code Civ. Proc. § 287, after conviction of a crime involving moral turpitude.

Original application by Fred H. Thompson for reinstatement as a member of the Bar of the State of California. Application denied.

Ingle Carpenter, of Los Angeles, for petitioner. James A. Gibson, Jr., of Los Angeles, for respondent Los Angeles Bar Ass'n.

WORKS, Judge pro tem. On January 6, 1911, the petitioner, together with another, was indicted by the United States grand jury for a violation of the terms of section 5470 of the Revised Statutes of the United States (U. S. Comp. St. 1916, § 10364), which provides, in effect, that "Any person who shall buy, receive, or conceal, or aid in buying, receiving, or concealing" any of various documents, contracts, evidences of indebtedness, or articles, all of which are specifically mentioned in the statute, "knowing any such article or thing to have been stolen or embezzled from the mail, or out of any post office, branch post office or other authorized depository for mail matter, or from any person having custody thereof, shall be punishable by a fine of not more than two thousand dollars, and by imprisonment at hard labor for not more than five years." The indictment was in four counts. The first count charged that the petitioner and his associate "did willfully, knowingly, unlawfully and feloniously receive from one Orlando F. Altorre * * * and conceal and aid him * * * in concealing certain articles and things of value, to wit, divers notes of the national bank currency, * * * and divers United States notes, treasury notes, legal tender notes, gold certificates, and silver certificates, * * * in the whole amounting to and representing * * * the sum of * * * $5,000, and of the value of * * * $5,000, * * * which * * * had theretofore been willfully, knowingly, unlawfully, and feloniously stolen, taken and carried away from the mails of the United States, in the post office * * * at the city of Los Angeles * * * by the said Orlando F. Altorre, * * * the said Fred H. Thompson * * * then and there * * * well knowing the same * * * to have been so willfully, knowingly, unlawfully and feloniously stolen, taken, and carried away from the said mails of the United States, as aforesaid, and well knowing said 'articles' to be then and there articles and things of value feloniously stolen, taken, and carried away from said mails of the United

States, as aforesaid." The remaining three counts, although differently worded, were in effect the same as the first count, so far as any of the questions involved in the present proceeding are concerned, one of them being related to currency of the value of $5,000, and the two others to currency of the value of $10,000. Upon a trial in the United States District Court in and for the Southern District of California, the petitioner was found guilty as charged in the indictment. On the first count he was sentenced to pay a fine of $1,000 and to be imprisoned in the United States penitentiary at McNeil Island, Wash., for a term of four years, at hard labor. The sentence was the same upon the third count, the imprisonment under that count to commence at the conclusion of the term for which sentence was pronounced under the first count. The sentence was imposed on January 3, 1912. The petitioner prosecuted a writ of error to the United States Circuit Court of Appeals, but the judgment was affirmed on February 3, 1913. Thompson v. United States, 202 Fed. 401, 120 C. C. A. 575, 47 L. R. A. (N. S.) 206. On July 16, 1915, the Los Angeles Bar Association filed with the Supreme Court of the state an accusation against the petitioner, alleging his conviction of the crimes above mentioned. A certified copy of the record of conviction was filed with the accusation. On August 10, 1915, the Supreme Court made its order transferring to this court the proceeding instituted by the filing of the accusation and record of conviction, and on August 12, 1915, this court, without notice to the petitioner, entered its order disbarring him and striking his name from the roll of attorneys. On November 9, 1916, the petitioner filed with this court his application for reinstatement as a member of the bar upon the ground of a reformation of his character. The application was never insisted upon until February 15, 1918, when he filed a paper in the nature of a supplemental application for reinstatement, in which the position is also taken that the order of disbarment is void.

[1] The order was made pursuant to the provisions of subdivision 1 of section 287 of the Code of Civil Procedure, to the effect that "an attorney and counselor may be removed or suspended" upon "his conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction shall be conclusive evidence." At the beginning of his brief the petitioner propounds the following question, as a basis for his argument:

"Can an attorney at law, upon the record of a foreign court, without notice and without an opportunity to be heard or to answer to the sufficiency of the record or deny the allegations therein contained, be removed or suspended?"

To the question thus broadly and generally stated an affirmative answer must be returned upon the authority of a case recently decided by this court, in which the record of conviction came from the same tribunal which passed sentence upon the petitioner (In re Shepard, 170 Pac. 442); and the opinion in that case answers, as well, practically all the specific points now presented for our consideration by the petitioner in support of the general question above stated. The questions which it does answer will receive no mention in this opinion beyond the statement just made.

Petitioner contends that "resort must be had to the laws of the United States to determine the grade of the offense" of which he was convicted. He insists that the Congress of the United States has not provided, in its penal legislation, a division of crimes into the two classes, felonies and misdemeanors, a division which is general under the laws of the various states. But the petitioner does not mean that, for according to section 335 of the federal Penal Code of 1910 (Act Cong. March 4, 1909, c. 321, 35 Stat. 1152 [U. S. Comp. St. 1916, § 10509]), generally so-called, "all offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors." On March 4, 1909, and by the terms of the section quoted, the Congress appears for the first time to have marshaled all crimes against the laws of the United States under such an arrangement. The section, along with the general provisions of the Code mentioned, went into effect on January 1, 1910. The petitioner does not argue that section 335 of the federal Penal Code has no application in this proceeding, because of its having taken effect after the commission of the petitioner's offense; but he apparently assumes it, and the question at once suggests itself. It is not, however, necessary to decide it in this proceeding and we may go forward as if the Congress of the United States never had enacted such a measure.

[2] Section 17 of our Penal Code is as follows:

"A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor."

Manifestly, then, under California law, all crimes are either felonies or misdemeanors. Manifestly, also, section 17 was enacted for the purpose of providing a convenient division of crimes into the lesser and the greater, to the end that, in other legislation, the terminology and segregation provided by that section might be taken advantage of whenever, in such legislation, it became necessary to draw a distinction or to allow a difference between crimes of the greater and crimes of the lesser magnitude. But in section 287 of the Code of Civil Procedure no distinction is made between the two grades of offense. It is true that the terminology of section 17 is there adopted, but not for the purpose of making use of the segregation there devised. Section 287 is as all-inclusive of crimes as is section 17 itself. The former is to be read

as if, in terms, it provided for the removal of an attorney for the "conviction of any crime involving moral turpitude," for such is its legal effect. Therefore the crimes denounced by section 5470 of the Revised Statutes of the United States are within the terms of section 287 of the Code of Civil Procedure whenever they involve moral turpitude.

[3] The petitioner takes the position that the crime of which he was convicted does not involve moral turpitude, and that the order of disbarment should be set aside for that reason. Many of the courts of the land have approved the definition given in Bouvier's Law Dictionary, to the effect that "everything done contrary to justice, honesty, modesty, or good morals is done with turpitude." The offense committed by the petitioner comes within that definition. To receive $15,000 in currency from one who has stolen it from the mails, and to conceal and aid in the concealment of it, the receiver taking the money with knowledge of the theft, is surely not consonant with the principles of natural justice. Such a course of conduct is as surely dishonest and immoral. In addition to the definition of Bouvier, we may refer to the opinion in the Matter of Coffey, 123 Cal. 522, 56 Pac. 448, in which one convicted of attempted extortion is held to be guilty of an offense involving moral turpitude, and in which the definition is approved and adopted.

[4] These considerations cover all the points made by way of assault upon the integrity of the order of disbarment. There yet remains the question whether the petitioner is entitled to a reinstatement because of a reformation of his character. No satisfactory evidence is furnished us, showing either that the petitioner has reformed or that he has not. Several letters bearing upon the question of his conduct and character are now before us. None of them is verified, and the names of all the signers of them, except three, are appended in typewriting. A proceeding of this character presents serious questions for the consideration of a court. As we said, in effect, in the opinion in Re Shepard, supra, such a proceeding is one in which the public has a large interest. Whenever a lawyer has suffered disbarment, the order has been made principally with a view to the protection of the public from the possibility of harm being wrought by one who, having once been licensed to practice law, has been found unworthy the confidence of those who may need the services of lawyers. When a reinstatement is asked by one resting under such a judgment, his request cannot be granted except upon some formal showing of a reformation of character. It has been the usual practice in California to receive, in support of such applications, evidence in the form of affidavits (In re Treadwell, 114 Cal. 24, 45 Pac. 993; In re Shepard, 170 Pac. 442), although, in the Shepard Case, an unverified petition was presented as coming from a considerable number of judges and lawyers, in addition to the affidavits there considered. An opinion in another case refers to the evidence of reformation as having been in the form of "testimonials" signed by judges of the superior court and prominent attorneys. In re Burris, 147 Cal. 370, 81 Pac. 1077. These testimonials and the above-mentioned petition in the Shepard Case came from judges and lawyers of California, all of whom were probably known to the courts which passed upon the cases, and all of whom were morally bound by their oaths as attorneys at law not to recommend a disbarred attorney for reinstatement in the courts of their state unless they were satisfied of the rehabilitation of his character. Code Civ. Proc. § 282, subds. 1, 2. In the present proceeding there are nine signers of letters asking the reinstatement, including those whose names appear in typewriting, one or two of the communications being signed jointly by several. Of the nine, seven are lawyers, but they all reside in the state of Washington, where the petitioner also has had his residence. One of the remaining two signers is presumably a resident of California, as his letter was written from a place within the state. There is no evidence upon which to consider the petitioner's application for reinstatement.

The application is denied.

We concur: CONREY, P. J.; JAMES, J.

---

37 Cal. App. 598

## KYDD v. CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 2409.)

(District Court of Appeal, First District, California. June 21, 1918.)

1. STATUTES ⟸206—CONSTRUCTION.
Statutes must be so construed that the whole, if possible, may stand.

2. MUNICIPAL CORPORATIONS ⟸216(1) — ACQUISITION OF UTILITY—RIGHT OF FORMER EMPLOYÉS.
San Francisco Charter, art. 13, § 11, subd. B(2), as to employés of a public utility acquired by city continuing in their positions gives a preference only to such employés as secure standings in examinations.

3. MUNICIPAL CORPORATIONS ⟸218(11)—ACQUISITION OF RAILWAY—RIGHT OF FORMER EMPLOYÉS.
In proceeding for writ of mandate to compel board of public works of San Francisco to restore petitioner to employment on municipal railway acquired by city while petitioner was an employé of former owner, petition was demurrable, where it failed to state that petitioner had secured standing in examinations.

4. MUNICIPAL CORPORATIONS ⟸218(2)—DISCHARGE OF EMPLOYÉS—TRIAL.
San Francisco Charter, art. 13, § 12, providing that no employé in classified service shall be removed except for cause upon written charges, etc., would not apply to petitioner employed on municipal railroad, and he would be subject to discharge or suspension at any time without trial, in view of section 11, subd. a.

5. OFFICERS ⊜71 — RIGHT OF REMOVAL IN GENERAL.

In the absence of restraint imposed by statute, the power of appointment implies the power of removal.

6. PLEADING ⊜225(1)—DEMURRER—RIGHT TO AMEND.

That order sustaining demurrer to complaint was silent as to any amendment did not prevent judgment from being entered, the complaint having been amended three times and plaintiff having taken no steps to further amend up to the time of entry of judgment four months later.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Proceedings for a writ of mandate by Isaac F. Kydd against the City and County of San Francisco and Timothy J. Riordan and others, Commissioners constituting the Board of Public Works, etc. Judgment for defendants, and petitioner appeals. Affirmed.

Devoto, Richardson & Devoto, of San Francisco, for appellant. George Lull, City Atty., of San Francisco, for respondents.

KERRIGAN, J. This is a proceeding for a writ of mandate to compel the board of public works of the city and county of San Francisco to restore petitioner to a place of employment on the municipal railway. A demurrer to the third amended petition was sustained by the court below, before whom the proceeding was had, and, appellant having failed to further amend, judgment was entered in favor of defendants and against petitioner, and from this judgment this appeal is taken.

The substance of the facts as alleged in the third amended petition may be stated as follows: That on December 10, 1913, and for 20 years prior thereto petitioner was employed in the operating service of the "Presidio & Ferries Railroad Company" in San Francisco, and that under such employment he "had absolute charge and control of the operation of said street railroad"; that on the 10th day of December the franchise of said railroad expired, and it was acquired by the city and county of San Francisco; that petitioner was continued in said position from that date until June 1, 1914, at the same salary he was paid while in the employ of the Presidio & Ferries Railroad Company, at which time he was notified that he had been granted a leave of absence and need not report for work any longer, and has not been allowed to continue his duty and employment ever since; that he has demanded reinstatement, which has been refused. Appellant bases his action on section 11, art. 13, of the San Francisco Charter. That subdivision provides as follows:

"Subdivision B. The following persons securing standing on the eligible lists in examinations shall be preferred for appointment:

"1. Persons employed in the operating service of the Geary Street, Park & Ocean Railroad Company on May 5, 1912, such preference to be solely for employment in the municipal railroad service;

"2. Persons employed in the operating service of any public utility acquired by the city who have been so employed for not less than one year; and such persons so employed at the time a public utility is acquired by the city shall continue in their positions."

It is the contention of plaintiff that under this subdivision, it being in force and effect on the 10th day of December, 1913, when the defendant acquired the Presidio & Ferries Railway as a public utility, he is entitled to employment by defendant of a like nature and at the same salary he was receiving at the time when the said public utility was so acquired. This contention is predicated upon the provisions of subsection 2 of subdivision B, it being argued that the examinations provided for in subdivision B have no reference to persons who may have been in the operating service for more than one year of a public utility acquired by the city, and that such persons unqualifiedly continue in their positions without the necessity of any examination.

[1-3] Statutes must be so construed that the whole, if possible, may stand. So construed, the plain meaning of the statute is that the preference provided for was intended for those securing standing in examinations and to those alone. The petition not containing an averment of this precedent condition the demurrer was properly sustained.

[4] Irrespective of this conclusion, however, petitioner was subject to discharge or suspension at any time without trial.

Section 12, article 13, of the San Francisco Charter, providing for tenure of office by civil service employés, states that "no person employed in the classified civil service shall be removed or discharged except for cause upon written charges and after an opportunity to be heard in his own defense." It further provides that:

"The appointing officer or officers of a department may, for disciplinary or penal purposes, suspend a subordinate for a period not exceeding thirty days, and such suspension shall carry with it the loss of salary for the period of suspension."

The section, however, concludes with the following language:

"The provisions of this section shall not apply to persons employed in the operating department of any public utility."

[5] Petitioner being within that class, the limitation upon the powers of dismissal and suspension thus provided for do not apply to him. Moreover, the manager or superintending head of a public utility is excepted from article 13 of the charter dealing with civil service (subdivision "a," § 11). In the absence of restraint imposed by statute the power of appointment implies the power of removal.

[6] Appellant further complains of the action of the court in entering judgment after the order sustaining the demurrer, such order

being silent as to any amendment. This omission did not prevent judgment from being entered. Smith v. Taylor, 82 Cal. 533, 541, 23 Pac. 217; Aalwyn v. Cobe, 168 Cal. 165, 172, 142 Pac. 79. Appellant had already amended his complaint three times. The last demurrer was sustained May 31, 1917, and no steps were taken by him to further amend up to the time of the entry of judgment some four months later. From the facts as presented it is manifest that further amendment would have availed him nothing.

Judgment affirmed.

We concur: BEASLY, Judge pro tem.; ZOOK, Judge pro tem.

---

(37 Cal. App. 478)

## DORAN, BROUSE & PRICE v. HENRY COWELL LIME & CEMENT CO.

(Civ. 2169.)

(District Court of Appeal, Second District, California. June 6, 1918.)

1. SALES ⟸72(5)—QUALITY OF GOODS—APPROVAL OF ENGINEER.
Where a letter ordering cement recited that the cement should comply with specifications of a highway commission and be acceptable to their engineer, and the seller in reply stated that the cement "will easily meet the specifications of the" commission, after which communications passed between the parties relating to the price alone, the contract called for cement acceptable to the engineer.

2. EVIDENCE ⟸441(9) — PAROL EVIDENCE — PRELIMINARY NEGOTIATIONS.
Where a contract for the sale of cement consisted of letters and telegrams, it was error to admit oral evidence as to the terms of the agreement and negotiations leading up to the making of the contract.

3. APPEAL AND ERROR ⟸1051(4)—HARMLESS ERROR—ADMISSION OF EVIDENCE.
Where the interpretation to be placed on letters and telegrams constituting a contract of sale was clear, the admission of oral evidence as to the terms of the agreement and the preliminary negotiations was harmless error.

4. SALES ⟸168(3)—QUALITY OF GOODS—DETERMINATION.
Where a contract for the sale of cement provided that the cement should meet the specifications of a highway commission and be acceptable to its engineer, the mere rejection of the cement by the commission, apart from the question of its quality, was not a compliance with the contract by the buyer, and, while a rejection by the engineer would be prima facie conclusive, such rejection could be impeached for gross mistake amounting to fraud.

5. SALES ⟸355(4)—ACTION FOR BREACH OF CONTRACT—PLEADING AND PROOF.
In an action by a buyer for breach of a contract to deliver cement conforming to the specifications of a highway commission and acceptable to its engineer, plaintiff could not recover on the theory of a rejection of the cement by the engineer, where the only allegation in the complaint was that the cement had been rejected by the highway commission.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by Doran, Brouse & Price against the Henry Cowell Lime & Cement Company. Judgment for plaintiff, and defendant appeals. Reversed.

H. F. Chadbourne, of San Francisco, and Ward Chapman and L. M. Chapman, both of Los Angeles, for appellant. Jones & Weller and John T. Jones, all of Los Angeles, for respondent.

CONREY, P. J. Action to recover damages for breach of contract. The defendant appeals from the judgment.

By means of letters and telegrams passing between the plaintiff and the defendant, the terms of the contract were settled in writing. In a letter sent by the plaintiff to the defendant under date of August 11, 1909, the plaintiff said:

"As the result of the irresistible persuasive powers of your Mr. Guthrie, kindly ship us as promptly as possible eight hundred (800) barrels of Mt. Diablo cement. * * * This cement is to comply with the enclosed specification of the Los Angeles County Highway Commission, and to be acceptable to their engineer."

Then followed a statement concerning prices and payments. In the reply of defendant, the defendant said:

"Yours of the 11th at hand and in reply beg to say that our cement will easily meet the specifications of the Los Angeles County Highway Commission."

Then followed a statement somewhat different from that of the plaintiff in its letter concerning prices and freight payments. To the defendant's letter the plaintiff replied by telegram under date August 17, 1909, as follows:

"If you desire order fill according to our letter; if not cancel same. Wire reply."

The defendant replied by telegram as follows:

"Can fill order as per ours fourteenth and will prepay."

The defendant at the same time sent to the plaintiff a letter concerning said telegram, by quoting it and saying as follows:

"We now confirm same. The only difference between us is that there is a delivered price Ivy instead of a Los Angeles price plus a local out and so we thought best to wire you as above."

The plaintiff had a contract with the Los Angeles County Highway Commission for certain paving and concrete work on a road in that county, and purchased the cement for the purpose of using it in the performance of that contract. The specifications referred to in the plaintiff's first letter to the defendant were the specifications of the plaintiff's contract with the Los Angeles County Highway Commission. Those specifications, among other things, provided that:

"No material of any kind shall be used until it has been examined and approved by the engineer, and the decision of such engineer shall be final."

The specifications further provided for the quality of the cement to be used by fixing a standard and percentage which the ce-

ment must pass as compared with such standard.

[1] Appellant admits that under the contract the quality of cement furnished was to be such as would meet the specifications of the highway commission, but contends that there was no agreement that it should be "acceptable to their engineer." It is our opinion that under the terms of the contract the cement was to be acceptable to the engineer. Defendant's first letter to the plaintiff evaded that question, but its letter in reply to the plaintiff's telegram covered the point by asserting that there was no difference between the two parties on the contract, except as to another matter. This is shown by the quotations given above.

[2, 3] Appellant contends that the court erred in admitting oral evidence of the terms of the agreement, and in admitting oral evidence of the negotiations that led up to the making of the agreement for the purchase of the cement. We think that the evidence in question should not have been admitted, but our interpretation of the written contract makes that error harmless, since upon the writings alone the point in question must have been decided against appellant.

Appellant next contends that the evidence is insufficient to support finding No. V of the court, wherein the court found "that the said cement so shipped to plaintiff as aforesaid did not comply with the specifications of the said Los Angeles County Highway Commission, in this, that the cement was not of the grade of fineness as required by said specifications, and the said cement and all thereof was rejected by the Los Angeles County Highway Commission, and plaintiff was not allowed to use the same on said work." The only testimony offered at the trial concerning the quality of the cement furnished by the defendant was testimony given by experts introduced as witnesses by the defendant. That testimony showed positively and without conflict that the cement was of the grade of fineness as required by said specifications. Therefore in that respect the evidence is not sufficient to support such finding.

[4] Appellant's next contention is stated as follows:

"The mere rejection of the cement by the Los Angeles County Highway Commission, or its engineer, is not sufficient to entitle the plaintiff to recover without a showing that the cement was in good faith tested according to the contract and found to be below the specifications."

We agree that a rejection of the cement by the highway commission, considered apart from any rejection by the engineer, would not be sufficient without such showing of the facts concerning the quality of the cement. On the other hand, the terms of the specifications are such that a decision of the engineer rejecting the cement would have been prima facie sufficient. Such decision would have been final, unless impeached by facts showing fraud or gross mistake amounting to fraud. American-Hawaiian Eng., etc., Co. v. Butler, 165 Cal. 497, 513, 133 Pac. 616, Ann. Cas. 1916C, 44.

[5] But there is no allegation in the complaint that the cement contracted for was ever rejected by the engineer for the Los Angeles County Highway Commission. The only allegation on this point is contained in paragraph IV of the complaint, and is to the effect "that said cement and all thereof was rejected by the said Los Angeles County Highway Commission, and the plaintiff was not allowed to use the same on said work." Neither is there any finding to the effect that the cement was rejected by the engineer. So far as appears from the findings, the engineer may have certified that the cement furnished by the defendant was fit to be accepted and the highway commission may have, wrongfully perhaps, refused to accept his decision. At all events, when the plaintiff in this action seeks to base its right of recovery upon a rejection of the cement by the highway commission, without any allegation or finding of its rejection by the engineer, the plaintiff cannot prevail without first showing that in fact the cement did not comply with said specifications.

The judgment is reversed.

We concur: JAMES, J.; WORKS, Judge pro tem.

---

(37 Cal. App. 213)

PEOPLE v. MARTIN. (Cr. 710.)

(District Court of Appeal, First District, California. May 13, 1918.)

CRIMINAL LAW ⊜1131(4)—DISMISSAL OF APPEAL.

In a criminal case, where appellant fails to file a brief or to appear, the appeal might properly be dismissed.

Appeal from Superior Court, City and County of San Francisco; George H. Cabannis, Judge.

Proceeding by the People against Edward Martin. From judgment for the People, Edward Martin appeals. Affirmed.

James W. Cochrane, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. In this case the appellant failed to file a brief in support of his appeal, or to appear before the court on the date set for the argument thereof, and the appeal might properly have been dismissed upon that ground. We have, however, carefully examined the record, and find that there was sufficient evidence to support the judgment, that the court fairly instructed the

jury, and that there were no errors in the admission or rejection of evidence.

It is therefore ordered that the judgment and order be affirmed.

---

37 Cal. App. 342

MOORE v. GUAJARDO. (Civ. 2284.)

(District Court of Appeal, Second District, California. May 23, 1918.)

1. APPEAL AND ERROR ⟹757(1) — ALTERNATIVE METHOD—PRINTING RECORD—STATUTE.
On an appeal presented by the alternative method, Code Civ. Proc. § 953c, presumes that without examining the written transcript the court will rely solely upon those portions of the record which the parties print in their briefs.

2. APPEAL AND ERROR ⟹757(1)—ALTERNATIVE METHOD—FINDINGS NOT REVIEWABLE.
Where appellant by the alternative method has not printed with his brief a copy of his notice of appeal and has printed no part of the judgment roll, the appellate court has not before it any of the findings which he says the evidence is insufficient to sustain.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by William H. Moore, Jr., as trustee in bankruptcy of the estate of H. J. Edwards, bankrupt, substituted as plaintiff in the place of Harry J. Edwards, against Arturo Guajardo. From judgment for plaintiff, defendant appeals. Affirmed.

D. L. Ault, of Calexico, and W. F. Frazier, of Oakland, for appellant. Wm. P. Butcher, of Santa Barbara, and W. T. Craig, of Los Angeles, for respondent.

CONREY, P. J. [1] In their brief, counsel for appellant inform us that this is an appeal by defendant from an adverse judgment rendered upon the second cause of action set out in plaintiff's complaint, and that "the solitary ground of appeal is that the evidence is insufficient to sustain the findings." The record on appeal has been prepared under the alternative method, without a printed transcript. Upon an appeal presented in this manner the law presumes that, without examining the typewritten transcript, the court will rely solely upon those portions of the record, which the parties print in their briefs. Code Civ. Proc. § 953c; Barker Bros. v. Joos, 171 Pac. 1085.

[2] Appellant has not printed with his brief a copy of his notice of appeal, nor has he printed any part of the judgment roll. Therefore we have not before us any of the findings which he says the evidence is insufficient to sustain. Counsel tell us in their brief that said second cause of action is one in quantum meruit for the reasonable value of lumber alleged to have been furnished to the defendant at his request, used in the erection of a certain building. They say that the evidence is insufficient to show that the lumber was furnished at the request of the defendant. They have printed some extracts from the evidence, but do not even assert it to be a fact that these extracts constitute the whole of the evidence relating to the supposed issue. That there was other evidence on that subject is shown by additional extracts from the evidence as printed in the brief for respondent. These additional extracts as produced by the respondent do tend to show that the lumber was furnished at the request of the defendant.

From the record as presented to us for consideration, we are unable to ascertain what findings were made, and we are unable to ascertain that the evidence is insufficient to support any finding made.

The judgment is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

---

37 Cal. App. 471

MOOSIOS v. RUSCONI. (Civ. 2203.)

(District Court of Appeal, First District, California. June 6, 1918.)

CHATTEL MORTGAGES ⟹170(2) — LIABILITY OF ATTACHING LESSOR.
The lessor of land for one-half the crop and advances, who attached and took possession of the whole crop, and personally and through the sheriff refused, on demand, to deliver possession to the lessees' mortgagee, was guilty of conversion.

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by Sam Moosios against Louis Rusconi. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. Cosgrave and Miles Wallace, both of Fresno, for appellant. N. Lindsay South and C. K. Bonestell, both of Fresno, for respondent.

KERRIGAN, J. This is an action brought by the plaintiff against the defendant for conversion of a lot of beans upon which plaintiff held a chattel mortgage. The trial court found against the defendant, and rendered judgment in plaintiff's favor for the sum of $700, the value of the beans found to have been converted.

The defendant leased a parcel of land in Fresno county to Harry Sidery, Y. Colivas, and Louis Fatseas, mortgagors of the plaintiff to be farmed on equal shares. In addition to receiving one-half of the crop, the defendant was to be reimbursed for any advances he might make to his lessees for the purpose of enabling them to produce and harvest the crop, this reimbursement to be made out of the lessees' share thereof at the time it was harvested, at which time, also, the defendant was to receive from the lessees his share thereof due as rent. Just prior to October 28, 1915, plaintiff and defendant apparently became apprehensive as to how the crop of

beans would be divided, and on the forenoon of that day the plaintiff obtained from the lessees a promissory note for $750, payable one day after date, for supplies and advances furnished them; the note being secured by a chattel mortgage on the crop, and providing that, if not paid when due, the mortgagee should be entitled to possession of the mortgaged property. On the afternoon of that day the defendant began an action against his lessees for recovery of the amount of advances made by him under the provisions of the lease, and the sheriff, acting under a writ of attachment issued in that action, and while the beans were yet on the vines took possession of the same. Later he harvested the crop and delivered one-half thereof to the defendant. In the meantime, the note of the lessees to plaintiff being overdue and unpaid, the plaintiff demanded possession of one-half of the crop both of the defendant and of the sheriff. They refused to comply with this demand, and there is nothing in the record to show what became of the proportion of the crop to which, under the terms of his chattel mortgage, the plaintiff was clearly entitled. Prior to the trial defendant's attachment suit against the lessees was dismissed, upon the ground that it was prematurely brought; it appearing to have been instituted before the defendant was entitled either to his share of the crop or to repayment of advances claimed by him to have been made.

From a mere statement of the facts it appears too plain to require argument that, upon the failure of the lessees to pay to plaintiff the amount of their note, he, under the provisions of the mortgage already noticed, was entitled to the possession of one-half of the crop of beans, and that the defendant, making no claim to more than one-half the crop, having through the sheriff—who, in effect was his agent—taken possession of the whole thereof, and having both personally and through the sheriff refused upon demand to deliver to the plaintiff the part to which he was entitled, was guilty of conversion. It follows that the conclusion of the trial court to that effect was correct.

The judgment is affirmed.

We concur: BEASLY, Judge pro tem.; ZOOK, Judge pro tem.

---

(37 Cal. App. 79)

## PEOPLE ex rel. LEMOORE LAND & FRUIT GROWING CO. et al. v. CITY OF LEMOORE et al. (Civ. 1810.)

(District Court of Appeal, Third District, California. April 27, 1918. Opinion of Supreme Court Denying Rehearing June 24, 1918.)

1. MUNICIPAL CORPORATIONS ⊜34 — ANNEXATION OF TERRITORY—MULTIPLICITY OF PARCELS—SUFFICIENCY OF EVIDENCE.

New territory *held* to constitute more than one body of land, some of the parcels being inhabited, and others uninhabited so that they should have been separately submitted, and as to the former the procedure indicated by St. 1913, p. 592, § 6, should have been followed, and as to the latter the procedure of St. 1899, p. 37, should have been followed.

2. MUNICIPAL CORPORATIONS ⊜34 — ANNEXATION OF TERRITORY—CONTIGUOUS BODY OF LAND—CONNECTION BY ROAD.

Two parcels of land sought to be annexed to a city were not made a continuous and contiguous body by an attempt to join them through the instrumentality of a portion of a public road 30 feet wide and 1,650 feet long.

3. MUNICIPAL CORPORATIONS ⊜33(9) — ANNEXATION OF TERRITORY—INTERFERENCE BY COURTS.

The courts have the right to interfere with the annexation of territory to a municipality when some substantial provision of the law has not been followed.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Proceeding by the People of the State of California, by U. S. Webb, Attorney General, on the relation of the Lemoore Land & Fruit Growing Company, a corporation, and J. H. Fox, against the City of Lemoore, Frank Blakeley, and others. From judgment for the People, defendants appeal. Affirmed.

F. E. Kilpatrick and J. L. C. Irwin, both of Hanford, for appellants. U. S. Webb, Atty. Gen., Haven & Athearn, of San Francisco, and H. Scott Jacobs, of Hanford, for respondents.

BURNETT, J. The purpose of the proceeding was to test the validity of an attempted annexation to the city of Lemoore of 308½ acres of land designated as "the 1916 addition to the city of Lemoore." A general demurrer to the complaint was overruled, and defendant declining to answer, judgment was rendered in accordance with the prayer of the complaint annulling such purported annexation. The question therefore is as to the sufficiency of the complaint to justify the decree.

It is not disputed that there are in force in California three separate statutes under which annexations of territory to municipalities may be made: Act of 1889 (Stats. of 1889, p. 358), of 1899 (Stats. of 1899, p. 37), and of 1913 (Stats. of 1913, p. 587).

The distinctive features of these acts, as far as germane to the present consideration, and pointed out by respondents, are as follows: (1) Act of 1889 for annexation of inhabited territory upon petition of electors of existing city; (2) act of 1899 for annexation of uninhabited territory; (3) act of 1913 for annexation of inhabited territory upon petition of electors in territory proposed to be annexed, which territory may be either (a) one body (sections 2 to 4), or (b) two or more bodies, which must be submitted as separate propositions (section 6).

In applying the law thus enunciated to the facts set out in the complaint these two in-

quiries are suggested by counsel: (1) Should the proposed annexation of the territory described in the complaint have been attempted as inhabited or uninhabited territory? (2) If the territory can "fairly be said to be inhabited," then should it have been regarded as one body of land or as "two or more bodies of outside territory," each one of which should have been submitted to the electors separately under the provisions of section 6 of the act of 1913?

It seems plain that the first of these questions cannot be answered so as to support the judgment of the court below. If the 308½ acres be regarded as one tract, it must be considered as inhabited for the simple reason that 99 people reside upon it.

There would be no difference in principle if the tract were composed of 10 acres or of 1 acre. If A. owns a farm of 308½ acres composed of one tract, and B. one of 10 acres, and each resides upon his land, it would be just as inapt to say that any part of A.'s land is uninhabited as to so affirm of B.'s land. The fact of occupancy is not limited, manifestly, to the space occupied by the building or buildings, but extends to every portion of the single tract of which that space is an undivided part. It may be difficult to formulate a description that can be applied with accuracy to every situation, but to say that any portion of a single and separate tract of land is uninhabited when people actually reside within the boundaries of that tract of land involves a contradiction in terms.

The real point of controversy here is whether such land was properly regarded as a single tract, and as to this we entertain no doubt that the court below was right in impliedly holding that it was composed of several parcels and under the law of 1913 should have been submitted to a separate vote.

Paragraph 9 of the complaint is as follows:

"The territory attempted to be annexed by the proceedings hereinabove set forth and designated as 'the 1916 addition to the city of Lemoore' is platted on a map hereunto annexed and marked Exhibit A and by this reference made a part hereof. Said territory is not a single body of territory lying contiguous to the city of Lemoore, but in fact, by reason of natural boundaries and diversity of uses, is constituted and composed of nine separate and distinct parcels of land, which said parcels of land are described as follows, to wit: Parcel No. 1 contains approximately 48 acres, is contiguous to said city of Lemoore, and adjoins portions of the southerly and easterly corporate limits of said city. Said parcel is, however, wholly disconnected with any of the other property proposed to be annexed to said city of Lemoore, except that it is connected with parcel No. 2, hereinafter described, by a strip of land 1,650 feet in length by 20 feet in width, and which strip of land is part of a public county road. This parcel constitutes a portion of a farm belonging to the relator, J. H. Fox, and is and was at all times herein mentioned entirely used for farming purposes. Said parcel is and at all times herein mentioned was entirely uninhabited, and no person resided or now resides thereon."

Parcel No. 2 is described as containing 23 acres and bounded on the north and east by the corporate limits and on the south and west by county roads, and it is alleged that, while subdivided for residential purposes, no person resides upon it.

Parcel No. 3 contains 30 acres, is separated from parcel No. 2 and parcels Nos. 4 and 5 by county roads, and is contiguous to the corporate limits only at the northeast corner of said parcel. It constitutes a part of a farm and has one dwelling house upon it occupied by three persons.

Parcel No. 4 contains 13½ acres. It has been subdivided for residence purposes and is inhabited by forty persons.

Parcel No. 5 contains 18 acres, separated from the corporate limits by parcel No. 4. It has been subdivided for residence purposes, and is known as the Sunset addition. No person resides upon any portion of it nor have any streets been constructed therein.

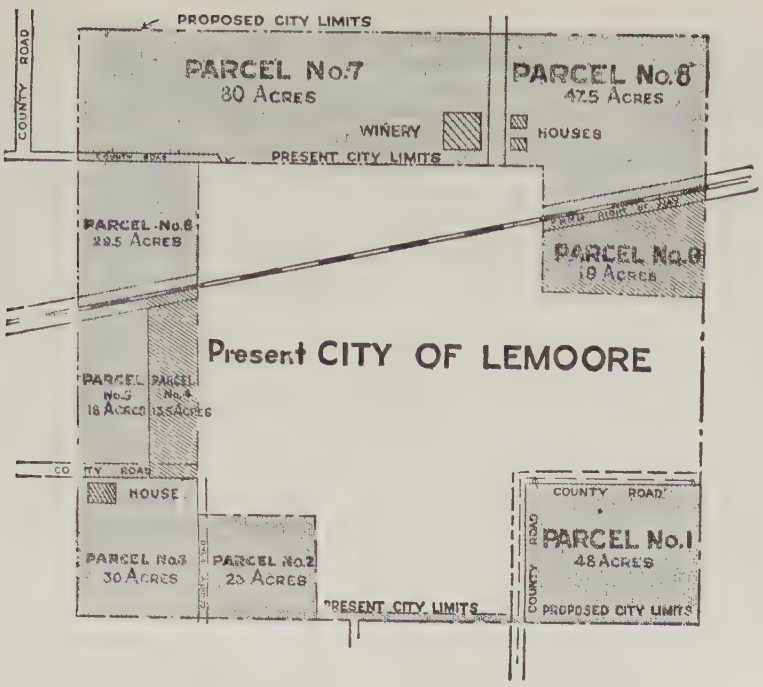
Parcel No. 6 contains 29½ acres, and is contiguous to the northern part of the western corporate limits, but is separated from parcels Nos. 4 and 5 by the right of way of the Southern Pacific Railroad Company, and from parcel No. 7 by a county road. It is used for farming purposes and is entirely uninhabited.

Parcel No. 7 contains 80 acres, is contiguous to the northern limits of the city and is separated from parcels Nos. 6 and 7 by county roads. Said parcel, with the exception of 4 acres in the southeast corner thereof, is a portion of a ranch belonging to the relator, Lemoore Land & Fruit Growing Company, and used for farm purposes. "Said parcel, with the exception of said four acres, is, and at all times" herein mentioned was, totally uninhabited, and no person resided or now resides thereon. The excepted parcel of 4 acres above referred to was occupied by a winery at the time of said annexation. Said winery was occupied by five persons, a night watchman, his wife, and two children, and an engineer. They were all transient, and none of them a voter.

Parcel No. 8 contains 47½ acres, and is separated from parcel No. 7 by a county road, and from parcel No. 9 by a right of way of the Southern Pacific Company. It is composed of portions of three ranches. There are two dwellings on the southwest corner of said parcel occupied by six persons who are not voters.

Parcel No. 9 contains 19 acres, and is separated from parcel No. 8 by a right of way of the Southern Pacific Company. This parcel has been subdivided for residence purposes and is occupied by 45 persons.

We herewith present a copy of said Exhibit A, which portrays the situation as thus described in the complaint:




Map Showing Territory Attempted to be Annexed to City of Lemoore.

Present corporate limits, City of Lemoore

Inhabited territory attempted to be annexed

Uninhabited territory attempted to be annexed

[1] We think it must fairly be said from the foregoing that the new territory constituted more than one body, and that some of the parcels were inhabited and others uninhabited.

As to the former, the procedure indicated by section 6 of the act of 1913 should have been taken as follows:

"The notice of such election shall state, as separate propositions to be submitted at such election the question of the annexation of each body of new territory, in the same manner as hereinbefore provided in the case of the notice of an election in such municipal corporation at which the question of the annexation of only one body of new territory thereto is submitted; and the question as to each such body of new territory, shall be printed upon the ballots to be used at such election and the same shall be voted upon, separately, in like manner as hereinbefore provided in the case of the submission of the question of the annexation of one body of such territory."

As to the portions or bodies not inhabited we are persuaded that the statute of 1899 should have been followed. Appellant in its brief admits that separate elections could be compelled "in the case of numerous parcels contiguous to the city, but separated from each other so that they could not be considered a contiguous body."

[2] If we confine our attention to parcels Nos. 1 and 2, it would be a strained construction to hold that they were made a continuous and contiguous body by the attempt to join them through the instrumentality of a portion of a public road 20 feet wide and 1,650 feet long. They remain two separate and distinct bodies. The continuity of other portions is prevented also, and they are divided into separate parcels by county roads and the right of way of the Southern Pacific Company.

We may notice some of the cases cited by respondent as involving a situation somewhat analogous to that presented here.

In Wild v. People, 227 Ill. 556, 81 N. E. 707, the proceeding was in quo warranto to test the validity of the incorporation of a village. The plat shows that to the original inhabited hamlet the incorporators proposed to annex several narrow strips of land running in several directions from the inhabited portion of the hamlet. Toward the southwest a long strip was run with three angles, and from the bottom of the last strip, along a section line, was run a narrow strip 50 feet in width and half a mile long which connected a square body of land with the rest of the proposed incorporation. Some of the other strips were not contiguous except that they cornered on each other. It was held that these strips

which simply cornered were not contiguous, and as to the connecting 50-foot strip the court said:

"It is apparent that the 50-foot strip is merely included for the purpose of connecting the piece of ground at the west end thereof with other territory in the village. It is also apparent that the piece of ground at the west end of the strip is not in fact contiguous to grounds in the village other than that strip. The use of that strip to connect the tract at its western extremity with other territory in the village is a mere subterfuge, and not a compliance with the law. It is useless to discuss the plea further."

In Linn County Bank v. Hopkins, 47 Kan. 582, 28 Pac. 606, 27 Am. St. Rep. 310, the question was whether two cornering lots of land constituted one tract so as to be included in a homestead, and the court said:

"Does the Constitution exempt two tracts of land as a homestead which corner? It has been settled by the court that a homestead must consist of only one tract of land. Randall v. Elder, 12 Kan. 257, and authorities there cited. In the case of Kresin v. Mau, 15 Minn. 119 [Gil. 87] it was said: 'Two tracts of land mutually touching only at a common corner—a mere point—cannot, according to any ordinary or authorized use of language, be spoken of as constituting one body or tract of land.' The same construction has been placed upon acts of Congress in relation to the entry of public lands. 1 Leslie's Land Laws, Reg. and Dec. 360. See, also, Hill v. Bacon, 43 Ill. 477; Aldrich v. Thurston, 71 Ill. 324; Thompson on Homestead Exemption, §§ 120, 145, 147."

In Bolen Coal Co. v. Ryan, 48 Mo. App. 515, it was held that lots separated from each other by an alley were not contiguous so as to permit a single mechanic's lien to be enforced.

Anvil H. & D. Co. v. Code, 182 Fed. 205, 105 C. C. A. 45, involved a similar question as to assessment work on mining claims, and the Circuit Court of Appeals of the Ninth Circuit said:

"The two claims last named are not made contiguous by the fact that Lucky Fraction corners with each. Two tracts of land which touch only at a common corner are not contiguous."

Another case more directly in point is Capuchino Land Co. v. Board of Trustees of the City of San Bruno, 167 Pac. 178, wherein the matter was clearly considered and cogently treated by the First District Court of Appeal. There is no appreciable difference in principle between that case and this, and the reason is just as persuasive here as there for sustaining the judgment of the lower court.

Of course, it is true, as stated in People v. City of Los Angeles, 154 Cal. 220, 97 Pac. 311, that:

The "question whether any particular territory of the shape, extent, and character fixed should be annexed to a municipality is purely political, for the exclusive determination of the voters of the municipality * * * sought to be annexed and with the wisdom of such determination the courts have no power to interfere."

[3] But it is equally true, as therein affirmed, that the courts have the right to interfere when some substantial provision of the law has been violated, and such we believe is this case.

We consider it manifestly unjust and inequitable under the circumstances described by the complaint for the electors residing in the two inhabited parcels Nos. 4 and 9 to determine the annexation of the other parcels against the will of their owners.

In conclusion we may say that possibly by answer an issue might have been tendered so that it could be shown that these various tracts were used and treated as one tract, and were therefore properly subject to the proceeding taken, but we are satisfied that their separate character is disclosed by their location, their different use, and the different conditions as to inhabitants, as set forth in the complaint.

We think the judgment is right, and it is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

Opinion of Supreme Court Denying Rehearing.

PER CURIAM. The conclusion of the District Court of Appeal is fully sustained by what is correctly stated as to parcel No. 1, and the remaining parcel or parcels, and in denying a hearing in this court we are not called upon to express or indicate any opinion with regard to whether the parcels other than that numbered 1 together constitute a single body of land.

Our denial of the petition for a hearing in this court is not to be taken as an assent to what is said in the opinion of the District Court of Appeal on this point.

(37 Cal. App. 222)

BEKINS v. SMITH. (Civ. 2514.)

(District Court of Appeal, Second District, California. May 13, 1918.)

1. LANDLORD AND TENANT ⊜290(1) — UNLAWFUL DETAINER.

Relation of landlord and tenant is necessary prerequisite to action for unlawful detainer under Code Civ. Proc. § 1159 et seq.

2. FRAUDS, STATUTE OF ⊜137—ORAL TRANSFERS—LIFE ESTATES.

Oral transfer of life estate in land may be made effectual by taking possession of and performance by grantee of acts in reliance upon grant.

3. LIFE ESTATES ⊜3 — TERMINATION PRIOR TO DEATH OF LIFE TENANT.

It is not essential to the creation of a valid life estate that there shall be no condition imposed which may terminate the estate in some contingency prior to the death of the grantee.

4. LIFE ESTATES ⊜3—TRANSFER.

An agreement of an owner of land to let another use land as long as she lived or conducted religious services created a life estate.

5. LANDLORD AND TENANT ⊜118(2)—TENANCY AT WILL.

An agreement of an owner of land to let another use land as long as she conducted religious services did not create a tenancy at will.

6. GIFTS ⟸34 — CONTINGENCIES — TERMINATION.
Under agreement to allow another to use land as long as she should continue to conduct the same character of religious services as theretofore, question as to whether subsequent services were of character required was question of fact, and forfeiture could not be worked at the arbitrary whim of the grantor.

7. GIFTS ⟸48—ADMISSIBILITY OF EVIDENCE.
Where defendant claimed life estate under parol transfer, it was competent for defendant to show expenditure of money on improvements.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by R. M. Bekins against Ella Smith, also known as Ella Smith Trull, and C. S. Trull. Judgment for plaintiff, and the first-named defendant appeals. Reversed.

R. D. McLaughlin, J. B. McLaughlin, and Earl Rogers, all of Los Angeles, for appellant. Winslow P. Hyatt and David G. Kling, both of Los Angeles, for respondent.

JAMES, J. Plaintiff brought this action to recover possession of certain real property described in the complaint, alleging that the defendant unlawfully detained the same. In the complaint it was alleged that, under the lease or agreement made between the parties, the defendant occupied the relation of tenant at will toward the plaintiff. It was further alleged that the requisite notices required by the Code had been given to terminate the tenancy. The answer filed by the defendant put in issue all of the material matters alleged in the complaint. Findings and judgment were in favor of the plaintiff, from which judgment this appeal is taken.

[1-3] The principal question presented is as to whether, under the evidence submitted by the plaintiff, the relation of landlord and tenant was shown to have existed between the plaintiff and the appellant; or whether under such testimony it should necessarily be concluded that the appellant held a life interest in the real property, subject to be terminated only in certain contingencies. That the establishment of the relation of landlord and tenant between the parties is a necessary prerequisite to the prosecution of an action for the unlawful detainer of real property under the provisions of section 1159 et seq., Code of Civil Procedure, seems not to be disputed. Johnson v. Chely, 43 Cal. 299; Richmond v. Superior Court, 9 Cal. App. 62, 98 Pac. 57. The real property in question was purchased by Martin Bekins, the father of the plaintiff; title being taken in the name of the plaintiff, no consideration appearing to have been paid by her. For the purposes of this action, Martin Bekins appears to be the real party at interest on the plaintiff's side of the case. Martin Bekins testified that he first met the defendant Ella Smith Trull at her residence in the city of Los Angeles, in November, 1913; that defendant was engaged in preaching the Christian gospel at that time; that he became interested in the services conducted by the defendant and offered to help purchase another piece of property in the city of Los Angeles for her use; that he went with the said defendant and two or three others to look at the property finally purchased. We now quote from the text of the testimony of this witness, as shown in the bill of exceptions:

"A few days later I told the defendant I would purchase the property and give her the free use of it for so long as she conducted her services as she had been doing, and was doing at that time. I meant the religious meetings. I don't remember just what she said. She must have thanked me. A short time later I again stated my offer at Mr. Schultz's house. Later, at Mr. Preston's office, the defendant not being present, it was arranged that I pay, and I did pay, the sum of $3,500, and Mr. I. H. Preston put in a lot at $500 which was the full purchase price of the property. The defendant went into possession at or about the time the lot was deeded to the plaintiff. She has remained in possession ever since. The line of services conducted at her meetings at that time was much like other religious services. I did not attempt to establish an arbiter who should say that the religious services were or were not conducted as they had theretofore been. There was nothing further said than that as long as she conducted the services on the line that she had been conducting them and did not depart from it she could have the free use of it. In April or May, 1916, I attended some of the services where she said in public that she was going to give birth to a Christ on the 3d day of June at 5 o'clock. I think it was an immaculate conception, as she was long past the age she said."

Witness I. H. Preston testified for the plaintiff as follows:

"I met Martin Bekins on or about the 13th day of November, 1913, at my office. There were some people whose names I do not recall who were discussing the purchase of that property, or a property for her work, and it appears that they were going to form an organization to carry on the work. I said I would contribute a lot worth $500. It subsequently developed that they could not do anything. They found out that they could buy the lot for $4,000, make a small payment on it, and pay the balance in installments; but Mrs. Smith refused to have anything to do with it. There the matter ended until Mr. Bekins proposed to buy it and asked me if I would contribute if he bought it. Mr. Bekins told me that his purpose was to let her carry on her work there so long as she carried it on along the lines she was then, and, if that was for her lifetime, why then she would remain during that time, and, if she left a worthy successor, her successor might carry on the same work. Those were the circumstances under which I contributed."

It appears, then, that the property in question was purchased expressly for the use of the defendant Ella Smith Trull, and that Bekins was not the only person who contributed to make the purchase. Preston's lot, valued at $500, was a part of the donation. The defendant last named entered immediately into possession of the premises and continued to occupy the same up to the time of the commencement of the action and the trial. On her behalf an offer was made to show

that she had expended considerable money in the making of improvements, such as buildings for use of the religious organization of which she was the head; but the trial court refused to allow the testimony.

It has been held in this state that an oral transfer of a life estate in land may be made effectual by the taking possession of and the performance by the grantee of acts in reliance upon the grant. Husheon v. Kelley, 162 Cal. 656, 124 Pac. 231. Other cases holding that a life estate may result from an oral agreement are: Manning v. Franklin, 81 Cal. 205, 22 Pac. 550; Norris v. Lilly, 147 Cal. 754, 82 Pac. 425, 109 Am. St. Rep. 188. The same holding also where the estate is conferred as a gift. Bakersfield T. H. Ass'n v. Chester, 55 Cal. 98. It is not essential to the creation of a valid life estate that there shall be no condition imposed which may terminate the estate in some contingency prior to the death of the grantee. Referring to estates for uncertain periods, which are not inheritable, or at will, but may last for life, Mr. Reeves, in his work on Real Property (volume 1, p. 633), says:

"It is to be reiterated and emphasized here that such interest as these are life estates. Indefinite duration that may be during a life, incapability of being inherited, and indeterminability merely at will usually place an ownership of realty within the category of life interests. Such are estates, to A. while he continues to live on the land, to a man and his wife during coverture, to a widow so long as she remains unmarried, to B. until he ceases to carry on a specified business, to X. while a designated tree stands, and to R. during his residence abroad. Though such an ownership may quickly terminate because of the happening of the specified event, it is a life estate, governed by all the rules and principles of life estates, as long as it continues."

Mr. Washburn, in his text on Real Property (volume 1, p. 102), adds:

"This is rather a class of estates, and embraces all freeholds which are not of inheritance, including estates held by the tenant for the term of his own life, or for the life or lives of one or more other persons, or for an indefinite period which may endure for the life or lives of persons in being, and not beyond the period of a life."

Section 1161, Code of Civil Procedure, in the first paragraph, provides that "a tenant of real property, for a term less than life, is guilty of unlawful detainer, when," etc.

[4-7] From what has been stated in the foregoing, it must appear plain that, conceding that the evidence of Martin Bekins and Preston was sufficient to show an intent that the defendant Ella Smith Trull should have the absolute possession of the real property so long as she should live, or so long as she should continue to conduct the same character of religious services as theretofore, then no other circumstances are shown which would render such agreement and transfer invalid. We think that the evidence clearly establishes that the character of interest held by the said defendant was more than that of a mere tenant holding at the will of the landlord Martin Bekins. It will be noted that Bekins in this testimony did not claim that he was to be the sole judge as to whether the services conducted by the said defendant at the new location were of the same character as those which had theretofore been conducted by her. The question as to whether the subsequent services were of the character required depended upon the establishment of the fact itself, and a forfeiture of the interests of the defendant could not be worked at the arbitrary whim of Martin Bekins. In our opinion, the undisputed evidence of Bekins, and of Preston his witness, showed the intent of Bekins and Preston to have vested in the defendant Ella Smith Trull a life estate in the real property described in the complaint, defeasible only upon breach of the condition named. As the transfer rested in parol, we think it was competent for the defendant to show all of the things which she did in compliance with the conditions imposed upon her and by way of acceptance of the donation. The offered testimony to show the expenditure of money in erecting buildings or improvements having to do with affording facilities for the holding of religious services was relevant and proper to be considered. It may be that the condition upon which defendant's right to the possession of the property depends has been broken, and that the plaintiff is entitled to have the estate of the defendant declared forfeited. If so, it must be done in some proceeding other than that brought to secure the summary remedy afforded by the Code to a landlord whose tenant has breached some condition of his lease.

The judgment appealed from is reversed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

---

(37 Cal. App. 486)

## MOLLOY v. PIERSON. (Civ. 2401.)

(District Court of Appeal, First District, California. June 7, 1918. Rehearing Denied by Supreme Court Aug. 5, 1918.)

1. JUDGMENT ⊂⊃447(1)—EQUITABLE RELIEF—MERITORIOUS CAUSE OF ACTION.
A judgment valid on its face will not be overturned by equity, unless it is against conscience, and it appears that a like judgment would not follow in the same action, or upon the same cause of action.

2. JUDGMENT ⊂⊃447(1)—ACTION TO SET ASIDE DEFAULT—NECESSITY OF GOOD DEFENSE.
In action to set aside a default judgment, plaintiff must establish a good defense, upon the merits, to the complaint upon which the judgment is based.

3. BILLS AND NOTES ⊂⊃493(1)—CONSIDERATION—PRESUMPTION.
A note is presumed to have been based on a good consideration.

4. HUSBAND AND WIFE ⊂⊃156—WIFE'S NOTE TO HUSBAND'S CREDITOR.
Where husband, immediately before death, conveyed all his property to his wife, and requested wife to sign note to creditor for sum

of his debt to such creditor, the advantage wife gained by deed in not having to probate estate, and disadvantage to creditor of being unable to collect debt out of estate, was sufficient consideration for note.

5. BILLS AND NOTES ⊜492—DELIVERY—PRESUMPTION—POSSESSION BY PAYEE.

A note in possession of payee will be presumed to have been delivered to him upon its date.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Hannah Molloy against Catherine Pierson, as administratrix of the estate of John J. Ryan, deceased. Judgment for plaintiff, and defendant appeals. Reversed.

R. W. Gillogley, of San Francisco, for appellant. James F. Brennan and J. J. West, both of San Francisco, for respondent.

BEASLY, Judge pro tem. William Molloy and John J. Ryan were friends. The former had brought Ryan to this country from their home in the old world, and Ryan had been for years an intimate of Molloy's family. During the years preceding April 1, 1910, Ryan had loaned Molloy several thousand dollars, which on that day were unpaid. These men trusted each other. There had never been any writing between them. On or about April 1, 1910, Molloy, being told that he was about to die, sent his wife to the family lawyer for advice about the settlement of his affairs. The lawyer suggested that Molloy deed his property, consisting of certain real estate, to his wife. This advice was followed, and with the aid of a notary Molloy executed a deed by which all his property was conveyed to his wife. At the same time Mrs. Molloy, at her husband's request, signed a note to Ryan, written by the same notary, for the sum of $3,287.50, which was the amount of his debt. Three years subsequently Mrs. Molloy gave Ryan $800, which the defendant in this action claims was, and Mrs. Molloy claims was not, a payment on the note. At the same time that she gave Ryan this sum, Mrs. Molloy executed a new note to him for $3,115.44, being the amount due on the first note less $800. Mr. Ryan died in January, 1914, and the defendant in this action was thereupon appointed administratrix of his estate. In June, 1914, the defendant here began an action against Mrs. Molloy to collect the second note given by her to Mr. Ryan. Mrs. Molloy was served with summons in the action by the attorney who began the action. She defaulted by not appearing, and judgment was taken against her on the note. One year later, in July, 1915, an execution was issued and levied on her real estate, whereupon Mrs. Molloy immediately began this action to set aside her default and the judgment against her in the action on the note.

In the present action Mrs. Molloy alleges that her default in the other action was procured by fraud practiced upon her by the attorney who began that action on the note, and that she has good defenses to that action on the merits; the defenses she asserts being that the note was without consideration, and that it was not delivered. These defenses deal necessarily with the execution and delivery of the first note given by her to Ryan at the time of her husband's illness.

[1-4] Equity will not overturn a judgment valid on its face, unless it is an unjust judgment. It must be against conscience, and it must appear that a like judgment would not follow in the same action or upon the same cause of action. Harnish v. Bramer, 71 Cal. 155, 11 Pac. 888. In order to support an action of this character, it is absolutely necessary that the party who attacks the judgment establish a good defense upon the merits to the complaint upon which the judgment is based. Reed v. Bank of Ukiah, 148 Cal. 96, 82 Pac. 845. The trial court found that the notes were without consideration. Mrs. Molloy testifies that she made the first note to Ryan solely because her husband asked her to do so, and because she wanted to pay, and thought it was a wife's duty to pay, her husband's debts. In face of the presumption that the note was based upon a good consideration, and the evident advantage which Mrs. Molloy gained by the deed in not being compelled to probate her husband's estate, and the disadvantage suffered by Ryan when Molloy conveyed all of his property to his wife, by being placed in a position where he could not collect his debt out of Molloy's estate in probate, and also where, by standing by and consenting to the transfer of the property to the wife, he could not attack that transfer as a fraudulent conveyance, it cannot be said, even upon this testimony of Mrs. Molloy, that this note was without consideration. Mrs. Molloy's testimony is not inconsistent with the fact that this note was based upon a good consideration.

[5] Upon the subject of the delivery of the note there is no evidence that it was actually delivered into the hands of Ryan, nor is there any evidence that it was not so delivered. Thereupon the presumption, from the fact that the note was found in Ryan's possession, that it was delivered to him upon its date, controls the finding, and it must be held in this state of the evidence that the note was delivered to Ryan.

These being the only defenses which Mrs. Molloy asserts, it must be held that she had no good defense upon the merits to her note, and therefore this action must fail.

The judgment is reversed.

We concur: KERRIGAN, J.; ZOOK, Judge pro tem.

⊜For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

37 Cal. App. 601

## Ex parte TURCK. (Cr. No. 609.)

(District Court of Appeal, Second District, California. June 21, 1918.)

1. BAIL ⊂=40—RELEASE WITHOUT BAIL.
Under the procedure generally applicable in criminal actions, a defendant is not entitled to be released without bail upon his mere promise to appear for trial; nor will such release ordinarily be permitted by an arresting officer, until it is so ordered by the court or magistrate.

2. CRIMINAL LAW ⊂=995(2)—JUDGMENT—SUFFICIENCY.
A judgment of conviction of exceeding speed limit, in violation of Vehicle Act, § 32, as amended by St. 1917, p. 410, is not void on its face, merely because it does not affirmatively declare that defendant, upon his appearance before the justice of the peace on the day of his arrest, waived his right to the five days' time provided by section 22, subd. (c), and does not set forth that the said justice was the most accessible magistrate.

3. HABEAS CORPUS ⊂=4—SCOPE OF PROCEEDING.
The right to five days' notice and right to be taken before the nearest justice, given by Vehicle Act, § 22, subd. (c), as amended by St. 1917, p. 404, to persons arrested for speeding, were rights which could be waived, which, if denied by justice's court, was mere error, correctible on appeal, but not reviewable under habeas corpus.

In the matter of the application of W. I. Turck for a writ of habeas corpus. Petitioner remanded.

Ray E. Nimmo, of San Francisco, for petitioner. W. F. Menton, of Santa Ana, for respondent.

CONREY, P. J. The petitioner, W. I. Turck, being in custody of the sheriff of the county of Orange and imprisoned in the county jail of that county, applied to this court for a writ of habeas corpus and the writ was issued. Attached to the sheriff's return to the writ is a copy of a commitment issued by John B. Cox, as justice of the peace of Santa Ana township, in the county of Orange. By that commitment it appears that on the 28th day of January, 1918, a complaint under oath was filed in said justice's court, charging that the petitioner on that day committed a misdemeanor, to wit, violation of the motor vehicle law; that a warrant of arrest having been issued on that day, and defendant having been arrested, thereafter on the same day he appeared before said court and was informed of all his legal rights; that, the complaint in the action having been read to him, the defendant pleaded guilty, and was by the court found guilty as charged in the complaint; thereupon, the defendant having waived time for the pronouncing of judgment, it was adjudged that for said offense defendant be imprisoned in the county jail of the county of Orange for the term of 10 days.

The complaint upon which the defendant was prosecuted in the justice's court charged that at the time and place stated he did willfully and unlawfully operate an automobile upon a public highway in the county of Orange at a rate of speed in excess of 30 miles per hour. This was a violation of the provisions of section 22 of the Vehicle Act (St. 1915, p. 409, as amended by St. 1917, p. 404). Subdivision (c) of said section 22 reads as follows:

"In case of any person arrested for violation of the provisions of this section, unless such person shall demand that he be taken forthwith before the most accessible magistrate, the arresting officer shall take the name and address of such person and the number of his motor vehicle and notify him in writing to appear before a designated magistrate at a time and place to be specified in such writing at least five days subsequent to the date of such notice and upon the promise in writing of such person to appear at such time and place, such officer shall forthwith release him from custody. Any person willfully violating such promise shall be guilty of a misdemeanor regardless of the disposition of the charge upon which he was originally arrested."

The alleged illegality of the commitment on which Turck is held in custody is set forth in the petition for the writ, in substance, as follows: That it does not appear upon the face of the proceedings that the defendant waived his right to the five days' time provided by said statute, and that it does not appear that the said justice of the peace was the most accessible magistrate at the time of the arrest of the defendant; that, in fact, John B. Cox, the said justice of the peace, was not at the time and place of arrest of the defendant the most accessible magistrate, but that there was then and there a magistrate in the town or township of Tustin, in the county of Orange, who was then and there located at a point nearer and more accessible to the defendant and the officer arresting him at the time of his arrest; that upon the face of the complaint it appears that the defendant was required to appear before the said justice, and did so appear, on the day of his arrest; and that the five days required by the statute had not elapsed. By reason of the facts so alleged, petitioner claims that said Justice of the Peace Cox had no jurisdiction to entertain said complaint filed with him on the 28th day of January, 1918, and had no jurisdiction to issue the alleged commitment, and that therefore said commitment is void.

Petitioner's argument begins with the general proposition that a justice's court is an inferior court, whose powers are conferred and whose duties and mode of procedure are prescribed by statute, and to which the rule applies that the evidence of its proceedings must affirmatively show jurisdiction of the person of the defendant and of the subject-matter. The rule has been illustrated in a series of cases, among which petitioner especially relies upon Ex parte Kearny, 55 Cal. 212. The particular application of the rule in that case was that the court determined that the alleged offense stated in the

complaint in the police court where the petitioner was convicted did not constitute any crime against the law, and that therefore the petitioner was entitled to be discharged on habeas corpus. In Ex parte Greenall, 153 Cal. 767, 770, 96 Pac. 804, 806, the court said:

"It has been the uniform practice to consider on habeas corpus the question of the sufficiency of the complaint in such inferior courts, and to discharge the prisoner where such complaint failed to show a public offense under the laws of the state."

The courts have been careful, however, not to extend the principles above stated so far as to interfere with the use of the right of appeal as the ordinary remedy of a defendant in a criminal case.

"The writ of habeas corpus is not intended to review the regularity of the proceedings in any case, but rather to restore to his liberty the citizen who is imprisoned without color of law." In re Kowalsky, 73 Cal. 120, 122, 14 Pac. 399.

"A writ of habeas corpus cannot be made the vehicle of determining mere errors, where a conviction has been had and the commitment thereon is in due form. If the court below had no jurisdiction of the offense charged, or if it affirmatively appears by the record that the prisoner was tried and sentenced for the commission of an act which, under the law, constitutes no crime, the judgment is void, and the prisoner should be discharged." Ex parte Mirande, 73 Cal. 365, 371, 14 Pac. 888, 891.

In Ex parte Turner, 75 Cal. 226, 16 Pac. 898, it appeared that in a police court the petitioner had been convicted of a misdemeanor. The judgment did not recite the date of the offense or state the elements of the crime as fully as they were necessarily stated in the complaint. Nevertheless the petitioner was remanded, the court saying:

"The distinction between a void and a voidable judgment is sometimes very nice, and the judgment will fall under the one class or the other accordingly as it is regarded for different purposes. * * * After trial and conviction, the commitment is of a higher dignity than an ordinary commitment holding to answer. This is true with courts, both of special or limited jurisdiction and those of general jurisdiction. The judgment of a court of inferior jurisdiction is, to a great extent, as far beyond the reach of collateral attack by the writ of habeas corpus as the judgments of higher courts are. Church on Habeas Corpus, § 240. * * * The failure of the court to state the elements of the crime in the judgment as fully as they were necessarily stated in the complaint does not render the judgment void. The offense is sufficiently designated in the judgment. To entitle the petitioner to a discharge, we must necessarily assume that the record of conviction fails to show the commission of any offense. To reach this conclusion, we should have to resort to a hypercritical, overnice, and technical examination of the commitment, convert the writ of habeas corpus into a writ of error, and defeat the ends of justice."

Justices' courts have jurisdiction of certain public offenses committed within the several counties in which such courts are established, including "all misdemeanors punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or by both such fine and imprisonment." Pen. Code, § 1425. The offense charged against the defendant came within this description. Vehicle Act, § 32, as amended by Stats. 1917, p. 410. It follows that the justice's court of Santa Ana township had jurisdiction over the case here in question immediately upon the filing of the complaint, unless such jurisdiction was excluded by reason of the provisions of subdivision (c) hereinabove set forth.

[1, 2] Under the procedure generally applicable in criminal actions, a defendant is not entitled to be released without bail upon his mere promise to appear for trial, nor will such release ordinarily be permitted by an arresting officer until it is so ordered by the court or magistrate. It was for the purpose of modifying this rule in a particular class of cases that said subdivision (c) of section 22 was enacted. It requires that the officer give the stated notice, and that, if the defendant make a written promise to appear, "such officer shall forthwith release him from custody." This regulation has to do with the duties of an arresting officer and the right of the arrested person to immediate release upon compliance with the stated conditions. If that right be disregarded, and the defendant be compelled to submit to trial before five days have elapsed, he objecting thereto, then and then only does the procedure of the court conflict with the intent and purpose of the statute. But it would be straining the words of the statute, so as to cover a purpose not intended, if we should say in this proceeding that the judgment under which the petitioner stands committed is void on its face merely because that judgment does not affirmatively declare that the defendant, upon his appearance before the justice of the peace on the day of his arrest, waived his right to the five days' time provided by said statute, and does not affirmatively set forth that the said justice of the peace was the most accessible magistrate at the time of the arrest. The judgment does declare that after the arrest of the defendant and on the same day the defendant "appeared before this court, and having been informed of all his legal rights, and the complaint in this action having been read to him, defendant pleaded guilty." It further appears by the return herein that the defendant perfected an appeal from said judgment to the superior court of Orange county; that the superior court rendered judgment of affirmance of the judgment and order of the justice's court; and this proceeding was instituted to prevent the enforcement of the judgment as so affirmed.

[3] Attached to the sheriff's return in this proceeding there is an affidavit of John B. Cox, in response to which counter affidavits have been filed on behalf of petitioner. It is not necessary for us to enter into an extended discussion of these affidavits. Their use in this proceeding or their consideration by the court is of doubtful propriety, considering the nature of this proceeding. The statements contained in the affidavits refer to the fact that the township of Tustin was

nearer to the place of defendant's arrest than the township of Santa Ana; that certain conversations by telephone and otherwise took place between the justice and the defendant and the arresting officer. Presumably these facts, so far as they were at all admissible, were included in the statement on appeal to the superior court. They are not such matters as may be retried by affidavits in a proceeding like that now before this court. It has been held in this state that the denial of a trial by jury is merely error to be corrected on appeal, and does not go to the jurisdiction of the court, so that it may be inquired into on habeas corpus, except in those cases where a jury cannot be waived, and therefore is a necessary constituent part of the court. In re Fife, 110 Cal. 8, 42 Pac. 299. On the same principle we may say that the right to the five days' notice insisted upon by the defendant in the present proceeding and the alleged right to be taken before another justice were rights which could be waived, and that their denial by the justice's court (if they were denied) was merely error to be corrected on appeal, and does not go to the jurisdiction of the court, which alone may be inquired into in this proceeding.

It is ordered that the petitioner be remanded.

We concur: JAMES, J.; WORKS, Judge pro tem.

---

(37 Cal. App. 192)

PEOPLE ex rel. LINDAUER, Dist. Atty., v. O'DONNELL, Superior Court Judge.

(Civ. 1852.)

(District Court of Appeal, Third District, California. May 9, 1918.)

1. CRIMINAL LAW ⟸982—SENTENCE—SUSPENSION—REVOCATION.

Under Pen. Code, § 1203, subd. 4, giving court who has suspended sentence the power to revoke its order of suspension of imposition of sentence, a court can revoke such order whether the defendant be in court or absent therefrom, where it is shown that defendant has violated a condition upon which order was made.

2. CRIMINAL LAW ⟸982—SENTENCE—SUSPENSION—REVOCATION.

Under Pen. Code, § 1203, subd. 4, suspended sentence cannot be revoked after term of probation has expired, although conditions of order were violated.

3. CRIMINAL LAW ⟸982—STATUTE OF LIMITATIONS—VIOLATION OF CONDITIONS OF PROBATION.

Pen. Code, § 802, providing that if defendant is out of state when offense is committed the period within which he may be prosecuted does not start running until his return, does not suspend, while he is out of state, the running of the term of probation of a person who in violation of an order suspending sentence leaves state.

4. COURTS ⟸1—POWERS.

Although under Pen. Code, § 4, penal statutes are to be liberally construed, where certain powers are conferred upon a court, the nature and extent of such powers must be ascertained from language of statute itself, since in view of Code Civ. Proc. § 1858, nothing can be added to or taken from a statute.

Mandamus by the People of the State of California, on the relation of Arthur Lindauer, District Attorney of Solano County, against W. T. O'Donnell, judge of the Superior Court of the State of California in and for the County of Solano. Alternative writ of mandate discharged, and proceedings dismissed.

U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., and Arthur Lindauer, of Vallejo, for petitioner. Francis McInnis, of Fairfield, for respondent.

HART, J. This is an application for a writ of mandate to require the respondent to accept and exercise jurisdiction of a certain proceeding instituted by the petitioner, as district attorney of Solano county, in the court of which the respondent is the presiding judge.

The facts as gleaned from the petition are: That one Luther R. Perry, having previously to the 17th day of July, 1914, been by a magistrate of Solano county held for trial in the said superior court for failure to provide his minor children with the common necessaries of life (Pen. Code, § 270), was, on the day named, arraigned before said court upon an information charging him with that offense and thereupon pleaded guilty thereto; that thereupon the superior court, after due proceedings, made an order suspending the imposition of sentence and releasing the said Perry upon probation, upon certain specified conditions, for the period of three years; that thereafter the said Perry left the state of California and remained therefrom and beyond the jurisdiction of said court during the whole of the said period of probation; that he violated the order of suspension of sentence and probation by leaving the state and by failing to comply at any time with any of the conditions of said order of suspension of sentence and probation; that, upon and after the expiration of the said period of probation, said Perry returned to the said county of Solano, this state, and was thereupon, at the instigation of the district attorney of said county, taken into custody by the sheriff of said county for violating said order of suspension and probation and the conditions upon which said order was made; that thereafter the district attorney appeared before the said superior court and moved that the said order of suspension of sentence be set aside and sentence thereupon pronounced in said case; that the superior court refused to entertain the motion upon the ground that it was then without jurisdiction to take action in the premises and accordingly dismissed the motion.

Attached to the petition and constituting a part thereof are the minutes of the court in

both the proceeding wherein the court suspended the pronouncement of sentence and the proceeding in which the district attorney moved and sought to have the order suspending sentence set aside and sentence pronounced. The court stenographer's transcription of his report of the two proceedings is also annexed to the petition and made a part thereof.

While the minutes of the court in the proceedings wherein the district attorney pressed his motion to set aside the order of suspension of sentence and to have sentence pronounced merely show that the court, without expressing any reason therefor, dismissed the motion, the reporter's notes disclose that the judge appeared to be of the opinion that, the probationary period having expired prior to the time at which the motion was instituted and made, the court had been divested of further jurisdiction of the case and was therefore without legal authority to take any further action therein.

It is contended here by the attorney for the respondent that the court had jurisdiction to dismiss the motion and that the ground of the order of dismissal is of no consequence; that, even if the reason for the dismissal was erroneous in a legal view, still the court's jurisdiction to dismiss the motion cannot be challenged through a writ of any kind. It is further contended that in no event will mandate lie to compel a court to accept jurisdiction of a proceeding or action.

Obviously, under the general rule, a court has jurisdiction to dismiss any proceeding before it, and whether its action in doing so is founded on a sound or an unsound reason, legally, would not be inquired into by a court of appeal except in a proceeding appropriate to the review and correction of error. Assuming, however, that the court, in this case, as the reporter's notes of the proceeding show, refused to entertain the motion for the sole reason that it had lost jurisdiction of the action and that that fact is in a proper way made to appear before us, and assuming further that as a legal proposition the court had not lost jurisdiction of the case, then the further question would arise whether the court may not be compelled, by mandate, to entertain and consider and determine the motion on its merits—that is, the question whether it should or should not be allowed—since there appears to be in such case no "plain, speedy and adequate remedy in the ordinary course of law," there appearing to be no appeal from such an order of dismissal provided for. But this question we need not decide here, for we are of the opinion that, the motion having been instituted and pressed to the attention of the court after the period of probation had expired, the court therefore lost jurisdiction of the case and was without legal authority for granting the motion.

First, it is important to note that it is clear from the record before us that the court, in suspending sentence and admitting Perry to probation, acted under section 1203 of the Penal Code rather than under section 270b of said Code, although the latter section appears to have been intended to have special application to cases arising under either section 270 or 270a of the Penal Code. Section 270b provides for the suspension of sentence in such cases upon the filing by the defendant of an undertaking, valid and binding for the period of six months only, and conditioned for the payment of such monthly sum as the court may fix for the support of either the minor children or the wife, as the case may be, during the time that such undertaking shall run. The section further provides that, upon the failure of the defendant to comply with the undertaking, he may be ordered to appear before the court and show cause why further proceedings should not be had in the action, or why sentence should not be pronounced, and the court is then authorized to pronounce sentence or modify the order or take a new undertaking and further suspend proceedings on sentence "for a like period."

Section 1203 of the Penal Code clothes the court with the authority of admitting any person over the age of 18 years, who has pleaded guilty to or been convicted of any crime, to probation upon certain specified conditions. The court is by said section empowered to suspend the imposition or execution of sentence and may direct that such suspension may continue for a period of time not exceeding the maximum possible term of such sentence, except where the offense consists of a violation of section 270 or 270a of said Code, in either of which cases such suspension of imposition or execution of sentence may, in the discretion of the court, continue for not over five years. The court may also, when acting under said section, require the defendant to give a bond for his appearance before the court at any time such appearance may be required for the purpose of investigating any alleged violation of the terms and conditions of probation.

In this case, no undertaking, as required by section 270b, was taken, nor, so far as the record here discloses, was any bond given and filed by the defendant, as required by section 1203. So far as the record before us shows, the court merely suspended the imposition of sentence and admitted the defendant to probation for the term of three years upon certain prescribed conditions. It is therefore evident, as above stated, that the proceeding was the one authorized by section 1203 and not the one authorized by section 270b.

Returning now to the proposition that the court had lost jurisdiction of the action, and therefore was without legal authority for entertaining or acting upon the motion, except to dismiss it, attention should first be directed to the language of subdivision 4 of section 1203, which is as follows:

"The court shall have power at any time during the term of probation to revoke or modify its order of suspension of imposition or execution of sentence. It may, at any time, when the ends of justice will be subserved thereby, and when the good conduct and reform of the person so held shall warrant it, terminate the period of probation and discharge the person so held, and in all cases, if the court has not seen fit to revoke the order of probation and impose sentence or pronounce judgment, the defendant shall, at the end of the term of probation, be by the court discharged."

[1, 2] We think that these two propositions are clearly deducible from the language of said section 1203, viz.: (1) That the court may, whether the defendant be present in or absent from court at the time, revoke the order suspending the imposition of sentence or the execution thereof and admitting him to probation, upon a sufficient showing that he has violated any of the terms and conditions upon which such order was made; (2) that, under the provisions of subdivision 4 of said section, the court loses jurisdiction or power to make an order revoking or modifying the order suspending the imposition of sentence or the execution thereof and admitting the defendant to probation after the probationary period has expired.

As to the soundness of the last-stated proposition there can be no possible doubt. It is necessarily implied from the initial language of subdivision 4 of said section. The authority in a court to suspend a sentence or the execution thereof in a criminal case and liberating the defendant for a certain period is wholly statutory, and the statute itself furnishes the measure of the power which may thus be exercised. Nothing which cannot be found in the statute or which is not reasonably and fairly or necessarily within the reason or spirit or intent thereof can be imported into it by the courts. When therefore the Legislature says, as it has said, that the order of suspension and probation may be revoked or modified during the term of probation, without adding language so qualifying that provision as to justify the construction that the time when such revocation or modification may be made is extended beyond the term or period of probation, the necessary implication is that it was not the legislative intention to confer upon the court the right to exercise that power after the time at which the period of probation has expired. Indeed, this view of subdivision 4 of the statute in question follows from a consideration of its language by the light of the familiar statutory rule of construction, "Expressio unius est exclusio alterius."

[3, 4] But the district attorney contends that, Perry having left the state and so placed himself beyond the jurisdiction of the court, and remained therefrom until after his term of probation had expired, the said term of probation, by analogy to the rule in this state with respect to the statute of limitations as applied to the finding of indictments and the filing of informations in criminal cases (Pen. Code, § 802), ceased to run while he was absent from the state. We cannot agree to that contention. While the rule in this state, unlike that of the common law, is that penal statutes are not to be strictly construed but are to be given such construction as will comport with the fair import of their terms, with a view to effect their objects and to promote justice (Pen. Code, § 4), yet, where certain powers are conferred upon a court or other tribunal wholly by statute, the nature and extent of such powers must be ascertained and determined from the language of the statute itself. As above stated and as our law declares (Code Civ. Proc. § 1858), nothing can be added to or taken from a statute in construing and applying it. The statute in question here itself fixes and limits the time within which an order suspending sentence or the execution of a sentence already imposed may be set aside or modified. It in no way qualifies the provision as to the time when such an order may be made. Neither in said statute nor in any other law of this state to which our attention has been called is there any provision that the term of probation shall cease to run during the absence of the defendant from the state while such order remains alive. In the absence of such a provision, it must be held that the term of probation continued unbroken until it reached the end of the time to which it was expressly limited. Clearly, section 802 of the Penal Code cannot be made to apply to a case of this character. It is plain that it does not directly apply, and we cannot perceive how it may reasonably be made to do so by analogy.

In this case, the terms and conditions upon which the court suspended the imposition of sentence and admitted the defendant to probation were these: (1) That he pay to the probation officer of the county a certain sum each month for the support of his two minor children; (2) that he, during the term of probation, refrain from using intoxicating liquors and from visiting saloons or other places where such liquors are kept for sale; (3) that he report in writing every two weeks to the probation officer his whereabouts, occupation, and earnings, "and shall not leave or absent himself from the state of California without first obtaining written permission from the district attorney of said county." It is further provided that violation of any of the terms and conditions of said order "shall be and is hereby made cause for the revocation hereof."

Thus it appears that the violation of any one or all of said terms of probation is expressly made a sufficient cause for the revocation of the order of probation, and the statute (subdivision 9, § 1203, supra) makes it the duty of the probation officer of the county to report to the court any such vio-

lation. The defendant in this case, when he left the state and failed to make the payments required for the support of his minor children, was guilty of a violation of at least two of the conditions upon which he was released on probation. Of such violation, the probation officer was fully cognizant, and, had he reported it to the court, the order admitting him to probation could have been nullified, or, whether set aside or not while Perry was out of the state, steps could have been taken to apprehend the prisoner, who in either case then would in law have been an escape and a fugitive from justice. But the record here does not show that any report of the default of the defendant in complying with the terms of his release on probation was ever, at any time, made to the court, nor that any further proceedings were taken in the case until after the term of probation had expired.

Our conclusion is, as above stated, that the court was without jurisdiction to entertain the motion to set aside the order suspending the imposition of sentence and admitting the defendant in the action to probation, and the alternative writ of mandate is accordingly discharged and the proceeding herein dismissed.

We concur: CHIPMAN, P. J.; BURNETT, J.

37 Cal. App. 189

Ex parte PERRY. (Cr. 442.)

(District Court of Appeal, Third District, California. May 9, 1918.)

1. DIVORCE ⟸324 — EFFECT OF DECREE — CUSTODY AND SUPPORT OF CHILDREN.

Where by divorce decree the custody of minor children is awarded to one of the parents without charging upon the other their support, the parent not entitled to their custody is by Civ. Code, § 196, relieved from liability for their support.

2. PARENT AND CHILD ⟸17(1)—SUPPORT OF CHILD—CRIMINAL LIABILITY.

When the wife by divorce decree was awarded the custody of the minor children with no provision for their support by him, the husband was not subject to prosecution under Pen. Code, § 270, for failure to provide for such children.

Original application by Luther R. Perry for a writ of habeas corpus to procure his discharge from custody under an order committing him for failure to support his minor child. Petition granted, and prisoner discharged.

Francis McInnis, of Fairfield, for petitioner. Arthur Lindauer, of Vallejo, for respondent.

HART, J. The petitioner alleges that he is illegally restrained of his liberty by the sheriff of Solano county and makes this application to this court for a writ of habeas corpus to the end that he may be released from such unlawful restraint. The petition for the writ alleges that, on or about the 4th day of February, 1918, the petitioner was arrested on a warrant issued by one S. A. Cripps, justice of the peace of Elmira township, in said county of Solano, upon a complaint charging petitioner with willfully omitting, without lawful excuse, to furnish his minor child, Henry Perry, with necessary food, clothing, shelter, etc. (Pen. Code, § 270); that upon said complaint the petitioner was given a preliminary hearing and thereupon held to trial in the superior court of said county upon said charge. It is further alleged that, on the 28th day of April, 1915, the superior court of the said county of Solano, in an action between the petitioner as defendant and his wife, Grace Perry, as plaintiff, made and entered an interlocutory decree of divorce, wherein and whereby said Grace Perry was adjudged to be entitled to a divorce from petitioner, upon the ground of desertion; that said decree provided, among other things, that the custody and control of the minor children of petitioner and said Grace Perry, to wit, Robert Winchell Perry and Henry Arthur Perry, be awarded to said Grace Perry; that said interlocutory decree of divorce so rendered and entered in said action made no provision whatever for any support of said children; that thereafter, to wit, on the 4th day of May, 1916, the said superior court of the county of Solano rendered and caused to be entered its final decree of divorce, wherein and whereby all the terms of said interlocutory decree "in regard to the custody and control of said minor children were confirmed and ratified"; that "said interlocutory decree of divorce and said final decree of divorce have never been altered or modified in any respect whatsoever, and still are in full force and effect as rendered and entered; that there have never been any proceedings brought under sections 138 and 139 of the Civil Code to require said Luther R. Perry to contribute to the children's support." Attached to and made a part of the petition is the judgment roll in the said divorce action.

The sheriff, in his return to the alternative writ, answers:

(1) That he holds the petitioner "under and by virtue of his violation of the 'order suspending the imposing of sentence and releasing the defendant (petitioner) on probation,' made by the superior court * * * in and for the county of Solano, on the 17th day of July, 1914." (2) That, further, he holds petitioner by "virtue of a commitment issued by the Hon. S. A. Cripps, justice of the peace of Elmira township, county of Solano, * * * on the 15th day of March, 1918, holding to answer upon a charge of failure to provide for his minor child, Henry Perry, the within named defendant (petitioner), Luther R. Perry."

The first of the above-stated grounds upon which the sheriff undertakes to justify the restraint of the petitioner constitutes the basis for the application to this court for the

writ of mandate in the case of People, etc., ex rel. Arthur Lindauer, District Attorney of Solano County, v. Hon. W. T. O'Donnell, Judge of the Superior Court of said Solano County (Civil No. 1852) 174 Pac. 102, an opinion in which has this day been filed. In that case we have considered and determined, adversely to the position of the district attorney, the question which is involved in the first of the two grounds set forth in the return as the authority for the holding of the petitioner by the sheriff, whether the superior court exceeded its jurisdiction in dismissing the motion by the district attorney to set aside the order suspending the imposing of sentence. It follows therefore that there is left to us for determination herein the single question whether the restraint of the petitioner by the sheriff by virtue of the commitment issued by the justice of the peace on the 15th day of March, 1918, holding petitioner to trial for violating the provisions of section 270 of the Penal Code, is legally justifiable.

The reply to the question thus propounded is not, in view of the many adjudications of the proposition involved therein in California, fraught with serious difficulty.

[1] It has frequently been held that where, by a decree of divorce, the custody of the minor children of the parties is awarded to one of the parents, without charging upon the other parent the support of such children, the parent to whose custody the children are so awarded is, under the terms of section 196 of the Civil Code, alone liable for their support, and the parent not entitled to the custody of the minors is relieved of that duty. See Matter of McMullin, 164 Cal. 504, 129 Pac. 773; Lewis v. Lewis, 174 Cal. 336, 340, 163 Pac. 42. In Lewis v. Lewis, supra, the McMullin Case is stated as follows:

"The petitioner had been held for trial for an alleged violation of the same section (section 270) of the Penal Code. There the wife had obtained a divorce in the state of Nevada. The decree granted her the custody of the minor child and required the petitioner to pay for its support. But since there had been no personal service of summons, the Nevada court had no jurisdiction to impose upon him the liability to make such payment. The result, as this court viewed it, was that the custody and control of the child had been given to the mother, without charging upon the father its support. 'Under section 196 of the Civil Code,' says the opinion, 'this situation prima facie relieves the husband of the duty of support and casts it on the wife.' The petitioner was discharged from custody."

In People v. Schlott, 162 Cal. 347, 122 Pac. 846, the conviction of the defendant under section 270 of the Penal Code was sustained, but in that case it appeared that the decree of divorce required the defendant to pay to his wife the sum of $50 per month for the support of herself and child, and the defendant failed to make the payments so required.

[2] In the present case, as we have seen, the decree in the action for divorce between petitioner and his wife awarded the custody of the minor children to the latter, but made no provision whatsoever for the support of said children by the petitioner. From this state of the facts, and the cases above referred to, it necessarily results that the order of the magistrate of March 15, 1918, holding the petitioner for trial in the superior court for the alleged violation of section 270 of the Penal Code, and the commitment thereupon issued, are void and of no legal force, and that the sheriff is consequently without legal warrant for holding the petitioner, so far as said commitment is concerned.

From the foregoing and the conclusion arrived at and announced in the case of the People ex rel. Arthur Lindauer, District Attorney, v. Hon. W. T. O'Donnell, Judge, etc., supra, it follows that there is no legal justification for the holding of the petitioner by the respondent, sheriff, and the prisoner is therefore discharged from the custody of said respondent.

We concur: CHIPMAN, P. J.; BURNETT, J.

---

(37 Cal. App. 120)

## PEOPLE v. FROST. (Cr. 426.)

(District Court of Appeal, Third District, California. May 1, 1918.)

1. HOMICIDE ⇐=248—EVIDENCE—SUFFICIENCY—ACCIDENT.
Evidence *held* to warrant conclusion that defendant's infliction of wound was result of deliberately formed intention to take life of deceased, and that her contention as to accident was an afterthought, so that jury was justified in rejecting her explanation.

2. CRIMINAL LAW ⇐=1166½(6)—CONDUCT OF COUNSEL—EXAMINATION OF JURORS—PREJUDICIAL ERROR.
That prosecutor in examination of prospective juror made following hypothetical statement: "You understand, do you not, * * * malice is presumed, and the burden of proof is on defendant to show * * * that she was justified"—which did not conform to Pen. Code, § 1105, *held* without prejudice, in view of evidence.

3. CRIMINAL LAW ⇐=730(1)—CONDUCT OF COUNSEL—CURE BY INSTRUCTION.
Any error in permitting prosecutor to state in examination of prospective juror that malice is presumed, and that defendant has burden of showing justification for murder, was cured, where jury was fully and correctly instructed, and directed to follow only such instructions.

4. CRIMINAL LAW ⇐=723(5)—ARGUMENT AND CONDUCT OF COUNSEL.
Remarks of prosecutor in closing address to effect that defendant was not justified because she had Indian blood in her and deceased was full of booze, and that she, if turned loose, would go back and kill another man, *held* at most somewhat intemperate.

5. CRIMINAL LAW ⇐=1163(6)—COMMUNICATIONS TO JUROR—HARMLESS ERROR.
That, after jury retired, sheriff, in violation of Pen. Code, § 1128, transmitted a communication to one of jurors to effect that anthrax had appeared among juror's cattle, will not be assumed to have resulted in prejudice; it not affirmatively appearing from nature of

error or other circumstances that defendant was harmed.

6. CRIMINAL LAW ⟸759(2)—UNNECESSARY INSTRUCTIONS.

Instruction that a person "is supposed to mean to do that which he actually, intentionally, and willfully does in fact do," while probably unnecessary, as involving an evident proposition, did not take from jury question of accidental killing.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Kate Frost was convicted of second degree murder, and appeals from the judgment and order denying new trial. Affirmed.

Shelley & Johnston, of Sacramento (John A. McGilvray, of counsel), for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendant was convicted of murder in the second degree, and she appeals from the judgment and order denying her motion for a new trial. It is admitted that she killed the deceased with a butcher knife, but it was and is the contention of defendant that his death was the result of an accident. Her account of it is as follows:

"Well, I was fixing potatoes for supper, boiled potatoes, and I was cutting the ends of them off, so salt would go through them when you cooked them, and as I was standing there it was kind of dark and it was—the shade from the levee—the levee is so high you can't see when the moon does shine. I was standing with my elbows on the scow this way. I heard some queer noise; I could not say what it was. I whirled around that way in the dark; I whirled so quickly he fell right over on me, and I had the knife in my hand, and my arm something like that—see—and he came right down on me and caught himself with his hand, and I says, 'Oh, my God!' and he pulled himself back and says, 'Oh, Kate; I'm hurt!' "

[1] But the jury was justified in utterly rejecting her explanation of the gruesome affair. Indeed, one cannot read the entire record carefully and dispassionately without having an abiding conviction that her infliction of the wound was the result of a deliberately formed intention to take the life of the deceased, and that her contention as to accident was an afterthought, a simulated defense, improbable, not worthy of credence, and justly repudiated by the jury. We shall not set out the evidence at length. It is sufficient to say that it was shown that she had made threats to kill the deceased; that they were heard talking in a loud tone of voice for some time before the killing; that her conduct after the discovery by others of the crime was that of a guilty person; that she did not immediately declare that it was an accident; on the contrary, expressed a willingness to suffer the extreme penalty of the law; and, when it did finally occur to her to claim that the killing was accidental, her repeated story varied in important particulars and was stamped as inherently improbable by the following testimony of the physician who performed the autopsy:

"There was only one wound on the body, except the wounds that had been made by the undertaker in preparing it. The wound was just above the left clavicle, or left collar bone. It was an incised and penetrating wound on the surface, about an inch and a half in the long diameter. The wound following down was almost directly downward and slightly inward, going in just back of the collar bone. During the course of the instrument that made the wound the superficial structures were severed; the nerves going to the left arm, the roots of the nerves, were cut. The left subclavian artery and vein were cut, the artery not quite in two; and then, coming further down, the apex or top of the left lung—there was a cut in that about an inch long. * * * The wound was almost parallel to the lung diameter—very slightly inward."

The doctor further testified that it would be impossible for such a wound to be inflicted by one falling on a knife, unless the injured person "was bent absolutely over, so his body was in a horizontal position; not if he was standing." Indeed, it is plain that the wound could not have been, and was not, inflicted as claimed by appellant. The only rational conclusion is that she plunged the knife intentionally into the body, and this is the basis upon which we must consider the alleged errors to which our attention is directed.

[2] 1. In examination of one of the jurors upon his voir dire the district attorney made the following hypothetical statement of the burden of proof:

"You understand, do you not, Mr. Armstrong, that if the prosecution has established the fact that the defendant killed the deceased, and unless the prosecution also shows in their proof facts which would excuse the defendant from the crime of murder, or some other fact which would excuse the defendant from the crime of murder, or some other fact which would discharge her of any crime, malice is presumed, and the burden of proof is upon the defendant to show by a preponderance of the evidence that she was justified in what she did?"

This seems to have been approved at the time by the trial judge. The foregoing is not in the exact language of section 1105 of the Penal Code, to which section it was plainly designed to conform, but, conceding a measure of inaccuracy to the statement, it is clear that it was without prejudice, in view of the evidence in the case.

Appellant, in support of her claim that it embodied a wrong interpretation of the law, quotes the following from Perkins v. State, 124 Ga. 6, 52 S. E. 17:

"Murder does not consist merely in killing a human being. The killing must be done with malice. When the fact of the killing is shown, and the evidence adduced to establish the killing shows neither circumstances of justification or alleviation, malice may be inferred. Likewise, if the statement of the defendant admits the homicide without explanation, malice may be inferred from such admission. But if at the time of the admission the homicide is justified, such qualification of the admission

* * * robs it of the vital element of murder."

Herein, however, there was evidence of murder without the admission of defendant. Besides, the jury had the right to believe that at first she made no explanation, nor attempt at justification, and it may be added that her asserted theory of accident is so inherently improbable as to be worthy of no consideration.

[3] Apart from the foregoing, we may say the jury were fully and correctly instructed at the close of the trial, and directed to follow only those instructions. Hence it is apparent that, if any such error as claimed was committed, it was cured by the subsequent action of the court.

[4] 2. At most, it could be said that the district attorney was somewhat intemperate in the following statement contained in his closing address to the jury:

"You know what she will do, gentlemen of the jury. They ask you to excuse her. Why? Because he was full of booze, and because she had Indian blood in her, and probably a little booze aboard, too, and she was full of fight. Now, gentlemen of the jury, is that any excuse —is that any reason why you should turn her loose, and let her go back and mix a little more booze with that Indian blood and kill a man? That is exactly what will happen if you turn her loose; she will go back and kill another man."

We must assume that the district attorney was acting in good faith, that his remarks were in response to the argument of appellant's counsel, and we cannot say that the inference that she would commit another murder was unjustifiable, as a person capable of committing one murder might be liable to commit another. We need not refer to the cases on this subject. Much more objectionable statements on the part of the prosecuting officers have been held to be insufficient to warrant a reversal of a conviction of murder.

[5] 3. After the jury retired, the sheriff, in violation of section 1128 of the Penal Code, transmitted a communication to one of the jurors from his wife. This was heard by all the jurors, and was to the effect that anthrax had appeared among the juror's cattle on his ranch at Madison, and it included also the juror's direction in reply for the sheriff to have Dr. Alexander go out to the ranch as soon as possible. The sheriff communicated with Dr. Alexander, and the latter said he would go out in the morning. This was reported to said juror, and he said that would be all right. The argument is that the juror was thereby induced to agree to a verdict by reason of the urgent necessity for his presence at home. It is thought, also, that the circumstance may have unduly influenced other jurors. The point is emphasized by reason of the fact that a short time before the jury had requested a statement from the court of the penalty for manslaughter, thus evincing a consideration of the possibility of finding such verdict.

It is unfortunate that such incident occurred, and the sheriff should have consulted with the judge of the court before communicating with the jury; but we think it would be an unwarranted aspersion on the character of any of the jurors to hold that he would permit a circumstance like that to influence him to consent to a verdict against the defendant. Is it not more likely that the jurors were thereby influenced to reach a more favorable conclusion than otherwise? They certainly would have been warranted in finding a verdict of murder in the first degree, but they agreed upon the lesser offense. At any rate, under the rule as now recognized, we cannot presume that the irregularity resulted in prejudice to the defendant. People v. Disperati, 11 Cal. App. 469, 105 Pac. 617; People v. Cord, 157 Cal. 562, 108 Pac. 511.

Some cases are cited by appellant wherein somewhat similar situations were held to involve error and to raise a presumption of injury; but now, from the nature of the error itself, or from other circumstances, it must appear affirmatively that harm was done to the defendant. It would have been safer practice for the district attorney to show that the jurors were not improperly influenced. Notwithstanding, we do not think the case should be reversed for a failure to do so. The case of Stocks v. State, 91 Ga. 831, 18 S. E. 847—as well as some others—cited by appellant, involved more serious and distressing news than herein, relating, as it did, to serious illness in the family of one of the jurors. Of course, it is important that all of the safeguards for the protection of the jury from extraneous influences be scrupulously maintained, and we do not approve of the course pursued in this matter; but we do not think it should be accorded the significance for which appellant contends.

[6] 4. In her criticism of the instructions of the court appellant claims that "No. 8" involves error, for the reason that "it took from the jury the question of accidental killing." Appellant is mistaken. It simply stated the presumption that a person "is supposed to mean to do that which he actually, intentionally, and willfully does in fact do." Of course, it would be a contradiction in terms to say that a person accidentally does what he intentionally and willfully does. The instruction was probably unnecessary, as involving a self-evident proposition; but it was not erroneous.

The same objection is made to instructions No. 9 and No. 13, and is equally without merit. These were all hypothetical instructions, entirely inconsistent with the theory of accidental killing; but they left it to the jury to determine whether the facts, upon which they were based, were shown by the evidence. Indeed, we may say that the jury were fully instructed as to every phase of the law—every instruction requested by the de-

fendant having been given—and there seems to be no ground for criticism as to the action of the court in that respect.

The sum of the whole matter is that the record clearly reveals the guilt of the defendant, and she was fortunate in securing the verdict that was rendered, and any errors that may have been committed should be disregarded as without prejudice, if such are to be overlooked in any criminal case. People v. Henry Lee, 168 Pac. 694.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

---

37 Cal. App. 352

## PASADENA RAPID TRANSIT CO. v. MUNSON. (Civ. 2168.)

(District Court of Appeal, Second District, California. May 27, 1918. Rehearing Denied June 25, 1918.)

1. APPEAL AND ERROR ⊜907(3)—REVIEW—PRESUMPTIONS.
On appeal upon the judgment roll without a bill of exceptions, it must be presumed that there was evidence to support a finding of the trial court.

2. CORPORATIONS ⊜90(7)—SUBSCRIPTION TO STOCK—CONSTRUCTION OF FINDINGS.
In an action on a note given for the price of stock subscribed in plaintiff corporation, finding that the entire available stock of the corporation, which had been issued to another corporation for property transferred to plaintiff, had been returned to the treasury of plaintiff, to be issued to subscribers, imported a finding that the stock was "legally" returned, so that the same could be delivered to defendant without injury to his rights.

3. CORPORATIONS ⊜76—"SUBSCRIPTION" TO STOCK—NATURE OF CONTRACT.
A contract for an original issue of stock in exchange for property is in legal effect a "subscription" to stock, though not in the form of a subscription contract.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Subscription.]

4. CORPORATIONS ⊜83 — SUBSCRIPTION TO STOCK—CANCELLATION.
A corporation may as against all but existing creditors cancel a subscription to stock, especially where the cancellation relates to only a part of the shares subscribed for.

Appeal from Superior Court, Los Angeles County; George H. Cabaniss, Judge.

Action by the Pasadena Rapid Transit Company against S. M. Munson. Judgment for plaintiff, and defendant appeals. Affirmed.

James S. Bennett, of Los Angeles, for appellant. Porter & Sutton, of Los Angeles, for respondent.

WORKS, Judge pro tem. The appellant subscribed for certain shares of the capital stock of the respondent, and the subscription contract was consummated prior to the organization of the respondent. A promissory note was given by the appellant to cover a part of the amount subscribed by him, and this action was commenced to recover on the note. The plaintiff had judgment, and the defendant appeals.

After the respondent was organized, it issued all of its shares of stock; none of it, however, going to the appellant. A large block of the stock was issued to another corporation in payment for certain property which that corporation conveyed to the respondent; but on the same day that the shares were issued this second corporation transferred a considerable portion of its shares back to the respondent, "to be held," according to the findings of fact, "as treasury stock of plaintiff, and to be sold for the benefit of plaintiff, or issued to the subscribers for the capital stock of plaintiff." It is only out of this returned stock that the respondent is able to issue to the appellant any shares as and for the shares subscribed for by him. The appellant contends that this stock is not the stock for which the subscription was made, that he is entitled to an original issue from the treasury, that the consideration for the note has wholly failed, and that judgment should have been pronounced in his favor.

[1, 2] The theory behind the appellant's contention is, of course, that the stock which, alone, the respondent is able now to issue to him is charged with a contingent liability under the law (see R. H. Herron Co. v. Shaw, 165 Cal. 668, 133 Pac. 488, Ann. Cas. 1915A, 1265), different from the subscription or "trust fund" liability which would be incident to shares issued to him in the first instance, from the treasury of the respondent. The appellant does not, however, present such a record as enables him to make this contention. The appeal comes to us upon the judgment roll alone, without a bill of exceptions. Therefore, the trial court having found that the shares which were returned to respondent were to be held as treasury stock, and were to be issued in part, to the subscribers for the capital stock of the respondent, we are bound to assume that there was evidence to support the finding. Paine v. San Bernardino V. T. Co., 143 Cal. 654, 77 Pac. 659. The finding means, necessarily, that the stock was legally returned to the treasury, to be legally issued to subscribers, and without injury to their rights, if such a thing were possible under any state of facts which might have been presented to the trial court.

[3, 4] It is well settled that a contract for an original issue of shares of stock in exchange for property is in legal effect but a subscription to stock, even if it be not a subscription contract in form. Cook on Corporations, § 22. It is equally well settled that a corporation may, under certain circumstances, and certainly as against all but existing creditors, cancel a subscription to stock, especially if the cancellation relate to only a part of the shares subscribed for

(Thomas v. Wentworth Hotel Co., 16 Cal. App. 403, 117 Pac. 1041, 1046; Silica Brick Co. v. Winsor, 171 Cal. 18, 151 Pac. 425); and there is nothing in the record before us to show that the respondent had creditors at the time the shares of stock in question were returned to the treasury.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

---

(37 Cal. App. 540)

## GREER-ROBBINS CO. v. PACIFIC SURETY CO. (Civ. 2276.)

(District Court of Appeal, Second District, California. June 15, 1918. Rehearing Denied by Supreme Court Aug. 12, 1918.)

1. APPEAL AND ERROR ⟸757(1) — ALTERNATIVE METHOD — REVIEW — TYPEWRITTEN TRANSCRIPT.

Appellate courts will not look to typewritten transcripts, filed under the alternative method of appeal, to determine whether grounds exist for reversal, where no part of the record is printed in the brief, as expressly required by Code Civ. Proc. § 953c.

2. APPEAL AND ERROR ⟸768—ALTERNATIVE METHOD — REVIEW — TYPEWRITTEN TRANSCRIPT—PRESUMPTIONS.

Although Code Civ. Proc. § 953c, requiring portions of the record to be printed in the briefs, was not complied with, where statements concerning the findings of fact, conclusions of law, and the judgment are made in appellant's brief, and are not challenged in respondent's brief, the court will assume that they are correct.

3. INSURANCE ⟸513 — INDEMNITY POLICY — INSTRUCTION.

Indemnity policy, binding insurer to defend any suit against the insured to enforce a claim for damages covered by the policy, whether groundless or not, required the insurer to defend every action in which the complaint showed a claim for damages covered by the policy, notwithstanding the suit was groundless and was defeated, and if the insurer failed to defend it was liable to the insured for the cost and expenses of defending.

4. APPEAL AND ERROR ⟸757(1) — ALTERNATIVE METHOD — REVIEW — TYPEWRITTEN TRANSCRIPT.

In the absence of compliance with Code Civ. Proc. § 953c, no statement of the respondent in his brief may take the place of the reproduction of the record as required by such section, unless assented to by the appellant.

5. APPEAL AND ERROR ⟸916(3)—PRESUMPTIONS.

In action on policy, by which defendant agreed to defend against actions based on liabilities covered by the policy, where insured sought to recover costs and expenses of defending suit, which insurer failed to defend, and the record on the insurer's appeal failed to show whether the insured's complaint disclosed that the complaint in the other action stated a cause of action, the court on appeal was bound to assume, in support of the judgment, that insured's complaint made such showing.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by the Greer-Robbins Company against the Pacific Surety Company. Judgment for plaintiff, and defendant appeals by the alternative method. Affirmed.

Goodrich & Martinson, of Los Angeles, for appellant. James, Smith & McCarthy, of Los Angeles, for respondent.

WORKS, Judge pro tem. [1] This appeal comes to us under the alternative method. The constant lapses, on the part of the profession, from a proper observance of the rules of practice governing the prosecution of appeals under this method, have made it, to us and to the other appellate courts of the state a dreadful alternative indeed. Once again, at more than a risk of repetition, we call attention to the fact that, under the method and according to the provisions of section 953c of the Code of Civil Procedure, the parties must print in their briefs "such portions of the record as they desire to call to the attention of the court," and that "appellate courts will not look to the typewritten transcript filed under the alternative method of appeal for the purpose of determining whether ground exists for the reversal of the judgment appealed from." Barker Bros. v. Joos, 171 Pac. 1085.

[2] In this case the reproduction of parts of the record in the briefs is so scant that we are enabled to pass upon the questions presented only upon an indulgence in certain assumptions which the law permits us to make. Not enough of the pleadings is printed in the briefs to enlighten us as to the character of the litigation; and we are not informed, in the manner contemplated by section 953c, of anything concerning the final action of the trial court in the suit, for no part of the findings of fact, conclusions of law, or judgment is reproduced in the briefs. As, however, certain statements concerning these matters are made in the brief of the appellant, as they are not challenged in the respondent's brief, and as the respondent argues the case upon the assumption of their correctness, we will, in turn, assume that they are correct. The action appears, then, to be one in which the plaintiff, which was engaged in the business of advertising and selling automobiles, sued the defendant to recover upon an automobile liability policy.

The policy, speaking now in general terms, had been given to insure the plaintiff against loss or expense resulting from claims against plaintiff for damages on account of bodily injuries or death to be suffered by any person through the operation of plaintiff's automobiles. One Hill had brought an action for such damages against the plaintiff, but had failed to procure judgment; and the present action was commenced to recover the costs and expenses incurred by the plaintiff in defending against that suit. One paragraph of the complaint in this action and one paragraph of the answer are printed in the appellant's brief, and by them it is shown that the plaintiff alleged, and the defendant admitted, that the person who was driving a certain car of plaintiff, at the time Hill

claimed to have been injured by it, was doing so for his own pleasure, and that he was not then engaged in the business of the plaintiff. The parties concede that the policy was not broad enough to insure against damages recovered in such a case, but the present action, brought to recover the costs and expenses of defending the Hill suit, as already stated, was prosecuted under certain special provisions of the policy, under which the plaintiff claims the right to recover the amount of such costs and expenses, notwithstanding the fact that the defendant could not have been called upon to respond to any claim of plaintiff for damages which might have been recovered by Hill in his action. In this present action the plaintiff had judgment according to the statements of counsel in the briefs, and the defendant appeals.

The appellant contends that the complaint did not state a cause of action, that neither the findings nor the judgment is supported by the evidence, and that the findings do not sustain the judgment. In effect, the contention of the appellant principally hinges on the presence in the complaint of the allegation that the person in charge of the respondent's automobile at the time of the alleged injury to Hill was operating it for his own pleasure. The policy is printed in full in the appellant's brief, and it is conceded by counsel that this action was grounded upon two of its paragraphs which were as follows:

"In addition to the limits hereinafter specified, if any suit is brought against the assured to enforce a claim for damages covered by this policy, the company will defend such suit, whether groundless or not, in the name and on behalf of the assured. The expenses incurred by the company in defending such suit, including costs, if any, taxed against the assured, will be borne by the company, whether the judgment is for or against the assured.

"If any suit, even if groundless, is brought against the assured to recover damages on account of injuries or deaths covered by this policy, the assured shall immediately forward to the company, or to the office of its nearest authorized general agent, every summons or other process served, or copy thereof. Thereupon the company will, at its own cost and expense, defend such suit in the name and on behalf of the assured."

The company refused to defend against Hill's complaint, although it was requested to do so; the process which was served in the action having been delivered to it as required by the policy. It will be noted that, in each of the paragraphs quoted above, the suits which the appellant agrees to defend are stated to be those brought to recover damages upon claims "covered by this policy."

[3] The appellant contends, in effect, that whether a given claim against the respondent is covered by the policy is to depend, under the paragraphs quoted, upon the outcome of the action brought to enforce such claim; that, if the litigation upon a given demand develops a case in which the claim is not covered by the policy, then and in that event, and for that reason only, the appellant may assert that the action was not one which it was bound to defend; that, in short, whether there be an obligation to defend may be determined after the time for the performance of the obligation has entirely elapsed, instead of before it has commenced to run. If the position of the appellant were adhered to in all cases, it would work an alteration in the very language of the policy. It would change its terms from those imposing an obligation evidenced by the words "will defend" to terms laying a duty indicated by some such words as "should have defended." Moreover, it would altogether wipe out the obligation to defend, no matter how strong a case were made on the face of a complaint for damages against the assured, for under such a rule the appellant need never defend. Upon an independent investigation of the facts in each case, or without investigation, the appellant could decline to defend, thus imposing upon the assured, in every case, the obligation to defend itself, an obligation which certainly, under the policy, was intended to be discharged by the appellant in some cases. The result would be that the question whether the appellant "will defend," no matter what the form of the complaint in a given case—a question necessarily to be answered at the inception of a litigation—could be answered through the whim, caprice or judgment of the appellant itself. There is a more certain basis for a determination of the liability of the appellant to defend, and that basis is to be found in the allegations of the complaint in each action for damages against the respondent. We construe the policy to mean that it is the duty of the appellant, under its terms, to defend every action in which the complaint shows "a claim for damages covered by this policy." These views are in accord with those expressed in South Knoxville Brick Co. v. Empire State Surety Co., 126 Tenn. 402, 150 S. W. 92, 94, Ann. Cas. 1913E, 107, where a policy similar to the one now before us was construed.

[4, 5] We are forced, now, to return to the question of the failure of the parties to observe the provisions of section 953c of the Code of Civil Procedure. It is not shown to us, by the reproduction of any part of the record in the briefs, whether the plaintiff's pleading did, or whether it did not, show that the complaint in the Hill case stated or attempted to state a cause of action covered by the policy complained on, or whether the evidence showed, under any appropriate issue, what were the allegations of Hill's complaint. The respondent asserts in its brief that the complaint in the Hill case stated such a cause of action, but is silent on the question as to whether the fact was pleaded in the complaint in this action, or as to whether the evidence in this action showed it; but no statement of the respondent could take the place of the reproduction of the record, as required by section 953c, unless it were assented to by the appellant, and the appellant

has presented no brief since the respondent's brief was filed. We are bound to assume, however, in support of the judgment now appealed from, such a state of the record of the trial court, the contrary not appearing, as will support the findings. Paine v. San Bernardino V. T. Co., 143 Cal. 654, 77 Pac. 659. We will therefore assume, as the state of the pleadings in the Hill case was most material to a determination of this case, as we have already decided, that it appeared to the trial court, either from the pleadings or from satisfactory evidence under them, that the complaint in that action showed against the respondent a claim for damages which was covered by the policy now sued on.

The judgment is affirmed.

We concur: CONREY, P. J; JAMES, J.

---

37 Cal. App. 571

## Ex parte THURBER. (Cr. 612.)

(District Court of Appeal, Second District, California. June 17, 1918.)

1. EXTRADITION ⇐30—INTERSTATE—"FUGITIVE FROM JUSTICE."
A "fugitive from justice," in the sense of Rev. St. U. S. § 5278 (U. S. Comp. St. 1916, § 10126), is one who, having within the state committed a crime, when he is sought to be subjected to its criminal process, has left its jurisdiction and is found in another state.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fugitive from Justice.]

2. HABEAS CORPUS ⇐92(2)—EXTRADITION.
On habeas corpus by one arrested on an extradition warrant, the court cannot question the truth of the alleged facts constituting the offense and can inquire only as to whether accused was within the territory of the other state when the alleged offense was committed.

Petition by Seymour J. Thurber for a writ of habeas corpus. Petitioner remanded to custody.

Wm. M. Morse, Jr., and S. M. Johnstone, both of Los Angeles, for petitioner. Thomas Lee Woolwine, Dist. Atty., and J. W. Joos, Deputy Dist. Atty., both of Los Angeles, for respondent.

SHAW, J. Petitioner, who is in custody under a warrant issued by the chief executive of this state on a requisition made by the Governor of Illinois, seeks his discharge therefrom upon the grounds: First, that he is not a fugitive from justice; and, second, alleged insufficiency of the information which charges him with the crime of abandoning his wife and minor child, who were in destitute circumstances, without providing them with means of support.

[1] In our opinion, there is no merit in either point. The first contention is supported by affidavits which, in effect, tend to show that, prior to his leaving the state of Illinois, petitioner had made provision for the support of his wife and child, from which facts, if true, petitioner argues that he is innocent of the offense charged against him, and therefore could not be a fugitive from the justice of the demanding state. The expression "fugitive from justice," as used in the Revised Statutes, § 5278 (U. S. Comp. St. 1916, § 10126), regulating the extradition of fugitives from justice, has reference to a person who, having within the state committed that which by its law constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, has left its jurisdiction and is found in the territory of another state. Roberts v. Reilly, 116 U. S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544; Bailey on Habeas Corpus, § 129. The authorities go no further than to hold that inquiry may be made into the question of fact as to whether the accused was within the territory of the state when he is alleged to have committed the offense charged against him. If it be made to appear that he was not, then he could not have fled therefrom and could not be a fugitive from justice. Ex parte Reggel, 114 U. S. 642, 5 Sup. Ct. 1148, 29 L. Ed. 250; Bruce v. Rayner, 124 Fed. 481, 62 C. C. A. 501. Petitioner, however, concedes that he was in the state of Illinois at the date when the alleged offense was committed; hence such question of fact is not involved. He may, as claimed by counsel and as shown by the affidavits, be innocent of the offense charged against him; but neither the Governor upon whom demand is made for his requisition, nor the courts of this state, can inquire into the question of his guilt or innocence. Kingsbury's Case, 106 Mass. 223. Since no question is raised as to petitioner having been in the state at the time of the alleged commission of the offense with which he is charged, there can be no doubt as to his being a fugitive from justice when found in this state.

[2] As to the second point, petitioner does not attack the information upon the ground that it fails to allege the commission of an offense, but seeks by his affidavits to show that on the date when the offense is alleged to have been committed, as well as thereafter, he made provision for the support of his wife and child, with whose knowledge and consent he left Illinois. As above stated, the courts of this state are not empowered to inquire into the truth or falsity of the alleged facts constituting the offense. As shown by the record before us, petitioner is properly charged with the commission of a crime under the laws of the state of Illinois while within its jurisdiction, after which he departed from said state, and, having been found in this state, it was the duty of the Governor thereof, upon the documents presented, to honor the requisition made by the Governor of Illinois and issue the warrant under which he is held in the custody of Martin McCormick, an agent of the demand-

ing state, for return thereto to answer the charge.

It is therefore ordered that petitioner be remanded to custody.

We concur: CONREY, P. J.; JAMES, J.

37 Cal. App. 350

## TRACY v. DONOVAN. (Civ. 2138.)

(District Court of Appeal, Second District, California. May 27, 1918. Rehearing Denied by Supreme Court July 26, 1918.)

1. LANDLORD AND TENANT ⟸118(3)—TENANCY AT WILL—CREATION OF—OCCUPATION UNDER PAROL LEASE.

A person who took possession of farm land with consent of owner, under a parol agreement of a two-year term lease, became, on taking possession, a tenant at will.

2. LANDLORD AND TENANT ⟸114(2)—TENANCY FROM YEAR TO YEAR—CREATION OF—OCCUPATION UNDER VOID LEASE.

A person who entered into possession of farm land under a parol agreement of a two-year term lease became a tenant from year to year, upon payment to and acceptance by owner of annual rent.

3. LANDLORD AND TENANT ⟸120(2)—TENANCY AT WILL—NECESSITY OF NOTICE TO QUIT.

Where tenant took possession of farm land under a parol agreement for a two-year term lease, and occupied land for two years, paying owner annual rent, the tenancy is from year to year, and under Civ. Code, § 761, dividing estates into four classes, estates of inheritance, estates for life, estates for years, and estates at will, such tenancy is in nature of an estate at will, and under Civ. Code, § 789, cannot be terminated without notice to quit.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by Margaret Tracy, executrix (substituted for Brigid Shinners) against C. W. Donovan. Judgment of nonsuit and plaintiff appeals. Affirmed.

Alex Webster, of Paso Robles, and Wm. Shipsey, of San Luis Obispo, for appellant. Carlton W. Greene, of Paso Robles, for respondent.

CONREY, P. J. This is an action of unlawful detainer, wherein the plaintiff appeals from a judgment of nonsuit.

On the 1st day of October, 1913, the defendant entered upon the farm of the plaintiff, under a parol agreement of lease for a term of two years from that date, and has ever since remained in possession and farmed the land. The plaintiff was to receive as rental one-fourth of the crops raised on the land. This rental for each of those two years was paid. On September 29, 1915, the plaintiff visited the premises in question and orally stated to the defendant that she wanted him to vacate and that she had promised the place to another party. The plaintiff never served any written notice or demand upon the defendant until the 27th day of October, 1915. On that day she did serve upon the defendant a written demand for immediate surrender to her of the possession of said premises. The defendant having failed to comply with this demand, the plaintiff commenced this action on the 9th day of November, 1915. All of the foregoing facts appear from the evidence produced by the plaintiff at the trial of the case.

Respondent contends that where a tenant enters agricultural land under oral agreement for lease for two years, and occupies the land for the two years, rendering an annual rent, which is accepted by the owner, the tenancy thus created must be terminated by the notice prescribed in section 789 of the Civil Code, before the tenant is liable to an action in unlawful detainer. This is the principal ground upon which the motion for nonsuit was made by the defendant and granted by the court. The rule at common law, as established by both English and American decisions, appears to be that, although a lease by parol may be void, as exceeding the period allowed by the statute of frauds, or the tenancy may, according to circumstances, be construed at will, or perhaps from year to year, it will nevertheless be governed, in respect to its termination, as well as to its other incidents, by the terms of the demise, and will expire at the time limited by those terms, without notice to quit. See Taylor's Landlord and Tenant (9th Ed.) §§ 80, 469, 471, with cases there cited. But in California this common-law rule has been changed by statute:

"A tenancy or other estate at will, however created, may be determined by the landlord's giving notice in writing to the tenant, in the manner prescribed by section 1162 of the Code of Civil Procedure, to remove from the premises within a period of not less than thirty days, to be specified in the notice." Civ. Code, § 789.

"After such notice has been served, and the period specified by such notice has expired, but not before, the landlord may re-enter, or proceed according to law to recover possession." Civ. Code, § 790.

[1-3] When the defendant entered into possession of plaintiff's land, the plaintiff consenting thereto, under the circumstances shown by the evidence, defendant became a tenant at will. Carteri v. Roberts, 140 Cal. 164, 73 Pac. 818. When thereafter the defendant paid and the plaintiff accepted an annual rent for the premises, the defendant became a tenant from year to year. Was this an "estate for years," or does it come within the definition of an estate at will? Civ. Code, § 761. If the latter, then section 789 of the Civil Code is applicable to the case, and the tenancy cannot to be terminated by the landlord without the notice thereby required. We are satisfied that it is a form of tenancy at will. Jones on Landlord and Tenant, §§ 192, 194; Tiffany on Landlord and Tenant, p. 120.

"The tendency of the courts is to construe all general or doubtful tenancies into estates from year to year; and parol leases, which, under the statute of frauds, constitute estates at will, are turned into estates from year to year by the

payment and acceptance of rent, or other circumstances indicating that that is the intention of the parties. * * * Such estates partake of the nature of an estate at will." Rosenblat v. Perkins, 18 Or. 156, 22 Pac. 598, 6 L. R. A. 257.

Therefore it was held that, under an Oregon statute similar to section 789 of our Civil Code, the tenancy would not be terminated without the notice required by the statute.

The judgment is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

---

(37 Cal. App. 363)

WILLIAMSON v. PRATT. (Civ. 1836.)

(District Court of Appeal, Third District, California. May 28, 1918. Rehearing Denied by Supreme Court July 26, 1918.)

1. BOUNDARIES ⟸37(1)—EVIDENCE.
In ejectment proceeding involving a boundary under an uncertain description in a deed, a finding for defendant *held* supported by the evidence.

2. BOUNDARIES ⟸1 — CONSTRUCTION OF DEEDS.
The construction placed upon a description in a deed, as shown by the conduct of the grantor and grantee for a long period of time with relation to a boundary line, is entitled to the gravest consideration, unless the terms of the deed are clear and certain to the contrary.

3. EVIDENCE ⟸460(6) — PAROL EVIDENCE — DEEDS.
Where a deed gave a road as a boundary but it was not clear what road was intended, it was proper to show by parol evidence the identity of the road.

4. BOUNDARIES ⟸3(3) — CONSTRUCTION OF DEED.
When monuments mentioned in a deed are identified, they control both courses and distances given, whether they were seen by the parties to deed or not.

5. BOUNDARIES ⟸48(5) — ACQUIESCENCE IN LINE ESTABLISHED.
Where grantor and grantee, under an uncertain description in the deed, established a certain line as the boundary, built fences, and made improvements, a successor of either is estopped from maintaining that such line is not the true boundary.

Appeal from Superior Court, El Dorado County; N. D. Arnot, Judge.

Action by Hector Williamson against Henry C. Pratt. Judgment for defendant, and plaintiff appeals. Affirmed.

Abe Darlington, of Placerville, for appellant. H. D. Jerrett, of Sacramento, for respondent.

BURNETT, J. The action is in ejectment; the land in dispute being situated in El Dorado county and consisting of a strip 71.8 feet wide at one end and running to a point 1,231.4 feet distant, containing 1.7 acres, of which plaintiff claims to be the owner.

Both parties to the action claim title from Catherine Stronach, who, on the 22d day of April, 1901, was the owner of all of a certain tract of land designated as lot 2. On said date she conveyed to her son Wallace C. McBeath a portion of said lot 2 described as follows:

"Commencing at the quarter section corner on the north boundary of section one in township 10 north of range 9 east, M. D. M.; thence south 18 chains and 41 links to a post on west side of road; thence north 22 degrees west 19 chains and 95 links to post on east side of road; thence west 7 chains and 50 links to place of beginning, containing 20.86 acres more or less."

On the 9th of April, 1902, said McBeath and his wife conveyed said land to one Schoenagle, and on the 27th of August, 1910, said Schoenagle conveyed it to plaintiff, Williamson.

On June 6, 1908, Catherine Stronach conveyed to Catherine A. and Bruce McBeath (another son) another portion of said lot 2, described as follows:

"Situate in section one, township 10 north of range 9 east, Mt. Diablo base and meridian, bounded west by Weber Creek road, east by the Coloma wagon road; north by the lands of Menardi and south by the lands of C. P. R. R. Co., containing 17 acres more or less."

Subsequently, Catherine A. McBeath conveyed her undivided one-half interest in said land to Bruce McBeath, who, on December 3, 1909, conveyed all his interest therein to defendant, Pratt. The action was commenced March 8, 1915.

The Weber Creek road, referred to in the last-mentioned deeds, was located through lot 2 in 1885, and there has been no change in its location since 1891 or 1892. Defendant has had possession of the disputed tract since acquiring title to it, has kept it fenced, and has cultivated portions of it for three or four years.

C. H. Wildman, county surveyor of El Dorado county, was called as a witness by plaintiff. He described the manner in which he made a survey of the property called for by the deed to plaintiff. He stated that there was on the ground nothing to indicate where the starting point mentioned in the deed was, so he established a quarter section corner according to the rules of the general land office. From there he ran the west line to the southwest corner. The second call in the deed is: "East 15 chains and 5 links to a post on west side of road." The surveyor stated that he ran this line to a point on the east side of the Weber Creek road, which constitutes the southeast corner of the property in controversy and which is 71.8 feet east of the fence of defendant; that if the stake was set on the west side of the road "the survey would not close or come anywhere near closing." It is argued by appellant that the insertion in the description of the word "west" was an error and that it should have been "east." Or, if it was intended as written, it is still west of a road which is approximately 450 feet east of the Weber Creek road. Respondent, on the other hand, claims that no error was committed

and that it was the intention of Catherine Stronach, by the use of the word "road" twice in said description and by the use of the term "Weber Creek road" in the description in the second deed, to make said Weber Creek road the boundary line between the two properties.

The testimony of the tax collector showed that from 1911 onward the following property was assessed to defendant and the taxes thereon levied paid by him: "Lot 2 of northeast quarter, lot 3 of northwest quarter, less 20.86 acres of lot 1." It was stipulated that said 20.86 acres had been assessed to plaintiff and his grantors.

[1] While it may be conceded that the surveyor's testimony is strongly in favor of appellant's contention, and that, if we follow the courses and distances prescribed in the deed to plaintiff, we reach the conclusion that he has the legal title to the property in controversy, yet, from a review of the whole record, we are entirely satisfied that the evidence is sufficient to support the finding of the lower court, and that the decision is just and should be upheld.

In the first place, the parol evidence, which was admitted without objection, shows without any conflict that the intention of the original grantor, Mrs. Catherine Stronach, was to make the said Weber Creek road the eastern boundary line of the tract conveyed by her to her son Wallace C. McBeath. The latter testified:

"I owned the land back of the road a short distance, and my mother owned a strip along in front of my land, and I wanted a frontage out on the road, and I bought the piece lying between my piece and the county road to get a frontage out on the road, and that is what she described in the deed."

He further stated that a survey was made for the purpose of getting the description to put in the deed, and that the present county road (the Weber Creek road) was there at the time. Furthermore, that what is marked on the map "approximate course of old road" was not traveled at all in his day.

[2, 3] Again, it is perfectly plain that the parties understood and so interpreted the deed as conveying the land only to said Weber Creek road. This is shown by the fact that the grantee took possession of such tract and no more, and afterward the grantor conveyed the disputed tract to another son; and fences were built and the land was cultivated and improvements made thereon in accordance with the theory that the Weber road was the boundary line. Moreover, during all the years from 1901 to 1915 no claim was made by any one that the description in the deeds to plaintiff and to his predecessors in interest covered the land in controversy. Indeed, from the acts and declarations of the parties in interest, there can be no doubt whatever that they understood and intended the deed to convey to said road as was stated by said Wallace C. McBeath. It cannot be doubted that the construction placed upon a description in a deed, as shown by the acts and conduct of the grantor and his grantees, and the manner in which they have exercised their respective rights under their deeds for long periods of time with relation to a boundary line, is entitled to the gravest consideration in the determination by a court of the location of such line. Hamm v. City of San Francisco (C. C.) 17 Fed. 119; Truett v. Adams, 66 Cal. 218, 5 Pac. 96.

Of course, if the terms of the deed were clear and certain to the contrary, no such significance could be attached to the conduct of the parties. If the description be so definite and accurate as to exclude doubt, it must be applied as found, notwithstanding a different construction may be indicated by the acts and declarations of the parties. But such is not the case here. The deed contains a reference to a natural monument, that is, to a road, and the deed itself does not make it plain what road was intended. It was proper therefore to show by parol evidence the identity of this object. In Colton v. Seavey, 22 Cal. 497, it was held that:

"Parol evidence is admissible to explain the location of the objects mentioned in the description of a deed, and thus fix the boundary lines of the tract conveyed."

The proposition, though, is elemental and needs no further discussion. It is equally plain that the conduct and declarations of the parties, to which we have referred, leave no room for doubt that the Weber road was the monument referred to in the deed.

[4] But it is conceded that, if the call in the deed, "thence south 18 chains and 41 links to a post on west side of road," is to be construed as designating a post in the west side of the Weber road, then the deed does not include the land in controversy. The evidence being such that we have a right to read that call as though it read, "thence south 18 chains and 41 links to a post on west side of Weber road," the familiar question arises as to the relative importance of monuments and of courses and distances in the construction of a deed. The proposition needs only to be stated to suggest an answer. "When monuments mentioned in a deed are identified, they control both courses and distances given, whether they were seen by the parties to the deed or not." Anderson v. Richardson, 92 Cal. 623, 28 Pac. 679. This rule is adopted because it is most likely to lead to the discovery of the intent of the parties. Piercy v. Crandall, 34 Cal. 334. All authorities on the subject assign courses and distances the lowest scale in evidence as being least reliable. Galbraith v. Shasta Inn Co., 143 Cal. 94, 76 Pac. 901.

If we follow this well-established rule, we may find, as stated by the county surveyor, that the distances do not correspond with two of the calls in the deed, and that there is a variation in one of the courses; but this is not of commanding importance. We know that such mistakes are quite frequent, and

it is no reflection upon the capacity of said witness to suggest the possibility of a mistake in his survey. At any rate, he admits that he found no monument marking the northwestern quarter section corner, which was the initial point of the survey, and that he had to locate it by means of the other corners which were definitely marked. But, assuming that his survey was substantially accurate, we do not know that said corner was similarly located in and by the survey upon which the deed was based.

The one who made the first survey was not called as a witness, but it must be said that there is substantial evidence that his delineation of the tract to be conveyed did not pass east of the Weber Creek road. Bruce McBeath testified that he was present at the time of the earlier survey, and in reply to the question, "Do you remember of this survey crossing the present county road?" he answered: "No, it did not cross it; it came to a stake west of the present county road." It is quite clear that the surveyor could not have located the land as claimed by appellant without going across said road, and the testimony furnishes strong confirmation of the theory that a mistake was made either by him in the earlier survey or by the county surveyor in the later one. However that may be, we ascertain the controlling monument, and we have no difficulty in shortening the lines and changing slightly one of the courses to make the actual location on the ground correspond with the unquestionable intention of the parties to the deed.

[5] Moreover, conceding for the sake of argument that, according to the terms of the deed, the location of the eastern boundary line was and is doubtful, we must assume that this uncertainty was known to Catherine Stronach and her sons, and that they all agreed upon the Weber road as the boundary line between the two tracts. While no one has testified definitely to an express agreement to that effect, such would be a fair inference from the conduct of the parties. They established the road as a boundary line, built the fences accordingly, and Pratt's predecessor made improvements upon the disputed tract. And it was not until some seven years after Bruce McBeath had entered into possession of the eastern tract that the established line was questioned by Wallace McBeath's successor in interest. Under such circumstances, it is clear that he is estopped from maintaining the claim that the Weber road is not the boundary line.

In Loustalot v. McKeel, 157 Cal. 640, 108 Pac. 710, it is said:

"The rule universally sustained by the authorities is that where the boundary line between the lands of contiguous owners is doubtful or uncertain, and they by parol agreement fix and determine a dividing line between their respective tracts, said line being marked by the erection or maintenance of a fence or other equivalent structure along it, and thereafter the parties hold and occupy their respective lands to the boundary as so agreed on, the accuracy of such boundary line cannot be subsequently questioned by the parties establishing it, or by those claiming under either of them"—citing cases.

Other circumstances might be mentioned in confirmation of the soundness of the lower court's conclusion, but we deem it unnecessary to go further.

Viewing the whole record, we see no substantial merit in appellant's claim, and the motive for his conduct in the matter was probably not inaptly expressed by the trial judge in the statement: "He wants to hector Pratt." Manifestly, some one has blundered in the survey of the land.

Judge Cooley, in Diehl v. Zanger, 39 Mich. 601, said:

"Nothing is better understood than that few of our early plats will stand the test of a careful and accurate survey, without disclosing errors. This is as true of the government surveys as of any others, and, if all the lines were now subject to correction on new surveys, the confusion of lines and titles that would follow would cause consternation in many communities. Indeed, the mischiefs that must follow would be simply incalculable, and the visitation of the surveyor might well be set down as a great public calamity."

He proceeds to point out the importance of recognizing the established landmarks in locating lot and boundary lines, and concludes that a good engineer will not overthrow boundaries that have been settled in accordance with the principles of law.

The county surveyor herein though may not have been censurable for trying to locate the boundaries in accordance with the courses and distances, as he was probably not in a position to give due consideration and significance to the important circumstances to which we have adverted.

At any rate, we feel satisfied that the judgment should be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

---

37 Cal. App. 358

CHASE v. PETERS et al. (Civ. 2530.)

(District Court of Appeal, Second District, California. May 28, 1918.)

1. LANDLORD AND TENANT ⊂⊃288—SUMMARY PROCEEDINGS—STATUTES—CONSTRUCTION.
The summary proceeding for obtaining possession of real property is special, and must be restricted to the particular purposes expressed in Code Civ. Proc. §§ 1159–1179.

2. LANDLORD AND TENANT ⊂⊃290(5) — SUMMARY PROCEEDINGS—CROSS-COMPLAINTS.
In summary proceeding under Code Civ. Proc. §§ 1159–1179, no cross-complaint nor counterclaim is allowed.

3. LANDLORD AND TENANT ⊂⊃291(14) — UNLAWFUL DETAINER—DAMAGES—AMOUNT.
In unlawful detainer, the damages recoverable are those only which accrue during the actual period of the unlawful detention.

4. LANDLORD AND TENANT ⟹291(14)—UNLAWFUL DETAINER—EXTENT OF RECOVERY.
Under Code Civ. Proc. § 1174, as to unlawful detainer, no recovery is authorized of any money, the right to which accrued before the unlawful detention began, except arrears of rents.

5. LANDLORD AND TENANT ⟹291(5) — UNLAWFUL DETAINER — PERSONS AGAINST WHOM ACTION LIES.
Where the lease did not prohibit an assignment, but provided that the contract should bind the lessee and his assigns, and, prior to the accrual of any rents alleged to be due the lessee assigned the lease to a third person, the landlord in unlawful detainer could not recover the arrears of rents from the original lessee, since they are recoverable only from the person guilty of the wrongful detention.

6. LANDLORD AND TENANT ⟹291(5) — UNLAWFUL DETAINER—PARTIES.
Where the lease did not prohibit an assignment, but provided that the contract should bind the lessee and his assigns, and prior to the accrual of any rents alleged to be due the lessee assigned the lease to a third person, the original lessee was not a proper party in unlawful detainer by the landlord.

7. APPEAL AND ERROR ⟹1036(2)—HARMLESS ERROR.
In action of unlawful detainer, where the landlord erroneously made the original lessee and his assignee parties, seeking to recover arrears of rent, which were recoverable only from the assignee, the assignee could not complain that the lessee was not a proper party, and that the complaint was defective for misjoinder, since in any event the action was maintainable as to the assignee.

8. LANDLORD AND TENANT ⟹291(14)—UNLAWFUL DETAINER—AMOUNT OF RECOVERY—TAXES.
In unlawful detainer, tax charges paid by the lessor cannot be recovered either from the lessee or his assignee.

9. APPEAL AND ERROR ⟹1170(12)—PREJUDICIAL ERROR—AMOUNT OF RECOVERY.
In unlawful detainer, the trial court's permitting recovery of tax charges, and further permitting recovery from the original lessee of arrears of rent, with which he was not chargeable, were more than mere errors of pleading or procedure under Const. art. 6, § 4½, and could not therefore be disregarded as harmless.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by Charles A. Chase against Homer H. Peters, Jr., and others and Jack & Gill, a copartnership and the Hawk Company, a corporation, and others. From a judgment for plaintiff, defendants Homer H. Peters, Jr., Peters Investment Company, and Fidelity & Deposit Company of Maryland appeal. Judgment as to defendant Peters Investment Company modified and affirmed, and as to defendant Homer H. Peters, Jr., reversed, with directions.

Riley & Heskett and Wright & McKee, all of San Diego, for appellants. James E. Wadham and Glen H. Munkelt, both of San Diego, for respondent.

JAMES, J. In this action defendants, Homer H. Peters, Jr., Peters Investment Company, a corporation, and Fidelity & Deposit Company of Maryland, a corporation, have appealed from a judgment entered in favor of the plaintiff. The appeal of the last-named defendant was separately taken, and will be disposed of in the opinion filed in case Civil No. 2535, 174 Pac. 119.

In September, 1912, plaintiff made a written lease with defendant Homer H. Peters, Jr., leasing for a term of 99 years certain real property in the city of San Diego. Prior to October, 1916, Peters, Jr., assigned the lease and delivered possession of the premises to the defendant Peters Investment Company. The installments of rental for the months of November and December, 1916, and January, February, March, April and May, 1917, were not paid. A three-day notice in writing, requiring the payment of such rental to be made, was served upon the appellants. This notice contained the usual alternative demand for possession of the premises. Compliance was not made with the terms of the demand, and this suit in unlawful detainer followed. The terms of the lease required the lessee to pay all taxes assessed against the property. There was a failure on the part of those in possession of the premises under the lease to pay taxes in the year 1916 to the amount of $3,132.28. Plaintiff asked and was allowed judgment for the amount of the taxes, as well as for accrued rental, against both of these appellants. These taxes the lessor was obliged to pay to protect his property from liens. The action, as characterized by the plaintiff, was distinctly a suit to recover possession of leased premises because of conditions broken, brought under the provisions of sections 1159 et seq., Code of Civil Procedure. In his complaint the plaintiff set forth the facts concerning the lease transaction, showing the rent unpaid for the months named and also the amounts of the taxes which the lessor had been obliged to pay after default of the lessee in that particular. That the facts stated in the complaint, as we have briefly summarized them, were established by the evidence, is not disputed here. Homer H. Peters, Jr., and his successor under the lease, the Peters Investment Company, objected, both by demurrer and answer, to the complaint on the ground that there was a misjoinder of parties defendant, and that different causes of action were improperly united.

The first contention amplified is that as appellant Peters, Jr., was not in possession of the premises at the time of the alleged unlawful detention thereof, he was not a proper party to the suit, and no judgment could be legally rendered against him. The point of misjoinder of parties defendant is also urged as to Peters Investment Company, but the argument in support thereof is not of the same potency as that available to defendant Peters, Jr., as will be developed in the discussion to follow. The second point assumes that both of the defendants were proper parties, but raises question as to the

propriety of allowing a recovery for taxes paid by the lessor, which payments should have been discharged by the lessee or his successor; that this cause of action was one distinctly upon contract, and could not be joined in a suit where the special relief authorized by the chapter dealing with the unlawful or forcible detention of real property is sought.

[1-3] The summary proceeding provided for the obtaining of possession of real property is special, and must be restricted in its use to the particular purposes expressed in the sections of the Code embraced within chapter 4, title 3, Code of Civil Procedure. The mode and measure of the plaintiff's recovery are therein limited. The law on this subject has been construed with strictness, for the relief authorized in some particulars is penal in its nature. The defendant is brought into court to answer within three days after issuance of summons (section 1167); amendments to the complaint are provided to be made without terms (section 1173); in the judgment the rents found to be due and damages may be trebled (section 1174). Other provisions designed to hasten the recovery of possession of the property as the main relief are included, which are all different from those affecting civil actions generally. A cross-complaint or counterclaim is not allowed. Arnold v. Krigbaum, 169 Cal. 143, 146 Pac. 423, Ann. Cas. 1916D, 370. Rents accrued at the time of the commencement of the action are allowed to be recovered only because the statute so provides (section 1174). These rents are added to the damages for the unlawful detention. Under the last-mentioned head only those damages accruing during the actual period of the unlawful detention are recoverable. Under the old Practice Act, the statute provided for recovery of "rents and profits during the detainer." In the case of Howard v. Valentine et al., 20 Cal. 282, decided while the old statute was in effect, the court reversed a judgment allowing recovery for rents accruing prior to the commencement of the period of unlawful detention, and said:

"* * * The case provided for in section 13, limits the recovery to rents accruing after the possession of the tenant has become unlawful, and rents prior to that time are not recoverable. * * * The error in this case is that rents are claimed which accrued anterior to the detention, and before the steps had been taken vesting in the plaintiff a right of action." Iburg v. Fitch et al., 57 Cal. 189.

We have presented, then, the view, illustrated, as we think, both by a consideration of the terms of the statute and the decisions, that the summary proceeding authorized by the Code and here adopted by the plaintiff is one which is, as to its prosecution and remedy, within the scope of its application, exclusive and limited.

[4, 5] The statute does not authorize the recovery of any money the right to which accrued before the unlawful detention began, except arrears of rents. And this recovery can only be had against the person guilty of such detention, for the main thing sought is the possession of the property. Arnold v. Krigbaum, supra. Defendant Peters, Jr., prior to the accrual of any of the rents alleged to be due plaintiff, had transferred the lease and possession thereunder to defendant Peters Investment Company (this was alleged affirmatively in the complaint and determined in the same way by the findings of fact). The lease in none of its terms prohibited the original lessee from assigning or transferring his rights, but did provide that the obligations of the contract should bind the lessee, his "grantees and assigns." In Ben Lomond Wine Co. v. Sladky, 141 Cal. 622, 75 Pac. 334, a proceeding similar to this, the court said:

"It would seem to require no argument to show that the summary proceedings provided, as the title to the chapter relating to them states, 'for obtaining possession of real property in certain cases,' will not lie against the mere assignee of a lease, who has again assigned and delivered possession to his assignee. * * * It is also entirely immaterial, so far as Sladky (the assignor) is concerned, whether or not he had been guilty of a violation of covenants of the lease. He was not guilty of unlawful detainer in retaining possession of the premises after breach of covenants, if there was a breach, so long as notice requiring the surrender of possession of the premises was not served upon him (Schnittger v. Rose, 139 Cal. 656 [73 Pac. 449]), and, the lease not forbidding an assignment, he certainly had the legal right to assign it and deliver possession of the premises to the assignee, at any time before service of the notice to quit. * * * Not being guilty of an unlawful detainer, * * * he could not be liable for damages in the summary proceeding provided by statute therefor, for the only damages recoverable in such a proceeding are the damages caused by the unlawful detainer. * * * For such damages as may have been suffered by plaintiff by reason of any breach of the covenants of the lease by Sladky while he was a tenant under the lease and lawfully in possession of the premises thereunder, plaintiff must resort to the ordinary action, and cannot take advantage of the summary proceeding designed solely to enable him to speedily recover possession of the demised premises and put an end to the lease. * * * The statute is so plain and unambiguous that it is unnecessary to cite authorities in support of the proposition that an assignee who has assigned the lease and delivered possession of the demised property to his assignee prior to the service of the notice to quit does not come within its terms."

[6, 7] Considering the first objection urged by the defendants named, in the light of what has been said, we find no difficulty at all in agreeing with appellant Peters, Jr., that he was not a proper party to the action; that as to him, by reason of the facts, a suit in unlawful detainer could not be maintained. The same objection, if considered tenable as a formal criticism of the complaint on the part of the Peters Investment Company, does not show that such defendant has suffered any prejudice by reason of the action of the court in overruling this objection. The investment company was the tenant in posses-

sion of the property, responsible for the payment of the charges under the lease agreement, and as to it the action could be maintained.

[8] The second objection, that as to the combining of the cause of action for recovery of taxes paid by the lessor with the cause of action for rent and possession, is available to both appellants, and should be sustained. The tax charges could not be recovered in an unlawful detainer suit. They could not be classed as damages, for damages could only arise after the retention of possession had become unlawful.

[9] Respondent urges us to apply the provisions of section 4½ of article 6 of the Constitution as a specific to cure these errors, and argues that no miscarriage of justice can be said to have accompanied the judgment. But, in our opinion, the cloak of the Constitution in the particular provision referred to cannot be made to cover the case. The forms of law provided in the establishment of the different character of actions are substantial, and a party is entitled to assist that he be compelled to answer and submit to judgment only when brought into court in an action properly framed in its particular class. A disregard of this right is more than a mere error "of pleading or procedure," such as is mentioned in the constitutional provision cited.

The findings of fact are quite full, and as to the defendant Peters Investment Company, the tenant holding unlawfully, a new trial will not be necessary, and obviously it will not be necessary to have a new trial in order to give appellant Peters, Jr., the relief to which he is entitled.

The judgment as entered against Peters Investment Company is modified by deducting therefrom the amount shown by the findings of fact to have been awarded on account of taxes paid by the plaintiff. As so modified, the judgment is affirmed, with costs to appellant.

The judgment as to appellant Homer H. Peters, Jr., is reversed, and the trial court is directed to enter judgment in favor of said defendant-appellant in accordance with the views herein expressed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

---

(37 Cal. App. 815)

CHASE v. PETERS et al. (Civ. 2535.)

(District Court of Appeal, Second District, California. May 28, 1918. Rehearing Denied by Supreme Court July 26, 1918.)

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by Charles A. Chase against Homer H. Peters, Jr., and others and the Fidelity & Deposit Company of America. Judgment for plaintiff, and the Fidelity & Deposit Company appeals. Judgment as to appellant reversed with directions.

Joe Crider, Jr., of Los Angeles, and Doolittle & Morrison, of San Diego, for appellant. James E. Wadham and Glen H. Munkelt, both of San Diego, for respondent.

JAMES, J. This is an appeal taken from a judgment entered in favor of the plaintiff, the action being one to recover possession of real property because of its alleged unlawful detention. The facts in the case are in the main set out in the opinion filed this day, wherein the appeal of Homer H. Peters, Jr., and Peters Investment Company, codefendants with this appellant, is considered, that appeal being numbered Civil 2530, 174 Pac. 116.

The additional facts pertinent to be stated here are that, contemporaneously with the making of the lease, this appellant gave a bond or undertaking guaranteeing the faithful performance of the terms and conditions of the lease contract. In this unlawful detainer suit, by a second count in his complaint, the plaintiff showed the facts relative to the giving of the undertaking and the breach on the part of the persons holding under the lease to pay rental and to pay the taxes assessed against the real property. It was alleged that the plaintiff had been required to pay the taxes, and recovery was sought against this appellant for amounts of money so paid, also for rents which had accrued against the lessee. The contention of appellant is that the joining of the cause of action against it with a cause of action for the unlawful detention of the property, against the persons in possession, was improper. We have given full consideration to the point made in the opinion filed in case No. 2530. We refer to that opinion as expressing our conclusions in the matter of this appeal.

The judgment as against the appellant surety company is reversed, and the trial judge is directed, upon the findings of fact as made, to enter judgment for said appellant.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

---

(37 Cal. App. 319)

RIGGINS v. PATTERSON et al. (Civ. 2166.)

(District Court of Appeal, Second District, California. May 20, 1918. Rehearing Denied June 19, 1918. Denied by Supreme Court.)

1. BROKERS ⟸67(2)—EXCHANGE OF LAND—DOUBLE AGENCY.

An agent in exchange of property may not collect compensation from both parties unless each party had full knowledge of agreement of other to pay compensation.

2. TRIAL ⟸397(2)—BY COURT—SUFFICIENCY OF FINDINGS.

In action by agent for commission on exchange of land where court found that plaintiff was acting as agent for both parties, judgment for plaintiff cannot stand where there was no finding that both parties knew of the double agency.

3. BROKERS ⟸82(4)—COMPENSATION—PLEADING.

In action by broker for commission on exchange of land, there could be no recovery where it appeared that broker, unknown to parties was agent for both, although answer contained merely a general denial.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by Leslie B. Riggins against Charles C. Patterson and Frank Reeves. Judgment for plaintiff, and defendants appeal. Reversed as to Patterson and affirmed as to Reeves.

Robert H. Scott and Hutton & Williams, all of Los Angeles, for appellants. Thos. C. Ridgway, of Los Angeles, for respondent.

JAMES, J. This appeal is taken from a judgment entered in favor of the plaintiff for the sum of $500. It is presented on the judgment-roll alone. For cause of action plaintiff alleged in its complaint that on August 11, 1914, the defendant agreed in writing to pay the plaintiff the sum sued for as commission for services theretofore rendered by Leslie B. Riggins Company, a corporation, as real estate agent in procuring an agreement of exchange of properties belonging to the defendant Patterson for property belonging to one Denton and one Beggs. The answer made by the defendant first contained a denial of all the material allegations of fact embraced within the complaint. It was then set up as a further defense that the plaintiff, on the 8th day of August, 1914, was employed by Denton and Beggs to act as their agent and broker in procuring the alleged agreement for the exchange of real estate, and that Denton and Beggs agreed to pay the plaintiff as compensation for such services the sum of $600; that on or about the same date the plaintiff accepted the employment and did at all times subsequent thereto represent and act for said Denton and Beggs as their agent and broker, and while representing itself to be such agent procured from the defendant Frank Reeves an acceptance of said proposition to exchange the real property. As a third defense defendant alleged that, if any services had been rendered by the plaintiff, the same were voluntarily rendered and without any employment or authority or request from the defendant. The court made findings of fact determining: First, that prior to August 11, 1914, the plaintiff as real estate agent rendered services to the defendant in procuring an agreement of exchange of property belonging to the defendant Patterson for property belonging to Denton and Beggs; that defendant agreed on August 11, 1914, in writing, to pay the sum of $500 as commission for such services. There is a finding also that no part of the sum sued for had been paid. The court then further finds that on the 8th day of August, 1914, Denton and Beggs entered into an agreement with the plaintiff by which they employed the plaintiff as their agent in procuring the agreement of exchange and agreed to pay such agent the sum of $600 for such services. This finding follows:

"It is true that plaintiff's assignor accepted said employment and at all times subsequent to the 8th day of August, 1914, represented and acted for said Alice M. Denton and Hugh H. Beggs as their agent in procuring said agreement of exchange, and said plaintiff's assignor did on August 8, 1914, while representing itself to be the agent of said Denton and Beggs, procure from defendant Frank Reeves an acceptance of said agreement of exchange, and the court further finds that said acceptance was in writing indorsed upon and forming a part of said agreement of exchange signed by said Denton and Beggs, and that in said acceptance said defendant Reeves agreed to pay plaintiff's assignor the sum of $500 commission for services rendered."

The further finding made recites the depositing of deeds in escrow by the several parties to the transaction. It is contended on behalf of appellant that the findings do not support the judgment, in that it is not determined by the court that, at the time the agreement to pay commission was made, both parties to the exchange had knowledge of the fact of the agreement on the part of the other to pay commission to the agent.

[1] That the law is that an agent in acting in the matter of the sale or exchange of property may not collect compensation from both parties, unless it appears that each party had full knowledge of the facts concerning the agreement to pay such compensation, is not here in dispute. Respondent's answer to the contention advanced by the appellant is that the lack of knowledge on the part of either party is a matter of affirmative defense to an action brought to recover commission, and that such defense is not presented by the pleadings in this case. The second answer urged is that, conceding the pleadings were sufficient to present such an issue, in the absence of a finding upon the issue it will be presumed in support of the judgment that if such finding were made it would be adverse to the appellant. In so far as appellant Reeves is concerned, it does appear at least by inference from the finding that he had knowledge prior to the time of making his agreement to pay commission that Denton and Beggs had already agreed to pay the sum of $600 to the plaintiff on the same account. This appears from the fact that the court finds, first, that the agreement of exchange prepared by Denton and Beggs or offered by them contained the agreement on their part to pay commission, and that it was this agreement which was indorsed by Reeves or accepted by him in writing and by which acceptance he bound himself on his part to pay $500 as commission for the services of the plaintiff. It nowhere appears in the findings that appellant Patterson signed any acceptance of that agreement of exchange or had any knowledge of the agreement to pay commission as made by the other parties to it. The court finds merely, in substance, that Patterson deposited with a title or trust company a deed with instructions, which instructions were in accordance with the terms and agreements of the agreement of exchange. The facts as found by the court do not give to the plaintiff the character of a middleman from which it might be assumed that he was dealing as the agent of both parties with their knowledge; but the court particularly finds that plaintiff was employed as the agent of Denton and Beggs and that,

representing himself to be such agent to Reeves, he procured an acceptance of the agreement of exchange. In Glenn v. Rice, 174 Cal. 269, 162 Pac. 1020, it is said:

"The authorities, with practical unanimity, declare that if an agent is engaged by both parties to effect a sale of property from one to the other, or an exchange between them, not as a mere middleman to bring them together, but actively in inducing each to make the trade, he cannot recover compensation from either party, unless both parties knew of the double agency at the time of the transaction. The reason for the rule is that he thereby puts himself in a position where his duty to one conflicts with his duty to the other, where his own interests tempt him to be unfaithful to both principals, a position which is against sound public policy and good morals. His contract for compensation being thus tainted, the law will not permit him to enforce it against either party. It is no answer to this objection to say that he did, in the particular case, act fairly and honorably to both. The infirmity of his contract does not arise from his actual conduct in the given case, but from the policy of the law, which will not allow a man to gain anything from a relation so conducive to bad faith and double dealing. And the fact that the party whom he sues was aware of the double agency and of the payment, or agreement to pay, compensation by the other party, and consented thereto, does not entitle him to recover. He must show knowledge by both parties. One party might willingly consent, believing that the advantage would accrue to him, to the detriment of the other. The law will not tolerate such an arrangement, except with the knowledge and consent of both, and will enter into no inquiry to determine whether or not the particular negotiation was fairly conducted by the agent. It leaves him as it finds him, affording him no relief."

[2, 3] As the findings of fact in this case disclose that the plaintiff was attempting to act as the agent of both parties to the transaction, and it does not appear that either Patterson or Denton and Beggs knew of the double agency, as between these parties sufficient facts are not found to support the judgment as made. We think that even had the answer contained merely a general denial when the facts disclose conditions as shown by the findings, the rule of public policy adverted to in the decision in Glenn v. Rice, supra, would interpose to prevent relief being granted to the plaintiff. In our opinion, the further finding was necessary to be made in order that the judgment have validity, showing the necessary facts to relieve the case from the rule. We do not think that such a finding can be supplied by inference or presumption.

After complaint filed the cause of action herein was assigned by the Leslie B. Riggins Company to Leslie B. Riggins, and proper substitution made by order of court. For convenience we have referred in the foregoing to the Leslie B. Riggins Company as the plaintiff.

The judgment as against appellant Patterson is reversed; as against appellant Reeves, it is affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

---

37 Cal. App. 407

## WHEELER v. HOUSTON, GORE & LOY et al. (Civ. 2163.)

(District Court of Appeal, Second District, California. May 31, 1918.)

1. ATTORNEY AND CLIENT ⊂⊃166(2) — CONTRACT OF EMPLOYMENT — SUFFICIENCY OF EVIDENCE.

In attorney's action against two corporations to recover for services, evidence *held* not to show two separate contracts of employment of plaintiff, nor to show agreement that plaintiff's compensation should be divided and paid for separately by two defendants.

2. APPEAL AND ERROR ⊂⊃757(1)—PRINTING RECORD IN BRIEF—STATUTE.

Under Code Civ. Proc. § 953c, where counsel for appellant do not print in brief any part of record concerning order denying motion to strike out plaintiff appellee's bill of costs, or showing the motion or its grounds, subject is not properly presented to the appellate court.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Frank W. Wheeler against Houston, Gore & Loy, a corporation, and the West Coast Engineering Company. From the judgment, defendant Houston, Gore & Loy appeals. Affirmed.

J. C. Craig and Frank S. Adams, both of Los Angeles, for appellant. Hardy, Wheeler & Hardy, of Los Angeles, for respondent.

CONREY, P. J. This is an action against the appellant and West Coast Engineering Company, a corporation, to recover the sum of $500 alleged to be due the plaintiff for professional services rendered by plaintiff as an attorney at law. The complaint alleged that the services were reasonably worth $600, and admitted the payment of $100. Defendant Houston, Gore & Loy appeals from the judgment, which was for the sum demanded. Judgment by default was rendered against West Coast Engineering Company.

It is appellant's contention that only a small part of the services detailed by plaintiff were performed for appellant, and that the remaining services were performed by plaintiff for West Coast Engineering Company, and related to matters in which appellant could not and did not have any interest. Appellant further claims that there is no evidence by which the court could determine the value of the services actually rendered for appellant.

At the trial appellant conceded that the entire services rendered were worth $600, but not that all the services rendered were for appellant. From the testimony as printed in the briefs, it appears that at the time of plaintiff's employment there existed a contro-

versy between defendant corporations and the Commonwealth Bonding & Casualty Company concerning contract obligations which the defendants were seeking to enforce against the bonding company. The plaintiff was called to the office of appellant, where he met certain officers of defendant corporations, including appellant's president, Mr. Houston. Thereupon those gentlemen submitted to plaintiff for his examination several documents relating to the matter in hand and stated their case. The plaintiff advised them concerning the matter, and thereafter conducted negotiations which resulted in a settlement of the controversy. At an early stage of those negotiations an agreement was reached as to the amount of money which would be paid by the bonding company to appellant. Further services were thereafter rendered by the plaintiff, by which settlement was made between the bonding company and the West Coast Engineering Company, and thus the entire transaction was completed.

[1] The evidence does not show two separate contracts of employment of plaintiff by the defendants. Neither does it show or tend to show any agreement that the compensation of plaintiff should be divided and paid for separately by the defendants in proportion to the services to be rendered to them separately. It was a joint employment for the purposes of the entire transaction. If one part of the services rendered by the plaintiff was more difficult than another, and required more labor than another, and if, therefore, the West Coast Engineering Company ought to pay the larger portion of the fee, that is a proper matter for adjustment between the defendants; but it is not a matter with which the plaintiff should be concerned.

[2] Counsel for appellant in their brief further state that the court erred in denying appellant's motion to strike out plaintiff's bill of costs. But they do not print in their brief any part of the record concerning the court's order, or showing the motion or the grounds thereof. The subject, therefore, is not properly presented for consideration here. Code Civ. Proc. § 953c; Barker Bros. v. Joos, 171 Pac. 1085.

The judgment is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

178 Cal. 697

## DOOLITTLE v. McCONNELL. (Sac. 2605.)

(Supreme Court of California. Aug. 8, 1918. Rehearing Denied Sept. 5, 1918.)

1. LIMITATION OF ACTIONS ⟸127(4)—AMENDED COMPLAINT—NEW CAUSE OF ACTION.
In a suit against an estate for personal services rendered deceased, *held* the first and second amended complaints did not state a new cause of action barred by the statute of limitations.

2. LIMITATION OF ACTIONS ⟸127(2)—AMENDED COMPLAINT—NEW CAUSE OF ACTION.
Where there is no attempt to state a new cause of action in an amended complaint, but merely the addition of matters essential to make the original cause of action complete, the amendment, though made after the expiration of the period of limitations, relates back to the time of the commencement of the action.

3. PLEADING ⟸248(3)—AMENDED COMPLAINT—NEW CAUSE OF ACTION.
An amendment which changes the alleged date of a contract or the sum to be paid, or any particular of the matter to be performed, or the time or manner of performance, is permissible so long as the identity of the matter upon which the action is founded is preserved.

4. EXECUTORS AND ADMINISTRATORS ⟸431(2)—SUIT BY CREDITOR—IDENTITY OF CLAIM.
In suit against estate for personal services rendered deceased, the claim filed setting forth that services were rendered from 1902 to time of testatrix's death, and the amended complaints alleging a contract made in 1887, *held* there was no fatal difference between claim filed and the one upon which suit was brought, the date of the contract not being an essential in creditor's claim.

5. EXECUTORS AND ADMINISTRATORS ⟸227(1)—CREDITOR'S CLAIM—ESSENTIALS.
The purpose of a creditor's claim being to advise the representative of the estate of its nature, there is no requirement that it shall state the facts with all the detail necessary in a complaint, and its sufficiency is not to be tested by the rules of pleading.

6. PLEADING ⟸8(7)—CONCLUSIONS.
In suit against estate for personal services rendered deceased, parts of second amended complaint, alleging that certain things were done by plaintiff in pursuance of a certain agreement and statements of deceased, were not mere conclusions of law.

7. APPEAL AND ERROR ⟸1170(3)—PLEADING—REDUNDANT MATTER—FAILURE TO STRIKE—REVERSIBLE ERROR.
Failure of court to strike out from complaint redundant and irrelevant matter is no ground for reversal, in view of Code Civ. Proc. § 475, as to no error being regarded where it does not affect substantial rights.

8. EXECUTORS AND ADMINISTRATORS ⟸221(5)—SUIT FOR SERVICES RENDERED DECEASED—SUFFICIENCY OF EVIDENCE.
In suit by plaintiff niece against estate of her deceased aunt for personal services rendered deceased under a specific oral contract, conflicting evidence *held* sufficient to sustain verdict for plaintiff.

9. WILLS ⟸58(1)—ORAL CONTRACT TO DISPOSE OF PROPERTY—ENFORCEMENT.
If made prior to 1905, an oral contract to dispose of property on death in a particular way may be enforced.

10. PAYMENT ⟸76(1) — RECEIPT — QUESTION FOR JURY.
In suit by plaintiff niece against estate of her deceased aunt for personal services rendered deceased, under a specific contract, whether receipt given by plaintiff was an admission of full payment *held* for jury.

11. EXECUTORS AND ADMINISTRATORS ⟸227(4)—CLAIM AGAINST ESTATE—VERIFICATION.
Where verification by plaintiff's attorney of claim filed against estate was in substantial compliance with Code Civ. Proc. § 1494, *held* objection that attorney did not have actual knowledge of facts supporting claim would not be sustained, vouchers and proofs not having been called for, and no objection made until rejection of claim and bringing of suit thereon.

Department 2. Appeal from Superior Court, Sacramento County; Wm. M. Finch, Judge.

Suit by E. Phœbe Doolittle against Thaddeus C. McConnell, as executor of the estate of Ellen M. Wilson, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

C. E. McLaughlin and White, Miller, Needham & Harber, all of Sacramento, for appellant. Grove L. Johnson, of Sacramento, Wm. M. Sims, of San Francisco, and Jay L. Henry (F. A. Plank, of San Francisco, of counsel), for respondent.

MELVIN, J. Defendant, as executor of the estate of Ellen M. Wilson, deceased, appeals from a judgment based upon a suit upon a creditor's claim. The amount of the judgment was $15,000.

Mrs. Wilson died in 1907. By her will all of her property was disposed of in a manner ignoring her niece, the plaintiff herein; her son, defendant herein, being the principal beneficiary under the testament.

The will was admitted to probate in 1908, and within the statutory time plaintiff presented a creditor's claim for $25,000 for personal services rendered her aunt, Mrs. Ellen M. Wilson, under a specific contract. It was set forth in the said claim that the services were rendered from August 6, 1902, to the time of Mrs. Wilson's death. This claim having been rejected by defendant, as executor of the estate of his mother, suit thereon was entered on June 10, 1908. The original complaint was amended in 1909, as appellant contends by abandoning the original contract as alleged in the creditor's claim and counting upon one entirely different—a contention which we shall presently examine in detail. Upon the amended complaint two trials were held before juries, each trial resulting in a substantial verdict in favor of plaintiff, but each judgment was on motion set aside and a new trial was granted. Upon the third trial, in 1916, at which another judge presided, plaintiff was permitted to file a new amended complaint and was again victorious before a jury. No motion for a new trial was made, but this appeal is prosecuted from the judgment.

[1] Appellant makes a number of specifications of alleged error based upon the supposed radical difference between the original cause of action set forth in the complaint and that upon which issue was finally joined and trial was had resulting in the last verdict. Among other assertions of appellant

is one to the effect that the new cause of action pleaded in the last amended complaint was barred by the statute of limitations.

In the original complaint it was alleged, in substance, that in 1902 Mrs. Ellen M. Wilson repeatedly represented to plaintiff's parents and sisters, who resided in Iowa, and to plaintiff herself, who has farming land in North Dakota, that said Ellen M. Wilson was wealthy; that her health was becoming impaired, and that she was physically unable to manage her household affairs; that she was living alone; and that she desired plaintiff to accompany her to California. It was further alleged that Mrs. Wilson promised that if plaintiff would accompany her to California, would take care of her, and would manage her household affairs she would fully compensate plaintiff for such services, if not in Mrs. Wilson's lifetime, then by provision in her will. It is averred that plaintiff accepted the offer made by her aunt and that she came to this state. There are very extended allegations regarding the manner in which plaintiff complied with her agreement, and in respect to the details of the care and attention bestowed by her upon Mrs. Wilson up to the time of the latter's death.

In the amended complaint of 1909 were alleged the same sort of duties which were to be performed by plaintiff under the agreement, and which, according to the averments, were performed during the same period as that specified in the original complaint and in the claim upon which it was founded. But it was averred that the contract was made, not in 1902, but in 1887, by the plaintiff and Mrs. Wilson and the mother of plaintiff, and that by them it was agreed, not that the plaintiff would then and there accompany her aunt to California, but that whenever Mrs. Wilson should write to plaintiff's mother for plaintiff to come to this state and live with her the plaintiff would do so, relying upon the promise of the aunt to see that the niece would be well provided for. It was alleged that in 1902 plaintiff came, in response to a request in a letter written to her sister, and that she entered upon the discharge of her duties in accordance with the agreement of 1887.

The amended complaint of 1916 differs very little from that of 1909. In both the time of the original agreement is given as the year 1887. In the amended complaint of 1909 the agreement alleged was that if plaintiff would come to California when requested her aunt would see that she was well provided for. In the pleading of 1916, after the words "provided for" were added the words "during the life of said Ellen M. Wilson and that at the death of said Ellen M. Wilson she, the said plaintiff, would be, by said Ellen M. Wilson amply and fully provided for and compensated for her said services." In this complaint for the first time occurs the formal allegation that Mrs. Wilson did not, by will or otherwise, provide for plaintiff.

We are of the opinion that none of the minute and diversified specifications of alleged error, founded upon the supposedly vital differences between the contract set forth in the original complaint and the two described in the later pleadings, is of any force. The essence of the plaintiff's action against the estate was her claim for services rendered during certain years pursuant to a certain agreement. Even if we should concede that the first complaint failed to state a cause of action, we would not be forced to the conclusion that the statute of limitations barred all possibility of recovery because there was no complaint which should have withstood an attack by demurrer during the time between the filing of the original and the preparation of the amended pleading. Nor is there anything so essentially different between the various contracts alleged and that finally proven as to require us to decide that either the one in the second or that in the third complaint set forth was at variance with the creditor's claim against the estate. These phases of the pleadings are so well analyzed in the opinion filed by the learned judge of the superior court who presided at the last trial that we take this occasion to quote and adopt his language used in ruling upon the application to file the second amended complaint. He said:

"Counsel for the defendant contend that the complaint on file (first amended complaint) does not state a cause of action, and that the proposed amendment must therefore be treated as the commencement of the cause of action therein stated against which the statute of limitations has run.

[2] "'Where there is no attempt to state a new cause of action in an amended complaint, but merely the addition of matters essential to make the original cause of action complete, the amendment, though made after the expiration of the period of limitation, relates back to the time of the commencement of the action. This was expressly held by the District Court of Appeal for the First District in Rauer's Law, etc., Co. v. Leffingwell, 11 Cal. App. 494 [105 Pac. 427], in which a rehearing was denied by this court, where the original complaint on a promissory note did not contain an allegation of nonpayment, an allegation absolutely essential to the statement of a cause of action. The amended complaint was filed after the statute would have run, if it had not been for the original complaint.' Ruiz v. Santa Barbara Gas, etc., Co., 164 Cal. 194, 128 Pac. 330.

"It is further objected that, whether or not the complaint on file states a cause of action, the proposed amendment states a new and different cause of action barred by the statute. This presents a problem not easy of solution, and concerning which the decisions of our own state seem not altogether in harmony.

"On this point I find no general rule laid down by the decisions in this state. All that is said is that great liberality should be used by the courts in allowing amendments (Burns v. Scooffy, 98 Cal. 276, 33 Pac. 86, and cases cited); and that the allowance of amendments is a matter within the discretion of the courts (Coubrough v. Adams, 70 Cal. 378, 11 Pac. 634; Lestrade v. Barth, 17 Cal. 286). And in practice the courts have been extremely liberal, as e. g., in Heilbron v. Heinlen, 72 Cal. 376, 14 Pac. 24, where the complaint was amended so as to describe a different tract of land from that described in the original complaint; or in

Walsh v. McKeen, 75 Cal. 519, 17 Pac. 673, where the case was changed from an action at law to a case in equity; or in Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164, where the change allowed was from an action on a special contract to an action on a quantum meruit; or, as in Castagnino v. Balletta, 82 Cal. 256, 23 Pac. 127, where the change was from an action on a mechanic's lien to an action on the special contract or in assumpsit; or in Bogart v. Crosby, 80 Cal. 195, 22 Pac. 84, where the principal debtors, who had been omitted from the original complaint, were brought in by amendment. * * *

"It is obvious that the unqualified way in which the rule is sometimes stated—i. e., that a new or different cause of action cannot be introduced by amendment—cannot be accepted. For the most common kinds of amendments are those in which the complaints are amended that do not state facts sufficient to constitute a cause of action; and in these, and often in the case of new parties, a new cause of action is in fact for the first time introduced. All that can be required, therefore (to use the language of Mr. Pomeroy), is that 'wholly different cause of action' shall not be introduced; or, as said by the court in Shields v. Barrow, 17 How. (U. S.) 130–143, 15 L. Ed. 158, that 'a complainant (is not) at liberty to abandon the entire case made by his bill, and make a new and different case by way of amendment,' or 'to strike out the entire substance and prayer of his bill, and insert a new cause by way of amendment'; or, as expressed by this court in an early case, the matter of the amendment must not be 'entirely foreign to the original complaint.' Frost v. Witter, 132 Cal. 424, 64 Pac. 705, 84 Am. St. Rep. 53.

"The following cases further illustrate the liberality of the rule:

"In Porter v. Fillebrown, 119 Cal. 238, 51 Pac. 322, the complaint in an action at law upon a creditor's claim for a sum less than $300, and hence not within the jurisdiction of the superior court, was amended so as to make it an equitable action for an accounting of a trust within the court's jurisdiction; in Union Lumber Co. v. Schouten, 25 Cal. App. 80, 142 Pac. 910, the complaint alleging an action for goods sold and delivered was amended to allege an account stated; in MacKroth v. Sladky, 148 Pac. 978, the complaint alleging a written contract to divide commissions was amended by alleging an oral contract instead of the written one; in Merchants' C. Agency v. Gopcevic, 23 Cal. App. 216, 137 Pac. 609, and in Turner & Dahnken v. Bauer, 28 Cal. App. 311, 152 Pac. 308, the complaints were amended to change the causes of action upon express contracts to causes upon a quantum meruit; and in Cowel et al. v. Snyder et al., 171 Cal. 291, 152 Pac. 920, the complaint in an action to recover for the rent of land and the price of rock quarried was amended to plead an account stated.

"In the latter case it is said, 171 Cal. at page 294, 152 Pac. 922: 'Undoubtedly an account stated and mutually accepted by the parties does give rise to a new cause of action, and the statute of limitations on that cause of action begins to run, not as of the date of the items of account, but from the time of the agreement that the statement is correct. * * * But the account stated arose out of the identical transactions pleaded in the original complaint, and it has repeatedly been decided that such an amendment as was here allowed is permissible, and is not subject to the bar of the statute of limitations.'

[3] "The Supreme Court of New Hampshire in 1839, stated the rule in language which answers some of the defendant's objections as follows: 'The difficulty which sometimes exists in the application of the rule arises from the fact that almost all amendments change, to some extent, the cause of action, as originally stated. An amendment which changes the alleged date of a contract, or the sum to be paid, or any particular of the matter to be performed, or the time or manner of performance, changes, in one sense, the cause of the action; but it is not in this sense that the rule is to be understood. Amendments of that character, so long as the identity of the matter upon which the action is founded is preserved, are admissible; the alteration being made, not to enable the plaintiff to recover for another matter than that for which he originally brought his action, but to cure an imperfect or erroneous statement of the subject-matter upon which the action was in fact founded. So long as the form of action is not changed, and the court can see that the identity of the cause of action is preserved, the particular allegations of the declaration may be changed, and others superadded, in order to cure imperfections and mistakes in the manner of stating the plaintiff's case.' Stevenson v. Mudgett, 10 N. H. 338–340 [34 Am. Dec. 155].

"Under the liberal interpretation of the rule as stated in the foregoing authorities, I conclude that the plaintiff is entitled to amend."

In addition to the authorities cited in the foregoing quotation, we might refer to San Joaquin Valley Bank v. Gate City Oil Co., 170 Cal. 250, 149 Pac. 557, and Glougie v. Glougie, 174 Cal. 126, 162 Pac. 118.

[4] The same rules announced by the court in overruling appellant's various attacks upon the complaint as amended apply with greater force to the refusal to hold that there was a fatal difference between the creditor's claim as filed and the one upon which suit was brought, because the courts go further in upholding such demands against estates than in sustaining pleadings. Indeed, it is usually necessary in such cases to go more into details in the complaint than in the claim. In the claim as in the complaint the essential element was a substantial assertion of the contract and its fulfillment on the claimant's part. While the date of making the agreement as set forth in the creditor's claim against the estate differed from that alleged in the complaint after amendment, the promise to be performed by Mrs. Wilson, as well as the nature of the services actually rendered and the time during which claimant performed those services, were all alleged in substantially the same form in the claim and in all the pleadings of the claimant. Plaintiff could recover for all of her services and could escape the bar of the statute of limitations only by showing that under her contract she was to be finally compensated upon the death of Mrs. Wilson. It was therefore necessary for her to put the essentials of the contract in the creditor's claim, but the date was not one of them. In Thompson v. Orena, 134 Cal. 26, 66 Pac. 24, the court was considering a suit based upon a claim for services performed for which payment was to be made upon the sale by decedent of certain land, which remained unsold at her death. In the creditor's claim the land was not described, and the omission of such description was not held fatal to the validity of the claim, the court holding that the only necessity for any reference to the land arose

out of the fact that the claim should show that it was not barred by the statute of limitations. In Western States Life Ins. Co. v. Lockwood, 166 Cal. 185–196, 135 Pac. 496, it was held that such a claim need not be drawn with the precision which would render a complaint good against a special demurrer. The Code does not prescribe the exact form of such a claim.

[5] The purpose of presenting such a demand is to advise the representative of the estate of its nature, and there is no requirement that it shall state the facts with all the detail necessary in a complaint, nor is its sufficiency to be tested by the rules of pleading. Pollitz v. Wickersham, 150 Cal. 238, 88 Pac. 911; Elizalde v. Murphy, 163 Cal. 681, 126 Pac. 978; Enscoe v. Fletcher, 1 Cal. App. 659, 82 Pac. 1075.

[6] Defendant moved to strike out as purely conclusions of law and redundancies certain parts of the second amended complaint —the one filed in 1916. Some of the parts at which the motion was directed were statements that certain things were done by plaintiff "in pursuance" of a certain agreement and statements of Mrs. Wilson. These were not mere conclusions of law, and were no more subject to just criticism, as respondent's counsel correctly argue, than the allegation, so frequently and properly used in pleadings, that a plaintiff "duly performed all conditions and terms" of a contract "on his part to be performed."

[7] Even if these expressions had been, as appellant's counsel contend, irrelevant and redundant, the failure of the court to strike them out would not be ground for reversal of the judgment. Code Civ. Proc. § 475; Sloane v. Southern California Railway Co., 111 Cal. 668–686, 44 Pac. 320, 32 L. R. A. 193; Higgins v. San Diego Savings Bank, 129 Cal. 184–186, 61 Pac. 943; and Procter v. Southern California Railway Co., 130 Cal. 20–24, 62 Pac. 306, 509.

[8] The testimony was conflicting, but there was sufficient evidence to sustain the verdict. It was the theory of the defendant's counsel that any agreement made in 1887 was, upon the view most favorable to respondent, merely an option which expired either by lapse of time or was revoked by other and later offers of employment. Even if it be conceded that the agreement was a mere option, there was substantial evidence in the case at bar to support a conclusion not only that the option had been exercised by Mrs. Wilson, but that she had stated to a number of her friends, after Miss Doolittle came to live with her, that the arrangement between them was one by which she was bound to provide in her will for her niece. The mere fact that fifteen years elapsed between the making of the original arrangement and a time when Mrs. Wilson's health was so impaired as to lead her to a conclusion that she wanted Miss Doolittle to come to California in fulfillment of the agreement does not destroy the validity of the option.

[9] It is well settled that, if made prior to 1905, an oral contract to dispose of property on death in a particular way may be enforced, and it sometimes occurs that many years elapse between the making of the agreement and an action such as this. In the recent case of Steinberger v. Young, 165 Pac. 432, the oral agreement which was enforced had been made almost half a century before the death of Mrs. Ross, of whose estate defendant Young was the administrator.

The contention is likewise made that the "option" was withdrawn by the offers made by Mrs. Wilson (of which there was some evidence) to pay plaintiff a certain wage if she would enter her aunt's employment. It is not contended that these offers were accepted, and they may be justly regarded as mere unsuccessful efforts to vary the terms of the original understanding. However, the agreement of 1887, as revealed by the testimony of members of plaintiff's family present when the alleged conversation took place between Mrs. Wilson and plaintiff's mother, was not a mere option simply because performance on the part of Miss Phœbe Doolittle was to be postponed. The oral agreement did not differ in essence from those alleged and proven in such cases as Steinberger v. Young, supra, and Rogers v. Schlotterback, 167 Cal. 35, 138 Pac. 728. The real issues of the case were admirably stated in an instruction offered by the defendant and given by the court, which was as follows:

"The claim of plaintiff, as set forth in the complaint, is as follows:

"That in the year 1887, the exact date plaintiff cannot state, Ellen M. Wilson said to plaintiff and the mother of plaintiff in Cresco, Iowa, that she wanted the mother of plaintiff to let plaintiff come to California and live with her, said Ellen M. Wilson, and to stay with her, to care for her, said Ellen M. Wilson, and that if she, said plaintiff, did so come to California, she, said Ellen M. Wilson, would see that plaintiff was well provided for during the life of said Ellen M. Wilson, and that at the death of said Ellen M. Wilson she, the said plaintiff, would be, by said Ellen M. Wilson, amply and fully provided for and compensated for her said services; and it was then and there stated to said Ellen M. Wilson by said mother of plaintiff, and agreed to by the said plaintiff, that whenever said Ellen M. Wilson should write to said mother of plaintiff for plaintiff to come to her in California, that said plaintiff would leave the Eastern states and her mother and her business and come to California to live with and care for said Ellen M. Wilson under said promise.

"That in pursuance of said proposition and agreement and statement the said Ellen M. Wilson did in July, 1902, write to the sister of the said plaintiff, and in and thereby did request the plaintiff to come to California to live with her according to said proposition, agreement, statement, and conversation, and plaintiff, in pursuance of said conversation and proposition and agreement and statement so made in 1887 as aforesaid, and of said letters from said Ellen M. Wilson to plaintiff's said sister, did, in August, 1902, leave her home and business interests in North Dakota and came to the home of the said Ellen M. Wilson near said Elk Grove, Sacramento county, Cal., and immediately enter-

ed upon the discharge of her duties in accordance with said agreement above set forth, and from that time until the death of said Ellen M. Wilson plaintiff gave and devoted all of her time and attention to her said aunt, and duly and properly cared for her, and in all and every respect fulfilled all of the conditions of said agreement by plaintiff to be done and performed and to the entire satisfaction of her said aunt; and unless you are satisfied by a preponderance of the evidence that the particular contract so alleged was made between plaintiff and Ellen M. Wilson, then your verdict must be for the defendant."

The testimony of the brother and one of the sisters of the plaintiff was sufficient, if believed by the jury, to establish the first requisites for a judgment for plaintiff as outlined by the quoted instruction. Mr. George Doolittle, speaking of a time in 1887 and an occasion at his mother's home in Iowa when his mother, his aunt, Mrs. Wilson, and several of his sisters were also present, testified in part as follows:

"My aunt made the remark that my mother had more girls than she was entitled to. She thought she ought to have one. My mother said that when she needed one she could have one. My aunt said she would take Phœbe home with her now. My mother said no, she could not let Phœbe go just now, but at any time when she thought she needed her, if she wrote she would have Phœbe come, she says. My aunt went on to say as long as she lived she would see Phœbe was well taken care of, and, if anything should happen to her, she would see she was provided for. Then my aunt went on to say she did not want any of her—she says: 'I don't want any of yours girls, Jane, to do what you and I did, worked in kitchens, somebody's kitchen.' She says: 'The way I look at it, the other girls have got good educations, they are able to, they are teaching school, able to take care of themselves, not be under anybody else; Phœbe is the one I will take.' * * * About what she said was that she wanted Phœbe to come out and live with her and be a companion for her, that she was all alone, did not have any one to stay with her."

He also testified that his sister Phœbe was about 17 years old at the time of that conversation. He also testified regarding a conversation with his aunt at her home in California after his sister had been living there and taking care of Mrs. Wilson for some time, as follows:

"My aunt said that she made Phœbe an allowance of $15 a month as pin money so she could send her mother some little things as she had been used to, to buy herself any little things; she said that in case anything happened to her, she intended to provide well for Phœbe."

Eva R. Huska, a sister of plaintiff, corroborated their brother with reference to the conversation in Iowa in 1887. She also said that Mrs. Wilson told the mother of the girls that if she should take one of them she would do well by the one who should come to her.

There was abundant testimony to the effect that Mrs. Wilson again and again declared her satisfaction with the manner in which Miss Doolittle ministered to her wants and managed her household affairs, and that she expressed her intention to pay for plaintiff's care and devotion of her by a substantial provision to be made by her will. It will not be necessary to set forth all of this testimony. Its trend will appear from the few quotations which we shall make below.

Dr. Briggs, physician and pharmacist, who for some years practiced and conducted a drug store at Elk Grove, Sacramento county, knew Mrs. Wilson well, and frequently talked with her when she was well enough to ride out, which, he said, was "a good part of the time." It was her custom to stop in front of the store, and, as it was difficult for her to get out the carriage, he would frequently go out and talk to her. Within six months after the arrival of Miss Doolittle at the home of Mrs. Wilson the latter had a conversation with Dr. Briggs, which he described as follows:

"She stated to me that she was very happy to have her niece with her; that the niece seemed to be the only one of the relatives that seemed to understand her—was willing to do the things that were necessary to make her comfortable. She stated that she was going to take care of her niece; that she did not know how long she would live. She had one stroke of apoplexy or cerebral hemorrhage, and she did not know how soon she might have another, and she stated that she was going to take care of her. * * * She said she was going to take care of her in her will, or make provision for her."

This witness also testified that upon one occasion Mrs. Wilson said she was contributing to her niece's expenses, but would take care of Miss Doolittle more liberally in her will. The witness also related the following substance of a conversation with Mrs. Wilson:

"She said she would make ample provision for her, she would not suffer in the world for comforts; she would make, she would provide well for her."

Mrs. Walther, an acquaintance of more than 30 years, testified that Mrs. Wilson, speaking of Miss Doolittle, said:

"Phœbe is a good girl. I told her, if she stayed with me as long as I lived, I would provide for her so she would never want,"

and that in the same conversation Mrs. Wilson, speaking of her niece, said:

"I am giving her a little monthly allowance now to buy her clothes and little articles with."

All of this testimony and more to the same effect tended to confirm the plaintiff's position with reference to the scope and meaning of the original agreement made in 1887.

It would unnecessarily prolong this opinion to quote at any length from the testimony of the many witnesses who told of the care and devotion bestowed by plaintiff upon her aunt. Suffice it to say that such testimony, if accepted as true, was amply sufficient to support that part of the case outlined in the latter part of the instruction quoted above.

[10] It is the theory of the appellant that the sum of $15 per month allowed to Miss Doolittle by her aunt was intended to be and was in full payment for her services. It is, of course, admitted that witnesses told of conversations in which Mrs. Wilson said this monthly payment was merely an allowance for "pin money"; but counsel insist that the

acceptance by plaintiff from defendant of a sum of money, and the signing of a receipt, amounted to the final settlement of an account stated which precludes recovery in this action. The receipt was in the words and figures following:

"Elk Grove, April 17, 1907.

"Received of T. C. McConnell forty-six dollars & fifty cts. $46.50 in payment for labor in full for Estate of Mrs. E. M. Wilson,

"E. P. Doolittle."

It appears from Miss Doolittle's testimony that her cousin, the defendant, came to her and asked what was "coming to her." She, according to her testimony, replied: "There is $15 on my monthly allowance and $2.50 for five days' additional amount, and $29.00 I had advanced Auntie to pay her hired man." The receipt was given, if the date be correct, upon the day upon which the will was filed and some time before Mr. McConnell was appointed executor. The paper was, of course, receivable as an admission; but it was for the jury to say whether or not it was, under all the circumstances, an admission of full payment of all that she believed herself to be entitled to receive under her aunt's will. When the receipt was given the defendant was not executor, and the document could not be regarded, in a strict sense, an account stated between plaintiff and the estate; but, even if it be so regarded, there is nothing to prevent impeachment of such an account for fraud or mistake. 1 R. C. L. 218–220. According to the modern doctrine, an account stated "simply affords strong presumptive evidence, which may be rebutted by showing fraud or mistake." 1 C. J. 709. Clearly it was for the jury to say whether or not under the evidence Miss Doolittle signed the receipt through mistake.

[11] It is asserted by appellant's counsel that respondent has no standing in court by reason of an improper verification of the creditor's claim. The affidavit attached to the claim was made by Miss Doolittle's attorney, who deposed as follows:

"That he is the attorney for E. Phœbe Doolittle, whose foregoing claim is herewith presented to the executor of said deceased; that the amount of said claim, to wit, the sum of twenty-five thousand dollars, is justly due to the said claimant; that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of said affiant; that the reason why this affidavit is not made by claimant is that claimant is absent from the state of California and deponent is familiar with the facts of this claim."

The verification is made in substantial compliance with section 1494 of the Code of Civil Procedure; but appellant's counsel insist that because Mr. Sims, who signed it as attorney, was not employed by Miss Doolittle until after her aunt's death, and because, upon examination at the trial, he testified that, although he knew Miss Doolittle was living with her aunt, he knew nothing of their business relations until he was retained as an attorney, therefore he was disqualified to make the affidavit. Whatever may be the rule in other states, in California the courts have generally refused to be very technical in passing upon matters of this sort. In Estate of Swain, 67 Cal. 637, 8 Pac. 497, the court refused to declare certain claims void because of faulty verification. It was there declared that a "claim" against an estate has reference to a debt or demand which might have been enforced against the decedent in his lifetime. If the demand were the subject of a suit during his life, and if the statement of the cause of action were deemed objectionable, defective, or insufficient, the defendant would have the right to demand a bill of particulars, and similarly an executor or administrator might insist upon "vouchers and proofs" to support a claim which has been presented. Section 1494, Code Civ. Proc. It is true that in the Estate of Swain the validity of the claim was established prima facie by the administrator's approval, and the burden of proof, therefore, was upon the heirs who assailed its sufficiency; but that case is authority, we think, for holding that an executor or administrator may not postpone an attack upon a verification until after the rejection of the claim and the bringing of suit thereon, when he has not called for vouchers and proofs, and when he bases his objections upon the supposed lack of actual knowledge, on the part of the verifying agent, of the facts supporting the claim. Of course, the claim must of necessity be authenticated by a verification which on its face contains the essential matters prescribed by section 1494, Code of Civil Procedure. Perkins v. Onyett, 86 Cal. 348, 24 Pac. 1024. This verification does meet that requirement. Griffith v. Lewin, 129 Cal. 596, 62 Pac. 172. In Guerian v. Joyce, 133 Cal. 405, 65 Pac. 972, the affidavit of the claimant showed upon its face that she was ignorant of the amount of some items of her claim, yet the verification was held sufficient. The purpose of a claim against an estate is to give the executor or administrator such information as will enable him "to act upon it advisedly." Western States Life Insurance Co. v. Lockwood, 166 Cal. 185–196, 135 Pac. 496. That case is also authority for a court's refusal to hear minute technical objections based upon the supposed faulty verification of a claim made long after the commencement of an action and after the time for presentation of claim has expired. The court did not err in refusing to grant a nonsuit on the ground that no legally verified claim had ever been presented to the executor.

No other alleged errors require review. The judgment is affirmed.

We concur: LORIGAN, J.; WILBUR, J.

178 Cal. 653

GALUSHA v. FRASER et al. (L. A. 4611.)

(Supreme Court of California. Aug. 2, 1918. Rehearing Denied Aug. 29, 1918.)

1. PLEADING ⟸225(2) — AMENDMENT AFTER DEMURRER—STATUTE.

Though, under Code Civ. Proc. § 472, plaintiff has right to amend complaint once without leave after demurrer is filed to it, provided he does so before demurrer is presented for decision, if demurrer is sustained, defendant is entitled to judgment, unless court in its discretion gives plaintiff leave to amend.

2. PLEADING ⟸225(2)—AMENDMENT OF COMPLAINT—LIBERAL EXERCISE OF DISCRETION.

A court should exercise its discretion liberally in favor of an application to amend the complaint after decision on demurrer.

3. APPEAL AND ERROR ⟸934(1) — PRESUMPTIONS FAVORING TRIAL COURT — TIME OF COMMENCEMENT OF ACTION.

In absence of contrary showing, Supreme Court will presume that action was begun at latest possible time prior to filing of second amended complaint, dismissed on demurrer as barred by limitations.

4. CONTRACTS ⟸188—BREACH—LIABILITY.

Breach of a contract cannot be made basis for action for damages, or charge of fraud, against defendants who did not execute the contract and were not bound by it, or concerned with its performance so far as plaintiff is concerned.

5. LIMITATION OF ACTIONS ⟸179(2)—FRAUD —AVOIDANCE OF THREE-YEAR LIMITATION.

Where plaintiff sues for fraud, seeking to avoid three-year period of limitations because he did not discover it until after perpetration, he must not only show he did not discover fraud until within three years, and that it was committed under such circumstances that his knowledge at time will not be presumed, but must also set forth time when and circumstances under which facts constituting fraud came to his knowledge.

Department 1. Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Elon G. Galusha against A. R. Fraser and others. From a judgment dismissing the action, plaintiff appeals. Affirmed.

Charles Cassat Davis, of Los Angeles, for appellant. Anderson & Anderson, of Los Angeles, for respondents.

SHAW, J. The plaintiff appeals from the judgment. The object of the action was to recover damages on account of fraud and deceit alleged to have been perpetrated by the defendants upon the plaintiff and his predecessor in interest, whereby they were induced to purchase a lot in the Silver Strand tract near Ocean Park from the defendants A. R. Fraser, G. M. Jones, and H. R. Gage. The Guaranty Realty Company is also made a party defendant. Fraser, Jones, and Gage filed a joint demurrer to the second amended complaint on two grounds, namely, that it did not state facts sufficient to constitute a cause of action, and that the action was barred by the statute of limitations, referring to sections 338 and 339 of the Code of Civil Procedure. The court sustained the demurrer without leave to amend, and thereupon entered judgment dismissing the action as against the defendants Fraser, Jones, and Gage.

[1, 2] The claim of the plaintiff that the court erred in refusing leave to amend when the demurrer was sustained is without merit. Under section 472 of the Code of Civil Procedure a plaintiff has the right to amend his complaint once, without leave of the court, after a demurrer is filed to it, provided he does so before the demurrer is presented to the court for decision. But, if the demurrer is sustained, the defendant is entitled to judgment forthwith, unless the court, in its discretion, gives the plaintiff leave to amend. It is true that a court should exercise its discretion liberally in favor of an application to amend; but the privilege of amending at that stage of the proceeding does not become a right, unless the circumstances are such that it would be an abuse of that discretion to refuse to allow it.

The complaint alleges that on June 29, 1905, Margaret E. Galusha, from whom plaintiff derives title, agreed in writing to purchase the lot from the defendants, Fraser, Jones, and Gage; that on January 30, 1906, before she had fully paid the price, she died, and her right and title thereupon devolved upon plaintiff, as heir or devisee, and that he completed the purchase; that to induce her to buy the lot the defendants represented to her that they would make certain improvements of the Silver Strand tract, of which said lot was a part, which, if made, would greatly enhance the value of the lot. These improvements are particularly described in the complaint. It is not necessary to give the details here. It is alleged that the defendants failed and refused to make said improvements, except a small part thereof.

Before the plaintiff made the final payment of the purchase price, he and the Guaranty Realty Company, on September 20, 1906, executed an agreement whereby, in consideration of said final payment, the Guaranty Realty Company agreed to "put in all the improvements on said tract as specified in agreement between Fraser, Jones, and Gage and the Guaranty Realty Company, which includes grading the property, bulkheads along the lagoon, sewer, sidewalks, bridges over lagoons, and staking out of lots when desired for building purposes; and the water, gas, and electricity will be put in by the city as required by building necessities." The terms of the agreement between Fraser, Jones, and Gage and the Guaranty Realty Company relating to improvements, thus referred to, are not alleged or stated in any part of the complaint other than by the above-quoted passage from the agreement aforesaid.

It is further alleged that plaintiff repeatedly demanded of the defendants that they

make the improvements above described and that defendants repeatedly promised that they would do so; that in June, 1910, plaintiff demanded of Fraser that the improvements be made as promised, whereupon Fraser refused to make any improvements unless the plaintiff would agree in writing to build a house upon said lot, which plaintiff declined to do until defendants made the improvements; that until said refusal of Fraser the plaintiff believed in the honest intentions of the defendants as to said improvements, but the long delay and the final refusal of Fraser satisfied him that he had been deceived. Damages are laid in the sum of $3,500.

[3] The second amended complaint was filed on November 18, 1914. The record fails to show when the action was begun, and the parties in their briefs do not advise us of the date of filing the original complaint. It is not claimed that it was begun within three years after June, 1910. Moreover, in the absence of a showing to the contrary, we will presume, if necessary to do so in order to support the judgment, that the action was begun at the latest possible time prior to the filing of the second amended complaint. This would make it later than June, 1914.

[4] The breach of the contract alleged to have been executed between plaintiff and the Guaranty Realty Company cannot be made the basis of an action for damages, or a charge of fraud against the defendants Fraser, Jones, and Gage, since they did not execute the contract, and it does not appear that they are in any manner bound by it, or concerned with its performance, so far as plaintiff is concerned. If the complaint states a cause of action for relief on the ground of fraud, the period of limitation would expire at the end of three years from the time when the action accrued, or from the discovery of the fraud. Code Civ. Proc. § 338. If it states a cause of action for damages upon a liability not founded upon a contract in writing, and unmixed with a claim for relief on the ground of fraud or mistake within the meaning of section 338, then the action would be barred after two years from the time it accrued, by the provisions of section 339, Code of Civil Procedure.

[5] Where the plaintiff sues for relief on the ground of fraud, and seeks exemption from the three-year period of limitation for the reason that he did not discover the fraud until after it was perpetrated, he must not only show that he did not discover the fraud until within the three years next before the action was begun, and that the fraud was committed under such circumstances that he would not be presumed to have had knowledge of it at the time, but he must also set forth the times and circumstances under which the facts constituting the fraud came to his knowledge, so that the court may determine from the allegations of the complaint whether the discovery was within that period. Lady Washington v. Wood, 113 Cal. 487, 45 Pac. 809. It is doubtful if the plaintiff has brought himself within this rule. But we need not determine the sufficiency of the facts stated to show his ignorance of the fraud prior to June, 1910. He avers that at that time he became fully aware of it. The period of limitation began to run at that time, if not before, and it expired in June, 1913. This was at least a year before the action was begun, according to the presumption which we must indulge, as above stated, in favor of the judgment. The action was therefore barred, and the demurrer was properly sustained.

The judgment is affirmed.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

---

(178 Cal. 638)

## SCOTT v. TIMES-MIRROR CO.

(L. A. 4554.)

(Supreme Court of California. Aug. 6, 1918.)

1. APPEAL AND ERROR ⟸856(5)—MOTION FOR NEW TRIAL—REVIEW.
When order of the trial court granting new trial is general in its terms, it will be affirmed if it could properly have been granted upon any of the grounds upon which motion was predicated.

2. APPEAL AND ERROR ⟸977(3)—MOTION FOR NEW TRIAL—REVIEW.
An order granting a new trial will not be disturbed upon appeal, except upon a showing of clear and manifest abuse of discretion.

3. LIBEL AND SLANDER ⟸103—REPUTATION—EVIDENCE.
In a libel case for damages to good reputation as an attorney at law, under Civ. Code, § 45, it was proper for plaintiff to affirmatively show what his reputation was as an attorney in his main case; the presumption of good reputation as an individual not applying to reputation in a professional capacity.

4. LIBEL AND SLANDER ⟸101(1)—DAMAGE TO REPUTATION—BURDEN OF PROOF.
In a libel action for damages to the reputation as a professional man, plaintiff had the affirmative, and was bound to plead and prove what that reputation was.

Department 1. Appeal from Superior Court, Los Angeles County; H. D. Gregory, Judge.

Action by Joseph Scott against the Times-Mirror Company, a corporation. Verdict for plaintiff, and from an order granting defendant's motion for a new trial, plaintiff appeals. Affirmed.

Joseph Scott, of Los Angeles, and John Mason Ross, of Bisbee, Ariz., for appellant. Samuel Poorman, Jr., and Hunsaker & Britt and Le Roy M. Edwards, all of Los Angeles, for respondent.

RICHARDS, Judge pro tem. This is an appeal from an order granting the defendant's motion for a new trial in an action for libel wherein the plaintiff was awarded com-

pensatory damages in the sum of $10,000 and exemplary damages in the sum of $20,000 by the verdict of a jury. A motion for a new trial having been made upon all the statutory grounds, the same was granted by a general order of the trial court. The main contention urged by the appellant as one of the grounds for the reversal of that order is that the trial court abused its discretion in attempting to set aside the verdict of the jury as to both of these elements and amounts of damage. A brief consideration of the nature of the action is essential to a determination of this as well as of the other points in the case. The plaintiff in his complaint alleged that he was at the date of filing the same and for some 20 years or more prior thereto had been an attorney at law of the several courts of record of the state of California, practicing his profession principally in Los Angeles, but also in several other counties of the said state and also in the state of Arizona, and that as such attorney at law he had always conducted and demeaned himself with honesty and fidelity and without any misconduct or malpractice in his said profession, and had thereby come to enjoy and did enjoy a good name and reputation as an attorney at law. He then proceeded to allege the facts and details of the publication complained of, which consisted of an article on a report regarding a certain action for divorce in which the plaintiff herein appeared as attorney of record for the plaintiff therein, with certain insinuations and animadversions reflecting upon the conduct of this plaintiff in the matter of advising and commencing said action, all of which this plaintiff alleged to be maliciously and knowingly false and to have been published with express malice and ill will on the part of the defendant toward this plaintiff, and with the intent to injure him in his professional standing and reputation and to bring him into public discredit as an attorney at law, by reason whereof he had suffered $10,000 actual and $50,000 exemplary damages. The answer of the defendant admitted the publication of the article complained of, but denied that it was either false or malicious. The defendant also, basing its denial upon the want of sufficient information, denied specifically the averments of the plaintiff's complaint respecting his general conduct as an attorney at law during the period of the practice of his profession, and upon the same ground denied that during all or any of the said period prior to the date of the publication of said article the plaintiff had or enjoyed a good name or reputation as an attorney at law. It would serve no useful purpose to restate or review at length the evidence presented upon these issues upon the trial and embraced in the somewhat voluminous record before us upon this appeal.

[1-3] It is the well-settled rule of this court that when the order of the trial court in granting a new trial is general in its terms it will be affirmed if it could properly have been granted upon any of the grounds upon which the motion for it was predicated. Weiseer v. S. P. Co., 148 Cal. 426, 83 Pac. 439, 7 Ann. Cas. 636; Morgan v. J. W. Robinson Co., 157 Cal. 348, 107 Pac. 695. It is an equally well-settled and long-established rule of this court that an order granting a new trial will not be disturbed upon appeal except upon a showing of clear and manifest abuse of discretion on the part of the trial court in respect to granting the same. Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 47 Pac. 1019; Doolin v. Omnibus Cable Co., 125 Cal. 148, 57 Pac. 774; Sherwood v. Kyle, 125 Cal. 652, 58 Pac. 270; Lee v. S. P. Co., 101 Cal. 118, 35 Pac. 572; Meinberg v. Jordan, 29 Cal. App. 760, 157 Pac. 1005, 1007. Having in mind these principles, we have carefully examined the record before us, and we are unable to say upon such examination that the trial court has in any degree whatever abused the discretion with which it is invested with respect to the matter of granting a new trial upon either the ground of excessive compensatory or excessive exemplary damages. The order of the trial court must therefore be affirmed upon these grounds, irrespective of whether the appellant is right or wrong as to certain other contentions. In view of the fact, however, that a new trial must be had of the case, we deem it proper to pass upon one other of the appellant's contentions in order that the trial court may be advised of our views upon the retrial of the cause. Among the grounds assigned in the motion for the new trial was the statement that the trial court had erred in the admission of the affirmative evidence offered on the part of the plaintiff in his main case as to his good reputation as an attorney at law. The trial court upon the hearing of the motion for a new trial concluded that it was in error in that respect, and assigned this as one of the grounds for granting the motion in its opinion filed at the time of doing so. We are of the opinion that the trial court was in error in this latter view, and that such evidence was properly admitted upon the trial of the cause. It is to be noted that the whole gravamen of the plaintiff's case is the alleged injury to his reputation as an attorney at law. In other words, it is an action by plaintiff for damage for that form of libel which, according to the definition found in section 45 of the Civil Code, "tends to injure him in his occupation." It is and has always been true that every suitor or party to an action or proceeding in a court of justice comes into court with the presumption of a good reputation as an individual, upon which presumption he is entitled and in some cases is bound to rely until his said reputation as such has been assail-

ed. This rule is well stated and its application to libel cases clearly defined, with the authorities supporting it fully collated, in the case of Davis v. Hearst, 160 Cal. 143, 116 Pac. 530. While this is therefore the undoubted rule in respect of the reputation of the litigant as an individual, we know of no such rule nor of any such presumption with respect to the reputation of a litigant in his capacity as an attorney at law or in any other business or professional capacity, and we are cited to no cases which pretend to assert the existence of such a presumption. On the contrary, our attention is directed to the case of Aston v. Examiner Printing Co. (D. C.) 226 Fed. 496, which was an action for a libel uttered against the plaintiff in his profession as an engineer. The plaintiff offered evidence of his good reputation in that capacity, which was admitted over the defendant's objection. In passing upon the question thus presented, Judge Van Fleet said:

"It is at once apparent, I think, not only from the form of the questions themselves, although somewhat inartificial, but from the general nature of the subject about which the witness was being examined, that the inquiry was not addressed to the personal character or reputation of the plaintiff, of which complaint was made in Davis v. Hearst, 160 Cal. 185, 116 Pac. 530, relied on by plaintiff, but was solely with reference to his standing as an engineer, his professional character, as to the propriety of which there can be no question."

[4] It would seem to be obvious that such a presumption as the appellant contends for could not exist, since an individual may have a perfectly good reputation as such and yet may have no reputation at all as a lawyer or doctor or engineer, though he may also be such, for the simple reason that he has not practiced his profession to the extent or with the degree of success necessary to acquire such a reputation. It would also seem to be obvious that the plaintiff would not have been entitled to claim and recover damages for an injury to his professional reputation as an attorney at law without alleging in his complaint that he was such attorney at law and that he had acquired a reputation as such. If this be true, it would follow that the rule of pleading in ordinary libel cases to the effect that it is not necessary for the plaintiff in the first instance to allege his possession of a good reputation could have no application to a complaint in which the pleader seeks to recover damages for injuries to his reputation in respect to a particular trade, occupation, or profession. In the latter case the averment would be essential and its denial would raise a material issue so as to require affirmative proof on the part of the plaintiff as to his possession of the particular kind of business or professional reputation which he asserted had been injured by the publication. In the instant case the plaintiff did allege his possession of a professional reputation as an attorney at law. The defendant denied, specifically the plaintiff's averments in that regard.

A material issue was thus presented, upon which the plaintiff had the affirmative and was bound to offer evidence. He did so, and the trial court properly admitted the evidence thus offered, and later improperly ruled, upon motion for a new trial, that its original action in admitting such evidence was error, for which a new trial should be granted. The new trial was, however, properly granted upon other grounds, and our ruling upon this particular ground is given for the guidance of the court upon a retrial of the case.

Order affirmed.

We concur: SHAW, J.; SLOSS, J.

---

178 Cal. 693

## ROTHROCK et al. v. SANBORN et al.

(L. A. 4555.)

(Supreme Court of California. Aug. 7, 1918.)

LANDLORD AND TENANT ⊂⊃79(2) — ASSIGNMENT OF LEASE—CONDITIONS.

Where a lease provided that it was not to be transferred without the lessor's consent, and then only on payment of a sum equal to three months' rent, and that in no case should the lessor be obliged to consent to any assignment, unless the tenant was absolutely satisfactory to him, an assignee with the lessor's consent, after payment of the stipulated amount, could not thereafter transfer the lease without a payment of an equal amount, with lessor's consent; the rights of the lessor not having been exhausted by the first payment.

Department 2. Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by S. L. Rothrock and others against Mrs. E. J. Sanborn and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Daniel M. Hunsaker, I. Henry Harris, and Charles A. Bank, all of Los Angeles, for appellants. Jones & Weller, of Los Angeles, for respondents.

LORIGAN, J. In May, 1913, defendants, the Sanborns, leased to Mr. and Mrs. Kendis an apartment house in Los Angeles city consisting of 25 furnished apartments for a term of ten years at a monthly rental of $496, payable on the 1st of each month of the term, in advance. The lease provided (paragraph 4) that it should not be assigned without in each case the written consent of the lessors. By subsequent paragraph (No. 12) it was provided that:

"It is further understood and agreed that should the lessees desire to transfer or assign their interest in the within lease to other parties that the lessors will give their consent, provided said party or parties deposit or give unto the said lessors a sum of money equal to the last three months' rent of this lease, said last three months' rent amounting to $1,488, said money to be paid to the lessors, their assigns or representatives at the time the written consent

of the lessors as provided for in paragraph No. four (4) of this lease is obtained, and in no case shall the lessors be obliged to consent to any transfer or assignment of this lease except as herein provided, and unless tenant is absolutely satisfactory to lessors."

In November, 1913, the lessees, Mr. and Mrs. Kendis, assigned the lease to plaintiff and appellant Nell L. Rothrock, the defendants Sanborn consenting thereto by the following written instrument:

"And we hereby consent that the said lease may be transferred by the said Mr. and Mrs. A. P. Kendis to Mrs. Nell L. Rothrock. This consent shall not be treated in any way as waiving any of the provisions of said lease, nor shall the same be assigned, or transferred by the said Mrs. Nell L. Rothrock to any person, without our consent first being had and obtained, and then only according to the provisions of paragraph XII of said lease."

And, concurrently with the execution of this written consent the original lessees, the Kendises, delivered to the defendants Sanborn, the lessors, the sum of $1,488 in compliance with the provisions of said paragraph 12 of the lease.

In March, 1914, said Nell L. Rothrock desired to assign said lease to one M. A. Merrill, and sought the consent of said lessors Sanborn, who refused to consent thereto unless they were again paid $1,488, which they claimed they were entitled to under said paragraph 12 of the lease. The said Rothrock objected to doing this, but the defendants insisted, and in order, so it is alleged, to prevent the loss of a large profit in a deal whereby said lease was to be transferred to said Merrill in exchange for some real estate, and under protest, said Nell L. Rothrock made and delivered to defendant E. E. Alexander, as agent of the other defendants Sanborn, her check for $500 and her promissory note for $988, which were still in his hands when this suit was commenced. Thereafter plaintiff brought this action to obtain a cancellation of both said check and said promissory note. Judgment went for defendants denying the relief sought, and plaintiffs appeal.

The only question in the case is the construction to be placed on paragraph 12 of said lease respecting the consent of the lessors to assignments of the lease and the conditions on which successive ones are to be granted or permitted. Appellants' contention, coming down to its real effect, is that the plaintiffs in making an assignment to Merrill were entitled to have the consent of defendants thereto without the payment of any sum of money whatever; that the right to exact the payment of a sum equivalent to the amount of three months' rent as a condition to an assignment had been satisfied and exhausted when the first assignment of the lease was made, and had no application to assignments thereafter; that such deposit of $1,488 was intended as security for the payment of the last three months' rent of the lease, and was fully complied with on the first payment, and the provision respecting it was thereafter inoperative, as it could only be complied with once. According to this construction which plaintiff seeks to put on the contract, though the lease was for a term of ten years, and though many occasions might arise in that time for assigning it, the only matter really contemplated by paragraph 12 was a payment of rent as such for the first assignment, and not a payment or bonus for the consent to any assignment. We see nothing in the terms of the provision in question which compels such a construction. In fact, to do so would require a consent on the part of the lessors without any bonus or consideration therefor after the first assignment. But the provision relating to consent to an assignment does not say anything about applying the amount paid by the lessees as a payment on the last three months' rent of the lease. The three months' rent is merely mentioned in connection with $1,488 as measuring the sum to be paid. If it had been intended that such payment should be made solely as a deposit to secure the payment of the last three months' rent of the term, it would have been very easy to have said so. Not doing so, the sum required must be considered as a payment, which might be exacted by the lessors as a consideration or bonus each time that their consent to an assignment was given, and not as a payment of rent. But even if we should construe the provision as one treating the payment of the $1,488 as security for the last three months' rent to ultimately be applied thereon, and therefore the provision requiring its payment was exhausted on the first assignment, it does not follow that the lessors were bound to consent to the second assignment of the lease without any consideration. It is to be noted that by paragraph 4 the lessees are prohibited from making any assignment of the lease whatever without in each case the consent of the lessors, and the lessees were the Kendises. By paragraph 12 this prohibition is qualified to the extent that, if the lessees desired to assign their interest in the lease, the lessors will consent to said assignment upon the lessees depositing or giving the lessors a sum of money equal to the last three months' rent of the lease amounting to $1,488, said money to be paid to the lessors, "and in no case shall the lessors be obligated to consent to any assignment of the lease except as herein provided and unless tenant is absolutely satisfactory to lessor." Now, this paragraph must be construed as a whole, and if its effect, as contended by plaintiffs, is that the right to demand $1,488, or any other sum, for the assignment, was exhausted by the payment made by the original lessees, the Kendises, it must necessarily follow that the right thereafter to require an assignment by any assignee of the lessees

without such payment is gone also, because it is so declared in the very same provision when it says that in no case shall the lessors be required to consent to an assignment of the lease excepting as therein provided, namely, by payment of said $1,488. If the result of the first payment is to exhaust any right of the lessors to demand its payment again for a subsequent assignment, then also any right of the lessees to demand any subsequent assignment without such payment cannot exist because paragraph 12 says it shall not; the rights of all parties under the paragraph are gone for all purposes, and the only provision in the lease thereafter controlling as to consent of the lessors is paragraph 4, which provides that no assignment shall be made without the consent of the lessors, and, of course, the lessors could fix any terms of payment for giving their consent that they saw fit.

In concluding it may be said it appears that, when the lease was originally transferred by the lessees to plaintiff with the consent of the defendants, lessors, all the parties placed a harmonious construction on said paragraph 12. The plaintiffs then accepted the written consent of the defendants, which in express terms prohibited them from assigning the lease without the written consent of the lessors, defendants, to be obtained only by complying with paragraph 12, which, of course, required the payment of $1,488. If, under this written consent so given and accepted by the plaintiff, the payment by the Kendises was to be treated as a payment of the rent and thereby exhausted the right of the lessors to the payment of a like amount for a subsequent consent, then all the language of the written consent to the plaintiffs about a consent to a subsequent transfer by them, and only in accordance with the provisions requiring the payment, was idle, meaningless, and useless. We do not so construe the terms of the writing.

The judgment is affirmed.

We concur: WILBUR, J.; MELVIN, J.

---

178 Cal. 681

## WILEY v. YOUNG. (L. A. 4462.)

(Supreme Court of California. Aug. 6, 1918.)

1. TRIAL ⟹139(1) — QUESTIONS FOR JURY — WEIGHT OF EVIDENCE.
The weight of the evidence is for the jury.

2. HIGHWAYS ⟹184(1)—COLLISIONS—PLEADING.
In an action by one riding in a motorcycle side car, which collided with an automobile, plaintiff need not allege whether he was riding as guest or otherwise; such question being germane only to the affirmative defense of contributory negligence.

3. TRIAL ⟹261—INSTRUCTIONS—REFUSAL.
Where several instructions were offered as a whole in several paragraphs, and one of the paragraphs was erroneous, the whole was properly refused.

4. NEGLIGENCE ⟹93(1) — IMPUTED NEGLIGENCE.
A guest riding in a motorcycle side car was not responsible for the negligence of the driver, who collided with an automobile, even if he selected him as host.

5. HIGHWAYS ⟹172(1) — INJURY ON HIGHWAY—CONTRIBUTORY NEGLIGENCE.
The fact that one riding in a motorcycle side car knew that the driver was usually negligent was only a circumstance to be considered by the jury in an action for damages against the owner of an automobile with which there was a collision.

6. TRIAL ⟹350(6) — QUESTIONS TO JURY — DISCRETION OF COURT.
In action by passenger of motorcycle side car against owner of automobile, with which there was a collision, there was no abuse of discretion in refusing to submit to the jury questions as to which side of road accident occurred on, speed of the vehicles, and whether defendant's car was struck by motorcycle.

7. TRIAL ⟹251(8) — COLLISIONS — SUDDEN PERIL—INSTRUCTIONS.
Where there was a collision in broad daylight between motorcycle and automobile, and a slight swerving of either might have avoided the accident, and there must have been a time in the mind of the driver of each when it was apparent that a collision was possible, it was proper, as against objection that it was outside the issues in the case, to instruct with reference to duty of persons in great peril.

8. APPEAL AND ERROR ⟹1033(5)—HARMLESS ERROR—INSTRUCTIONS.
A party cannot complain of an instruction which is more favorable to him than he deserves.

9. DAMAGES ⟹216(7)—PAIN AND SUFFERING.
In an action for damages, it was proper to instruct that plaintiff might recover for suffering "reasonably certain" to be endured in the future.

10. DAMAGES ⟹216(1) — PAIN AND SUFFERING—INSTRUCTIONS.
In an action for damages, an instruction, "It is not necessary, therefore, that any of the witnesses should have expressed an opinion as to the amount of such damages for pain and suffering, but the jury may make such estimate of the damages from the facts and circumstances and evidence, and by considering them in connection with their own knowledge and experience in the affairs of life," was correct.

11. TRIAL ⟹295(11) — DAMAGES — PAIN AND SUFFERING—INSTRUCTIONS.
An instruction that, "with regard to pain and suffering the law prescribes no definite measure of damages, but leaves such damages to be fixed by you as your discretion dictates, and as under the circumstances may be just and proper," was correct; the jury having been already instructed in the same instruction that damages should be compensatory, so that effect of charge as a whole was that plaintiff was entitled to compensatory damages only.

Department 2. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Ethel Wiley against P. H. Young. Judgment for plaintiff, and defendant appeals. Affirmed.

Duke Stone, of Los Angeles, and B. P. Gibbs, of St. Paul, Minn., for appellant. R. T. Walters, of Whittier, and W. J. Wallace, of Los Angeles, for respondent.

WILBUR, J. [1] Defendant appeals from a judgment for damages for personal injuries suffered by plaintiff in a collision upon a Los Angeles county highway between a motorcycle side car in which she was riding and an automobile operated by the defendant. Plaintiff's evidence tends to show that, as the two machines were approaching each other, the defendant's automobile was following a one-horse wagon; that when defendant's machine turned out to the left, to pass the wagon, the motorcycle was so close to the wagon that the collision resulted. It is claimed that the defendant violated the state law, which required that, in turning out for the purpose of passing a slower moving vehicle, the highway must be clear for 100 yards to the front. Stats. 1913, p. 647. Defendant's claim is that his machine was at all times on the right-hand side of the highway, but that the machine in which the plaintiff was riding suddenly swung to the left in front of his machine, and that the collision resulted. There was sufficient direct evidence to sustain the plaintiff's contention if believed by the jury. We cannot consider whether or not the weight of evidence was in her favor.

[2] Appellant demurred to the complaint on the ground of alleged uncertainties therein. The demurrer was overruled. This ruling is claimed to be error, for the reason that the complaint should have shown the capacity in which plaintiff was riding in the side car of the motorcycle, whether as guest or otherwise. This question was germane only to the defense of contributory negligence, which, being an affirmative defense, was required to be set up by the defendant. The demurrer was properly overruled.

[3] Certain instructions given by the court are claimed to have been erroneous. The instructions requested by the defendant and refused by the court are contained in four paragraphs, but it does not appear that these paragraphs were separately offered, as separate instructions. If the instruction was offered as a whole, then, if any one of these paragraphs is erroneous, the whole was properly refused. Without quoting these instructions at length, the only point in them not fully covered by other instructions is that with relation to the plaintiff's knowledge concerning the alleged habitual carelessness of the driver, Lewis, with whom she was riding, and the effect of that knowledge upon her rights and conduct in the premises.

[4] A part of the proposed instructions relating to this matter is as follows:

"I charge you that, if you believe from the evidence that the plaintiff selected as a driver the person [Lewis] shown to have been operating the motorcycle at the time of the accident, and directed or assisted in directing his movements, which contributed to place the motorcycle in peril, and which contributed to cause the injury, then the plaintiff is responsible for the negligence, if any, on the part of the driver [Lewis], and if such negligence, if any, contributed to cause the injuries complained of, then plaintiff cannot recover."

This instruction is erroneous, for the reason that if, as claimed and proved, the plaintiff was riding as a guest of Lewis, she was not responsible for his negligence, even if she selected him as her host. Nor is it correct to say that, if she directed or assisted in directing his movements, she was responsible for his negligence. Defendant's claim that plaintiff was guilty of contributory negligence is based upon the proposition that she omitted some precaution which she, as a guest, was under the obligation to take, including, if need be, warning or suggestion to the driver of the motorcycle to avoid the collision. There is no evidence that plaintiff either directed or assisted in directing the driver's movements. It was not error to refuse this instruction.

[5] Another portion of the instructions complained of is as follows:

"I charge you that, if you believe from the evidence that plaintiff knew or had reason to believe that the driver of the motorcycle was usually careless or negligent in the operation of the same, before she accompanied him on the occasion of this accident, then plaintiff is chargeable with any negligent act or acts of the driver of the motorcycle (if you find that there were any such negligent act or acts) which might have been reasonably anticipated by the plaintiff; and if you find that the driver of the motorcycle was negligent, and that such negligence contributed to cause the injury to the plaintiff, and that plaintiff, before accompanying said driver, knew or had reasonable grounds to believe that said driver was usually negligent in the operation of said motorcycle, and that it was negligence for the plaintiff to accompany the driver under the circumstances, then she cannot recover, and your verdict must be for the defendant."

This instruction is predicated upon the theory that it would be negligence upon the part of the plaintiff to ride with a driver, if she had reason to believe that the driver of the motorcycle was usually careless or negligent in some unspecified particular in the operation of the same. This is not the law. If the plaintiff knew, or had reason to believe, that Lewis was usually negligent in the operation of his machine, it was her duty to consider that fact in determining what precaution she should have taken for her safety in the event of meeting the defendant's automobile upon the public highway, and the question for the jury to determine under all the facts and circumstances, including the knowledge of the plaintiff, if any, concerning the driver, Lewis, was whether or not she was guilty of any negligence which proximately contributed to the injury. The only evidence as to plaintiff's knowledge of the driver's habitual negligence, if any, is the inference to be drawn from the fact that plaintiff had ridden as his guest some 15 times. There was no evidence that he had ever collided with any other machine, or obstacle, and hence there was no basis for an instruction so general in its terms, even if otherwise proper.

[6] The defendant requested that the jury answer four questions: One, as to which side of the road did the accident occur; the others with relation to the speed of the automobile and the motorcycle, and the question of whether or not defendant's car was struck by the motorcycle. There was no abuse of discretion in refusing to submit the questions to the jury.

[7] Appellant also complains of the giving of an instruction with reference to the duty of persons in great peril. That the instruction was correct in point of law is not questioned; but it is claimed that there was no such issue in the case, and it was therefore calculated to mislead the jury. The collision occurred in broad daylight. Each party involved was in plain view of the other. According to some of the testimony, both vehicles were operated at a high speed. There must have been a time in the mind of the driver of each vehicle when it was apparent that a collision was possible. A slight swerving of the automobile or motorcycle might perhaps have avoided the accident. Whether or not, under these conditions, both acted with care, was to be determined by the jury; and it was proper to instruct them, therefore, in relation to the standard by which the conduct of persons in peril was to be determined, varying, as it does, from the standard by which the conduct of men is judged under ordinary circumstances.

[8] Appellant complains of the following instruction:

"If you believe from the evidence that at the time of the collision in this case the defendant did not use ordinary care to avoid the accident, and that the injuries which the plaintiff received were caused by such want of ordinary care on the part of the defendant, without any contributory negligence on the part of the plaintiff, or those lawfully in charge of her, then I charge you to return a verdict in favor of the plaintiff."

The phrase in this instruction, "or those lawfully in charge of her," is objected to as injecting a condition of uncertainty in the instruction. Appellant certainly is in no position to complain of this instruction. It clearly prevents plaintiff's recovery if she was negligent, and adds the additional provision preventing her recovery if those "lawfully in charge of her are guilty of negligence." This was less favorable to the plaintiff than she was entitled to. But the parenthetical provision was introduced for the sole purpose of qualifying an instruction as to defendant's negligence. What constituted contributory negligence on the part of plaintiff was elsewhere defined by the court at the request of the defendant. There was no error in this instruction prejudicial to the appellant.

[9] Complaint is made of the instruction as to the measure of damages, which contains the following:

"You are instructed, however, that in considering such damages for pain and suffering you are to take into consideration pain and suffering caused at the time of the accident, but also the pain and suffering reasonably certain to be endured in the future, if any, which are the result of the accident."

This form of instruction, authorizing the jury to give compensation for damages "reasonably certain" to result in the future, was approved in Cordiner v. L. A. Traction Co. et al., 5 Cal. App. 400, 91 Pac. 436, and is in accord with the provision of the Civil Code (section 3283):

"Damages may be awarded, in a judicial proceeding, after the commencement thereof, or certain to result in the future."

The case of Malone v. Sierra R. R. Co., 151 Cal. 116, 91 Pac. 522, cited by the appellant, dealt with an instruction which authorized the jury to award damages for such pain and anxiety as the plaintiff "may suffer by reason of his injuries." The vice of the instruction in the latter case was due to the use of the word "may," thus allowing the jury to engage in speculation as to the possibilities, instead of confining them to damages reasonably certain to occur as a result of the accident. In that case it is said:

"It is true that in a succeeding instruction the court declared that plaintiff was entitled to recover, not only such damages as he may have suffered, but also 'such damages as by the evidence it is reasonably certain he will suffer in the future.' Herein is a declaration of the true rule, but none the less the instructions on the matter are conflicting, and it cannot be said by which the jury was guided."

That case, therefore, is direct authority for the instruction in the form given in this case.

[10] Appellant also complains of that portion of the instruction with relation to the damages which reads as follows:

"It is not necessary, therefore, that any of the witnesses should have expressed an opinion as to the amount of such damages for pain and suffering; but the jury may thus make such estimate of the damages from the facts and circumstances and evidence and by considering them in connection with their own knowledge and experience in the affairs of life."

This instruction was proper, and so far as we know is always given. There is no other method by which the pecuniary value of pain and suffering can be included in a verdict, except by the jurors applying to the facts and circumstances in evidence their own knowledge and experience in the affairs of life.

[11] The following portion of the instruction is also objected to:

"You are instructed, however, that with regard to pain and suffering the law prescribes no definite measure of damages, but the law leaves such damages to be fixed by you as your discretion dictates, and as under all the circumstances may be just and proper."

This was correct. Rystinki v. Cen. Cal. Trac. Co., 165 Pac. 952. The jury had already been instructed in the same instruction:

"If you find the defendant liable, you are instructed that the damage should be fixed at such an amount as will compensate plaintiff for such loss sustained by her as set forth by her in her

complaint, and any injury that she will sustain in the future as is supported by the evidence."

The effect of the instruction as a whole is that the plaintiff is entitled to compensatory damages only. The instruction with reference to the amount of damages for pain and suffering is elaborated, for the purpose only of disclosing to the jury that it is not necessary that any particular witness should have fixed a particular amount as the damage for such pain and suffering.

The judgment is affirmed.

We concur: LORIGAN, J.; MELVIN, J.

178 Cal. 630

## NICHOLS v. PACIFIC ELECTRIC RY. CO. et al. (L. A. 4551.)

(Supreme Court of California. Aug. 2, 1918. Rehearing Denied Aug. 29, 1918.)

1. STREET RAILROADS ⟸117(24) — INJURIES ON TRACKS—DUE CARE—QUESTION FOR JURY.
In action against electric railway for injuries on track in collision with automobile, question whether plaintiff, while passenger in automobile, exercised ordinary care on approaching tracks *held* for jury.

2. TRIAL ⟸232(3)—FUNCTION—INSTRUCTION.
Instruction, with reference to jury's duty in weighing testimony of witnesses, stating they were sole and exclusive judges of facts and of credibility of witnesses, etc., *held* an excellent presentation of the jury's duty.

3. TRIAL ⟸296(8)—INSTRUCTION—WEIGHING TESTIMONY.
Court's statement to jury that they were not bound to believe testimony of any witness unless it imported verity and established conviction in their minds, in connection with whole instruction with reference to their duty in weighing testimony, *held* proper.

4. TRIAL ⟸194(17)—INSTRUCTION—CONTRIBUTORY NEGLIGENCE.
Instruction that, to hold plaintiff injured in collision with street car guilty of contributory negligence, jury must find from "all the evidence in the case" that plaintiff failed to do that which a person of ordinary prudence and caution would have done was proper, since jury is required to pass upon "all" the evidence.

5. APPEAL AND ERROR ⟸1033(5)—HARMLESS ERROR—INSTRUCTIONS.
Electric railway company, joined as defendant with driver of automobile in suit by passenger in automobile for injuries in collision on track, cannot complain of instructions on question of automobile driver's negligence which were too favorable to him.

6. NEGLIGENCE ⟸93(1) — IMPUTED NEGLIGENCE—GUEST IN AUTOMOBILE.
Negligence of automobile driver who collided with car of electric railway on its track was not imputable to a guest in the automobile.

7. STREET RAILROADS ⟸117(24) — INJURIES ON TRACKS—EXCESSIVE SPEED OF AUTOMOBILE—QUESTION FOR JURY.
In action against electric railway for injuries to passenger in automobile in collision with car, whether or not automobile was being driven at excessive speed by its driver *held* for jury.

8. CARRIERS ⟸280(7)—INJURIES TO GUEST IN AUTOMOBILE—LIABILITY OF DRIVER.
Under Civ. Code, § 2096, providing carrier of persons without reward must use ordinary care, driver of automobile owed to guest reasonable care, and if collision between automobile and electric car was proximately caused by driver's negligence, or concurrent negligence, of both driver and company, driver's guest could recover, unless guilty of contributory negligence.

Department 2. Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by Mildred Nichols against the Pacific Electric Railway Company, a corporation, and Dr. J. C. Negley. From judgment for plaintiff, defendants appeal. Affirmed.

Barstow, Beach & Rohe, Frank Karr, and R. C. Gortner, all of Los Angeles, for appellants. Hindman & Yakey, of Los Angeles, for respondent.

WILBUR, J. Defendants appeal from a judgment rendered in favor of the plaintiff for damages received by her in a collision between an electric railway car operated by the defendant railway company and an automobile operated by the defendant Negley, in which plaintiff was riding as a guest. Defendant railway company relies upon the defense of contributory negligence, it being claimed that the plaintiff was negligent in riding in the automobile of defendant Negley while it was being driven at a dangerous speed, without herself taking any precautions to ascertain whether or not the car of the defendant railway company was approaching. The automobile had a single seat, and plaintiff was seated at the left of the defendant Negley, who was driving the car, and on her lap was seated a Mrs. Collins. Plaintiff testified that the speed of the automobile was not excessive, and explained her statement in her complaint that the defendant Negley was driving his automobile at a rapid and dangerous rate of speed, by saying:

"His speed was rapid or he would not have hit the car. What I would call an excessive rate of speed would be the speed at which we were going to hit the car. I can only say that it was rapid and dangerous enough to hit the car."

Her first knowledge of the danger of a collision was the fact of the collision.

[1] The question as to whether or not the plaintiff, while passenger or guest in an automobile, exercised ordinary care upon approaching the tracks of a railway company is a question for the jury, under proper instructions by the court. Irwin v. Golden State Auto Tour Co., 171 Pac. 1059.

[2] The court gave the following instruction:

"You are the sole and exclusive judges of the facts in this case, and of the credibility of the witnesses. Your power of judging, however, is not arbitrary, but must be exercised with legal discretion, and in subordination to the rules of legal evidence. You are not bound to believe the testimony of any witness unless such testimony imports verity and establishes conviction in your minds, nor are you bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds as against a lesser num-

ber, or against other evidence satisfying your minds. Every witness is presumed to speak the truth. This presumption may be repelled by the manner in which he or she testifies, by his or her interest in the case, if any is shown by the evidence, his or her partiality or impartiality, by the reasonableness or unreasonableness of any statement he or she makes, by his or her candor and fairness or lack thereof, and by any other fact or circumstance elicited during the trial which may aid you, in determining as to whether the witness has spoken the truth."

[3] This is an excellent presentation of the jury's duty. Exception is taken to the clause, "You are not bound to believe the testimony of any witness unless such testimony imports verity and establishes conviction in your minds." It should be observed that the court in this sentence is not dealing with the measure of proof or instructing the jury with relation to a preponderance of the evidence, but is instructing them with reference to their duty in weighing the testimony of the several witnesses. It should, of course, be considered as a part of the whole instruction. The jury is never bound in law to believe the testimony of any witness that they do not in fact believe, and this is the meaning of this portion of the instruction.

[4] The railway company also complains of the instruction that:

"In order to hold the plaintiff guilty of contributory negligence you must find from *all* the evidence in the case that the plaintiff * * * failed to do that which a person of ordinary prudence and caution, etc., would have done."

—the particular objection being directed to the use of the word "all." The instruction was proper. The jury was required to pass upon all the evidence in the case in arriving at a verdict.

[5, 6] The following instruction is also complained of by the defendant railway company:

"Defendant Negley had a right to assume that, if a street car was proceeding along its tracks on Sixth street towards Crocker, some signal would be given by it of its approach, and he also had the right to assume that it would proceed at a moderate rate of speed and within the limit of speed as fixed by the governing ordinance, and he also had the right to assume that the motorman would operate said street car in a careful and prudent manner."

Other instructions were given in connection with the question of defendant Negley's negligence. The jury found that both defendants were negligent. Even if the instructions, taken together, were too favorable to defendant Negley on the question of whether or not he was guilty of negligence, the jury found him negligent. The defendant railway company cannot complain of such instruction, for Negley's negligence, if any, was not imputable to the plaintiff. Tousley v. P. E. Ry. Co., 166 Cal. 457, 137 Pac. 31.

[7, 8] The defendant Negley claims that his motion for a nonsuit should have been granted, for the reason that there was no proof of negligence on his part. The testimony tended to show that he was driving about 15 miles an hour at the time, at the intersection of Crocker and Sixth streets—a well built up section of the city of Los Angeles; that he did not slow down previous to the collision; that at the intersection of these two streets a hotel building extended to the sidewalk, occupying the southwest corner of Crocker and Sixth streets. The collision occurred between the north-bound automobile and the east-bound street car. The hotel, therefore, obscured the view of the driver of the automobile in the direction from which the car was approaching. The question of whether or not the automobile was being driven at an excessive speed was a question for the jury. Under this condition of the evidence the motion for nonsuit was properly denied. For the same reason it cannot be said that the evidence is insufficient to justify the verdict against the defendant Negley. The jury was properly instructed that defendant Negley owed to the plaintiff, his guest, "a reasonable degree of care for the safety of such guest, and that if the accident or collision between the automobile and the electric car was directly and proximately caused by the negligence of Negley, or the concurrent negligence of both, the plaintiff was entitled to recover against Negley unless she was guilty of contributory negligence." "A carrier of persons without reward must use ordinary care and diligence for their safe carriage." Section 2096, Civ. Code. See, also, Fitzjarrell v. Boyd, 123 Md. 497, 91 Atl. 547.

The judgment is affirmed.

We concur: LORIGAN, J.; MELVIN, J.

---

178 Cal. 592

## Ex parte FARB. (Cr. 2141.)

(Supreme Court of California. July 30, 1918.)

1. CONSTITUTIONAL LAW ⊜89(4)—FREEDOM OF CONTRACT—EMPLOYMENT.

Contracts to work, contracts to employ, and liberty freely to make such contracts, are protected by Const. art. 1.

2. CONSTITUTIONAL LAW ⊜89(4)—LEGISLATIVE AUTHORITY—POLICE POWER.

The constitutional guaranty to freely make contracts to work and to employ, while apparently absolute, is qualified by the legislative authority to enact proper laws under the police power.

3. CONSTITUTIONAL LAW ⊜81 — LEGISLATIVE DISCRETION—POLICE POWER.

A large discretion is vested in the Legislature in determining, not only proper subjects for the exercise of the police power, but the method of putting that power in force by statute.

4. CONSTITUTIONAL LAW ⊜275(2)—MASTER AND SERVANT ⊜69—DUE PROCESS—REGULATING TIPS.

St. 1917, c. 172, making it a misdemeanor for an employer to require his employé to pay over to him tips or gratuities received as a condition of the employment, is void as in conflict

with the due process provision of the United States Constitution and Const. art. 1, § 13.

Richards, J., dissenting.

In Bank. Application by Sam Farb for a writ of habeas corpus. Petitioner dismissed.

Oscar Samuels and J. Samuels, both of San Francisco, for petitioner. A. T. Roche and C. M. Fickert, both of San Francisco, for respondent. John T. Williams, of San Francisco, for Thos. F. Finn, Sheriff.

MELVIN, J. A writ of habeas corpus was issued upon the petition of Sam Farb, found guilty under a complaint charging him with violation of chapter 172 of the Statutes of California of 1917. It is conceded by petitioner's counsel that the one question involved in a final determination of this matter is whether or not that part of the statute is constitutional which prohibits an employer from entering into a contract requiring an employé to surrender to the employer all tips or gratuities received for services rendered to the public on behalf of the employer. The part of the act pertinent to this discussion is as follows:

"Any employer or agent or representative of an employer or other person having authority from his employer to hire, employ or direct the services of other persons in the employment of said employer, who shall demand or receive directly or indirectly from any person then in the employment of said employer, any fee, gift or other remuneration or consideration, or any part or portion of any tips or gratuities received by such employé while in the employment of said employer, in consideration or as a condition of such employment or hiring or employing any person to perform such services for such employer or of permitting said person to continue in such employment, is guilty of a misdemeanor." Stats. 1917, p. 257.

It is the contention of petitioner that this statute permits a violation of the right of employers and employés freely to enter into contracts, that it is in conflict with the provisions of the federal and state Constitutions, and that it seeks to make an improper extension of the police power of the state.

Respondent seeks to justify the statute upon the ground that it is designed to relieve the public against fraud and imposition arising from the employer's failure to notify the public that the gratuities bestowed upon employés go to the employer; and upon the further ground that the Legislature is empowered to enact such laws to "provide for the comfort, health, safety and general welfare of any and all employés." Article 20, § 17½, Const. of Cal. It is further contended in opposition to the writ that regulation will not accomplish the removal of the evil to be overcome, and that therefore the Legislature has the right to prohibit any agreement whereby an employer may enjoy any part of the gratuities tendered to the employé.

[1-3] At the outset it is to be noted that the statute under review does not by its terms or otherwise seek to limit or reduce the bestowal of tips or the practices by which either the keepers of places of public resort or those employed therein may try to wheedle or extort contributions from customers. That the custom of tipping has in many communities grown into proportions that astonish and dismay the person of moderate wealth is undoubtedly true; and that in many establishments one seeking accommodation must either tip or go unserved is equally well known. Therefore we may well concede that the police power might be invoked to prevent, by regulation, some of the evils arising from the tipping custom in those places where it has developed almost into organized blackmail. We cannot see how the statute before us would have any tendency by its operation to benefit the public generally. Indeed, it would rather have the opposite tendency, because the waiter or other employé engaged in serving the public would probably seek very keenly to coax or extort contributions from his customers if he were the sole beneficiary of such payments, while his enthusiasm and art would be less heartily enlisted in getting from customers gifts to be enjoyed exclusively or principally by the employer. The statute, if defensible at all, must be upheld therefore as a measure tending reasonably to protect employés in their health, or safety or to preserve their morals or to promote their general welfare. That contracts to work, contracts to employ, and liberty freely to make such contracts, come under the protection of the very first article of our Constitution, is undoubtedly true. It is also true that the constitutional guaranty freely to make such agreements, while apparently absolute, is qualified by the legislative authority to enact proper laws under the police powers of the state. It is also true that a large discretion is vested in the Legislature in determining, not only the proper subjects for the exercise of the police power, but the methods of putting that power in force by statutes. Yet the courts must determine, in passing upon the constitutionality of such laws, whether or not that discretion has been exercised in such manner as to interfere unduly with the right of contract. We might quote very many authorities from many jurisdictions to illustrate the principles upon which such questions as that now before us should be determined, but we find a brief and sufficient declaration of them in Mr. Justice Shaw's language, in the opinion of this court in a matter involving the right of the limitation by law of the hours of work for women in certain occupations. We refer to In re Miller, 162 Cal. 687–693, 124 Pac. 427, 428, where the following language was used:

"Because of the great value to mankind and the consequent paramount importance of the preservation of individual liberty, it is univer-

sally admitted and held that the police powers of the Legislature are not absolute or unlimited. These personal rights cannot be taken away or impaired at the mere will of the Legislature, nor at all, unless public welfare demands it. So far as the effect on himself alone is concerned, each person has the absolute right to judge for himself whether the hard labor which he voluntarily performs is for his best interest or not. The Legislature cannot judge for persons in this respect and interfere solely to prevent them from injuring themselves by excessive labor. The injury must be of such character and extent and to such a number of persons that it may be reasonably supposed that it will cause injury to others, that is, to the community in general, or, as it is expressed, to the public health and general welfare. Lawton v. Steele, 152 U. S. 136 [38 L. Ed. 385, 14 Sup. Ct. 499].

"The means adopted to produce the public benefit intended, or to prevent the public injury, must be reasonably necessary to accomplish that purpose and not unduly oppressive upon individuals. The determination of the Legislature as to these matters is not conclusive, but is subject to the supervision of the courts, and, if the above qualities are wanting, a law arbitrarily interfering with the right of contract, or imposing restrictions upon lawful occupations, will be held void."

In Miller v. Wilson, 236 U. S. 373, at page 380, 35 Sup. Ct. 342, at page 343 (59 L. Ed. 628, L. R. A. 1915F, 829), involving the same statute, Mr. Justice Hughes thus briefly described the question arising in all cases of this sort:

"As the liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint —not immunity from reasonable regulation to safeguard the public interest—the question is whether the restrictions of the statute have reasonable relation to a proper purpose."

Upon the principles above announced, courts have not hesitated to sustain statutes enacted in pursuance of the police power having the legitimate function of protecting the health or morals of certain classes, but they have been equally ready to apply constitutional rules to the overthrow of laws which under the guise of such regulation have interfered with the freedom of contract. It will suffice for the purposes of this discussion to cite a few of the leading cases of that kind. In Adams v. Tanner, 244 U. S. 590, 594, 37 Sup. Ct. 662, 61 L. Ed. 1336, L. R. A. 1917F, 1163, Ann. Cas. 1917D, 973, the Supreme Court of the United States considered a law enacted by the people of the state of Washington, by which it was declared unlawful for any employment agent to demand or receive either directly or indirectly from any person seeking employment any fee for furnishing him or her with employment or information leading thereto. The statute was held to be in violation of the guaranty of liberty secured by the Fourteenth Amendment. In the course of the prevailing opinion in that case, Mr. Justice McReynolds, answering the contention that certain abuses had grown up in connection with the business of conducting employment agencies used the following language:

"Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

This language is peculiarly apt in view of the arguments advanced in defense of the statute here under review. We are cited to the incident of a man who employed girls to attend to the checking of hats. These girls were required, as a condition of retaining their employment, to put all tips into a locked box through a slot, and were compelled to comply with the requirement that they should wear dresses and aprons having no pockets, lest they might secrete some of the money and take it away with them. Such an exaction would, of course, be humiliating to the employé, but one desiring to avoid it might resign.

In Coppage v. State of Kansas, 236 U. S. 1, 35 Sup. Ct. 240, 59 L. Ed. 441, L. R. A. 1915C, 960, a statute of the defendant in error making it a misdemeanor for an employer to require an employé to agree not to become a member of any labor organization during the time of the employment was held repugnant to the "due process" clause of the Fourteenth Amendment. After citing Adair v. United States, 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764, to the effect that the right to sell and the right to purchase labor are correlative and each subject to regulation by contract, Mr. Justice Pitney, who wrote the opinion of the court, said (236 U. S. 12, 35 Sup. Ct. 243, 59 L. Ed. 441, L. R. A. 1915C, 960):

"Granted the equal freedom of both parties to the contract of employment, has not each party the right to stipulate upon what terms only he will consent to the inception, or to the continuance, of that relationship? And may he not insist upon an express agreement, instead of leaving the terms of the employment to be implied? Can the Legislature in effect require either party at the beginning to act covertly; concealing essential terms of the employment—terms to which, perhaps, the other would not willingly consent—and revealing them only when it is proposed to insist upon them as a ground for terminating the relationship? * * * Can the right of making contracts be enjoyed at all, except by parties coming together in an agreement that requires each party to forego, during the time and for the purpose covered by the agreement, any inconsistent exercise of his constitutional rights?

"These queries answer themselves. The answers, as we think, lead to a single conclusion: Under constitutional freedom of contract, whatever either party has the right to treat as sufficient ground for terminating the employment, where there is no stipulation on the subject, he has the right to provide against by insisting that a stipulation respecting it shall be a sine qua non of the inception of the employment, or of its continuance if it be terminable at will."

The statute before us is not defensible as a regulatory measure upon any of the grounds which have operated to uphold laws prescribing hours of labor, conditions of workshops, and the like; but this court is urged to uphold it upon the ground that it is designed to protect the public from fraud. We are told that gratuities are bestowed, not upon the employer, but upon the employé as a reward for promptness or politeness or skill beyond the mere performance of his duty to serve his master's customers, and that when this personal gift is appropriated by the employer a fraud upon the giver is perpetrated. If we concede the correctness of this contention, for the purposes of discussion, still we must declare the statute void as seeking to overcome by prohibition of any contract between employer and employé, a deception which would instantly disappear if the former were required to post in his place of business a notice of the terms of the contract whereby he was to have the benefit of gratuities. It can hardly be doubted that an employer might (as a few of them do) forbid the employé, under pain of dismissal for disobedience, to accept any tips. This would be no fraud upon the customer. How then would the customer be defrauded if he were informed that he might not give a tip to the employé but might bestow a gratuity upon the employer? To ask the question answers it. The law does not tolerate the prohibition of something which may be regulated in such way as to overcome any evils which may be incidentally connected with it. As was said in Adams v. Tanner, supra:

"Appellant's occupation as agent for workers cannot exist unless the latter pay for what they receive. To say it is not prohibited because fees may be collected for something done in behalf of other principals is not good reasoning. The statute is one of prohibition, not regulation. 'You take my house when you do take the prop that doth sustain my house; you take my life when you do take the means whereby I live!'"

In other words, even if it be conceded that the object of the statute is to protect the public from fraud existing because of keeping people in ignorance of the ultimate disposition of tips bestowed upon employés, the means used to accomplish that object are most unreasonable. It has been held in California that while the Legislature might well regulate or prohibit the transportation of diseased fruit or prevent deception in the labeling of it, a law requiring every package of fruit to bear a label naming the county and immediate locality in which the fruit was grown could not be upheld as a legitimate exercise of the police power. Ex parte Hayden, 147 Cal. 649, 82 Pac. 315, 1 L. R. A. (N. S.) 184, 109 Am. St. Rep. 183. It has also been held that, while regulations to prevent deception of the public by the offer of stale eggs as fresh ones are beneficial laws and should be upheld, this object would not be attained by laws requiring each egg brought from without the state of California to bear a printed declaration of the fact of its importation. Matter of Application of Foley, 172 Cal. 744, 158 Pac. 1034, Ann. Cas. 1918A, 180. These and other authorities which might be cited confirm the doctrine that reasonable regulation, where it is practicable, is the only method by which incidental evils sometimes attaching to a legitimate business or calling may be overcome and abolished.

In the foregoing discussion it has been conceded for the purposes of argument that concealment from the customer of the contract by which gratuities are enjoyed by the employer amounts to a fraud upon the said customer. There is nothing essentially immoral in the contract itself whereby the employé agrees to work for a certain wage and to surrender all tips to his employer. Supreme Court of Iowa (correctly we think) approved an instruction to the effect that while the plaintiff, a bootblack, would be entitled to any gifts by way of tips, the employer might, if he could, prove an agreement on plaintiff's part to turn the tips over to him. Zappas v. Roumeliote, 156 Iowa, 709, 137 N. W. 935. If it is lawful, as between employer and employé, to provide for the ownership of tips given into the possession of the latter, it can hardly be said that the patron's ignorance of it makes the contract unlawful. A waiter, for example, might buy a suit of clothes and agree with the tailor that he would apply all tips to the payment of the bill for the garments until the stipulated price should be fully paid. Would the patrons bestowing those gratuities be defrauded by their ignorance of the contract? Assuredly they would not. Yet such a contract does not differ in principle from one whereby the servant agrees to forego the enjoyment of tips for the sake of his salary and of retaining his position. In either case it would make no difference whether the extra payment or gift were bestowed because of the good quality of the food (for which the waiter might not be responsible); or the comfort of the chair (for which the barber might deserve no credit); or because of the beauty of the girl in the hatroom, the sweet voice of the cabaret singer, the deftness of the bootblack, or any other attribute or excellence of a personal nature. Even if we concede that the gratuity is essentially a personal earning of the employé, nevertheless it must be true that one may enter into a contract involving the expenditure of one's earnings.

[4] The statute under review is void because it is in conflict with the "due process" provision of the Constitution of the United States and with section 13 of article I of the Constitution of California.

Petitioner dismissed from custody.

We concur: SHAW, J.; SLOSS, J.; WILBUR, J.; LORIGAN, J.

ANGELLOTTI, C. J. (concurring). I am of the opinion that, in so far as the act under discussion prohibits any contract between the employer and the employé that all or any tips and gratuities received by the employé while in the employment of the employer shall belong and be paid to the employer, or that prohibits any demand or receipt by the employer from the employé of the tips and gratuities to which he is entitled under any such contract, it is in violation of provisions of the federal and state Constitutions. In my opinion the only conceivable ground upon which this portion of the act might be upheld is that it was essential to the protection of the public against fraud. As is shown by the prevailing opinion, the only possible fraud on the public is the keeping of them in ignorance of the ultimate disposition of tips and gratuities conferred by them. That this evil might be sufficiently overcome by reasonable regulation short of absolutely prohibiting a contract between the employé and employer is also sufficiently shown in the opinion. This being so, the authorities amply sustain the conclusion that there can be no such prohibiting of contract. See, also, In re Kelso, 147 Cal. 609, 82 Pac. 241, 2 L. R. A. (N. S.) 796, 109 Am. St. Rep. 178.

I therefore concur in the judgment discharging the petitioner.

RICHARDS, Judge, pro tem. I dissent. The statute under review in this proceeding was not chiefly designed, as the prevailing opinion seems to indicate, "to protect employés in their health or safety or to preserve their morals or to promote their general welfare." Its chief and obvious purpose was to deal with the relation or transaction arising between patrons of places of public resort for service, pleasure, or instruction, and the servitors in such places, wherein the former seeks to insure or reward promptness, fidelity, and courtesy on the part of the latter in the performance of some particular service by the giving to such servitor a sum of money popularly known as a "tip." In the individual instance the offering is usually small and the service slight, but in the concrete a very large proportion of the general public is affected by what has grown to become an almost universal custom. Every person who travels in this age of travel or who patronizes hotels or restaurants or attends theaters, lectures, or other public places of amusement or instruction, is affected by the custom of giving and receiving tips.

Whether or not it is a pernicious custom savoring of extortion, and furnishing a fertile soil for flunkeyism, favoritism, and partiality in respect to those elements of promptness, fidelity, and courtesy to which patrons of such public places or conveniences are equally entitled without the voluntary offering or the compulsion of such gratuities, the law in question does not attempt to determine. All that it does is to say that the employer and the servitor shall not make an agreement between themselves the effect of which would be to divert the gratuity given by the individual patron from the person for whom it was intended, and thus destroy the incentive to prompt, faithful, and courteous service which prompted the gift. Can it be said that a statute which has for its object the preservation of the spirit, intent, and effect of a relation and agreement to which in the concrete the general public is the most largely interested party is invalid when it seeks to prevent the proprietor and the servitor from making another agreement, to which the general public is not a party, the effect of which is to divert the consideration, destroy the incentive, and render ineffectual the relation created by the former agreement? To my mind the right of freedom of contract does not extend so far as to embrace the freedom to make one contract which shall violate the spirit, intent, and obligation of another, particularly when that other is one of a class of like agreements so infinite in number as to affect the public at large.

In addition to this, however, the contract, the freedom to enter into which is upheld by the prevailing opinion, is one which is in its essence unconscionable and fraudulent, and is also one which in many if not most instances is devoid of that very element of freedom as to one of the parties by which it is sought to be justified. It is unconscionable because by its terms the employer as the proprietor of the place or service in connection with which the tip is received by his employé, is not entitled to it, since he is already fully paid for whatever he furnishes by his regular charges, which cover and compensate him for the fullest measure of promptness, fidelity, and courtesy toward his patrons on the part of his employés. To permit him to exact more is not only to legalize an overcharge, but is also to encourage discriminations in the price and quality of his service as between those of his patrons who do and those who do not submit to the overcharge. It is fraudulent in respect to those patrons because it secretly aims to take from them that which they intended for another, and because its effect is to destroy the very incentive for doing those things for which the gratuity was given. The porter, the waiter, the bellboy, the chambermaid, who either willingly or unwillingly enters into a contract with his or her employer by which the tip is to be surrendered, has no longer any interest in doing promptly, faithfully, and courteously the service which the tip was given to insure, and to the extent of the inevitable lapses in the efficiency of such service the immediate patron, and by extension the general public, is defrauded of its due.

The suggestion in the prevailing opinion

that all this would be avoided by the simple expedient of having the proprietor post in his establishment a notice to the effect that all tips paid to his employés were by agreement to belong to the employer has, it is true, the merit of simplicity, but has nothing else to recommend it. That such notices, as a matter of common knowledge, have never been posted anywhere, may be taken to be sufficient proof that the publication of such an agreement by that means would defeat the very purpose for which the agreement was made by stopping the flow of tips at once, since the public would have no interest in giving tips to servitors who had no longer any interest in doing the service with the degree of promptness, fidelity, and courtesy which the tip was given to induce. Besides, it is not the province of the courts to suggest similar ways of remedying admitted evils as a reason for refusing to uphold those which the Legislature has seen fit to adopt in the exercise of its right of selection in the choice of remedies. In so far as the elements of freedom of contract, as between the proprietor and his employé, is concerned, upon which emphasis is laid in the prevailing opinion, it may be safely said that the trend of modern authority and decision is against the longer acceptance of that outworn fiction upon which Adam Smith predicated much of his impractical economics. How much is there of mutual freedom of contract between the proprietor, who has his choice and time in the matter of selecting his servants, and the average applicant for the position of waiter or bellboy or chambermaid, whose every hour of unemployment is a step nearer to starvation? We have already banished this fiction from many of our statutes and decisions regulating the obligations and liabilities arising out of the relation of master and servant. Why then should we invoke it to defeat a piece of salutary legislation framed in the public interest and intended not only to forbid fraud upon the public, but also to prevent employers from compelling their employés, under the pretense of an agreement which would not as a rule from the very nature of things be voluntary, to yield up to their employers that which they have no right to appropriate? The illustration used in the prevailing opinion of the waiter agreeing with his tailor to turn over to him his tips in payment for a suit of clothes has no possible aptitude, since in that case the incentive is left in the waiter to earn the tips in order that he may the sooner enjoy the clothes, while no such incentive remains when by previous agreement or compulsion his employer appropriates his tips; and, if it be argued that he would still strive to deserve the tip in order to hold the job, then what becomes of the argument based upon his supposititious freedom of contract?

The cases cited in support of the views expressed in the prevailing opinion have no application to the instant case, since their facts bear no similitude to those of the case at bar. The statute under review is novel, and the case is one of first impression. The subject with which the statute deals is one in which the public interest is so far involved as to bring it properly within the purview of the police powers of the state. It is practically conceded in the prevailing opinion that the Legislature might well and safely have enacted a statute abolishing altogether the custom of tipping, and declaring it unlawful to permit this practice in any place of public resort, for the reason, as well stated therein, "that the custom of tipping has in many communities grown into proportions that astonish and dismay persons of moderate wealth, and that in many establishments one seeking accommodation must either tip or go unserved." That the state has the almost unlimited power to regulate that which it has full power to destroy has been too frequently decided to require the citation of authority. The statute in question is a step in the way of such regulation which should be sustained upon all the grounds urged in its support.

The writ should therefore be discharged and the petitioner remanded.

---

178 Cal. 525

## PEOPLE v. MOONEY. (Cr. 2175.)

(Supreme Court of California. July 15, 1918.)

1. CRIMINAL LAW ⟸998 — SETTING ASIDE JUDGMENT—FRAUD.

Motion to set aside judgment and sentence on ground that verdict, order denying new trial, judgment, and sentence were procured through the willful nonfeasance and malfeasance and willful fraud of the district attorney, committed upon the superior court, jury, and defendant, whereby defendant was deprived of a fair and impartial trial, and which prevented a fair submission of the cause, was too general as a charge of fraud.

2. CRIMINAL LAW ⟸997 — SETTING ASIDE JUDGMENT—WRIT CORAM NOBIS.

Motions in the nature of writs of coram nobis to set aside judgments cannot be granted, where remedies exist by statute which did not exist at common law; such writ applying only where the defendant has been denied a trial upon the merits, or where there has been no trial at all.

3. CRIMINAL LAW ⟸998 — SETTING ASIDE JUDGMENT—GROUNDS.

A judgment in a criminal case cannot be set aside for fraud, because it is predicated upon perjured testimony, or because material evidence is concealed or suppressed.

4. CRIMINAL LAW ⟸998 — SETTING ASIDE JUDGMENT—FRAUD.

The duty of a district attorney does not differ in the trial of criminal actions from that of counsel in civil actions, and if he introduces perjured testimony, or suppresses material evidence, the injured party is without remedy, in so far as the judgment is concerned.

In Bank. Thomas J. Mooney was convicted of murder, and the conviction was affirm-

ed by the Supreme Court. From an order of the superior court, denying his motion to set aside the judgment and sentence, he appeals, and applies for a certificate of probable cause. Application denied.

Maxwell McNutt and Edwin V. McKenzie, both of San Francisco, for appellant. Charles M. Fickert, Fred L. Berry, A. R. Cotton, and Louis Ferrari, all of San Francisco, for the People.

PER CURIAM. The defendant applies to the court for a certificate of probable cause on his appeal from an order of the superior court denying his motion to set aside the judgment and sentence heretofore pronounced against him. His object is to obtain a stay of execution of the judgment under section 1243 of the Penal Code.

[1] He was regularly convicted of the crime of murder, and was sentenced on February 24, 1917. He moved for a new trial and his motion was denied. Thereafter he appealed to the Supreme Court from the judgment and from the order denying a new trial and on March 1, 1918, said judgment and order were affirmed. 171 Pac. 690. The present proceeding was begun by a notice of motion filed in the superior court on April 28, 1918, which was after the affirmance of the judgment and order by the Supreme Court had become final. The grounds of the motion involved in this appeal, as set forth in said notice and in his oral motion in open court, are that the verdict of the jury, the order denying a new trial, the judgment, and the sentence, were procured through the willful nonfeasance, malfeasance, and willful fraud of the district attorney and his assistants, who conducted the prosecution, committed upon the superior court, the jury, and the defendant, Mooney, whereby defendant was deprived of a fair and impartial trial, and which prevented a fair submission of the cause. These general averments are not sufficient as a charge of fraud, under any rule of pleading, civil or criminal, known to our law. People v. McKenna, 81 Cal. 159, 22 Pac. 488; Reay v. Butler, 69 Cal. 582, 11 Pac. 463. In order to ascertain the facts constituting the asserted fraud, we must look to the affidavits offered in evidence in support of the motion at the hearing in the court below.

The crime charged was committed July 22, 1916, on Steuart street, near Market, in San Francisco, by the explosion of a bomb. On the trial it was the theory of the prosecution that the bomb, inclosed in a suit case, had been carried to the place in an automobile by Mooney, Billings, and others, all of whom rode in the automobile, and that it was deposited on the sidewalk by Billings a few minutes before it exploded. The affidavits set forth that two witnesses, Mrs. Edeau and Frank C. Oxman, testified at the trial that they, respectively, saw the defendant, at about the time and near the place of the explosion, in the company of the other persons accused of the crime, and under circumstances tending strongly to show that Mooney was a participant therein, which testimony, it is alleged, was wholly false, and that prior to the trial the district attorney was informed that certain statements had been made out of court by Mrs. Edeau which tended to show that she had never seen Mooney until after his arrest upon the charge of murder set forth in the indictment, and which, if shown, would have impaired her credibility with the jury. With regard to Oxman, it is asserted in the affidavits that certain information was given to the district attorney before the trial, which, it is claimed, would have tended to discredit Oxman as a witness. The affidavits are vague and unsatisfactory on this subject, and it is doubtful if they even tend to show that the information possessed by the district attorney and his assistants was of a character that should have raised a suspicion in their minds of Oxman's credibility. These alleged discrediting circumstances were not communicated to Mooney or his attorneys by the prosecution, and they had no knowledge thereof until after the trial, nor until after their motion for a new trial had been denied, and the judgment pronounced.

It must be admitted that the showing of fraud or misconduct on the part of the district attorney and his assistants in conducting the trial is of the weakest character, even if he were under any duty or obligation to disclose to the defendant all the evidence within his knowledge relating to the case. But we do not place our denial of the application for a certificate of probable cause entirely upon this ground. There are other reasons which lead us to conclude that the motion below, and the appeal from the order denying it, are alike without merit. The proceedings by way of motion to set aside the judgment, when made after the judgment has been rendered and has become final, and after a motion for a new trial has been denied and the time therefor has expired, is in the nature of an application for a writ coram nobis, at common law. Mr. Freeman, referring to the nature of this proceeding at common law, says:

"But this writ does not lie to correct any error in the judgment of the court, nor to contradict or put in issue any fact directly passed upon and affirmed by the judgment itself. If this could be, there would be no end of litigation. * * * The writ of error coram nobis is not intended to authorize any court to review and revise its opinions, but only to enable it to recall some adjudication made while some fact existed which, if before the court, would have *prevented the rendition of the judgment*, and which without fault or negligence of the party, was not presented to the court." 1 Freeman on Judgments, § 94. The italics are ours.

The learned judge of the court below, in giving his decision on the motion, delivered an opinion from which we quote and adopt the portions applicable here:

[2] "In all of the cases submitted by counsel on both sides, in which such relief has been sought, it is held that courts of general jurisdiction have the power to issue writs or hear motions in the nature of the writ of coram nobis. But where remedies exist by statute which did not exist at common law, the office and function of the writ are abridged thereby, and in such cases the writ is unavailable. These remedies are the right to appeal and to make a motion for a new trial, and, where they are provided by statute, to that extent an application for a writ of coram nobis cannot be entertained. It is in those cases where the defendant has been denied a trial upon the merits—in other words, where there has been no trial at all—that relief of this kind may be granted. In such cases it is obvious that the statutory remedies have no application and that defendant is wholly without remedy; and it is upon that theory that we look to the common law to provide a remedy. Such a case was People v. Perez, 9 Cal. App. 265, 98 Pac. 870; and, indeed, all of the cases cited, in which relief was afforded, were cases where no trial had been had, but a plea had been obtained from the defendant by some character of duress, or the trial was affected by some outside force. Asbell v. State, 62 Kan. 214, 61 Pac. 690; Sanders v. State, 85 Ind. 318, 44 Am. Rep. 29; State v. Calhoun, 50 Kan. 523, 32 Pac. 38, 18 L. R. A. 838, 34 Am. St. Rep. 141.

[3] "In the case at bar the defendant was not denied his defense. On the contrary, a trial was had, a motion for new trial was made by him, and appeal taken. These were the remedies provided by our statute to the exclusion of any common-law remedy. The statute, in other words, takes the place of the writ, and only in cases where there is no remedy by statute may we look to the common law. In the trial of the case of Thomas J. Mooney the truth or falsity of the testimony of the witnesses Oxman and Edeau was a part of the issue submitted to the jury, and that issue, upon the return of the verdict, became an adjudicated issue of fact, which cannot now by the writ of coram nobis be readjudicated. The remedy in such case is by motion for a new trial, and if newly discovered evidence is too late in its production, its consideration cannot be brought about under the guise of a motion to vacate the judgment upon the ground of fraud. The defendant in such case is without remedy. In this state it is the settled law that a judgment cannot be set aside because it is predicated upon perjured testimony, or because material evidence is concealed or suppressed. The fraud which is practiced in such cases upon both the court and him against whom the judgment is pronounced is not such fraud as is extrinsic to the record; and it is only in cases of extrinsic fraud that such relief may be had. Pico v. Cohn, 91 Cal. 134, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159; In re Griffith, 84 Cal. 112, 23 Pac. 528, 24 Pac. 381; Allen v. Currey, 41 Cal. 321.

[4] "Nor can it be said that the duty of a district attorney differs in the trial of criminal actions from that of counsel in civil actions. Each has an equal duty imposed upon him by the oath he has taken and by the law of the land to present to the court and to the jury only competent and legitimate evidence from which may be determined the truth of the issues involved. If that obligation be violated, and perjured testimony produced, or material evidence suppressed by either, as we have seen, in so far as the judgment is concerned, the injured party is without remedy."

For these reasons, the application for a certificate of probable cause is denied.

178 Cal. 569

## N. O. NELSON MFG. CO. v. RUSH et al.

(L. A. 4475.)

(Supreme Court of California. July 30, 1918.)

1. MECHANICS' LIENS ⊂=118 — NOTICE TO OWNER.

Where the owner by letter requested a subcontractor's materialman to give him the stop notice provided by Code Civ. Proc. § 1184, setting forth such notice, which sufficiently described the property, which demand was served on the materialman's credit manager, and the materialman failed to give such notice, he could not claim any lien on the owner's property for materials furnished.

2. MECHANICS' LIENS ⊂=118 — MATERIALMAN'S NOTICE—STATUTORY PROVISIONS—VALIDITY.

Code Civ. Proc. § 1184, providing that a materialman, who shall refuse to give notice that he has furnished material and its amount, shall be deprived of the right to claim the lien, is not unconstitutional, as depriving materialmen or laborers of the lien given by Const. art. 20, § 15.

Department 1. Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Suit by the N. O. Nelson Manufacturing Company against T. J. Rush and others, to foreclose a materialman's lien. Judgment for defendants, and plaintiff appeals. Affirmed.

Daniel Beecher and R. L. Horton, both of Los Angeles, for appellant. G. C. De Garmo, Behymer, Craig & Salzman, and W. T. Blakely, all of Los Angeles, for respondents.

SHAW, J. The plaintiff appeals from the judgment. The action is to foreclose a lien claimed by the plaintiff upon the property of T. J. Rush for materials furnished to W. A. Merrick, who was a subcontractor for a plumbing and heating plant installed in an apartment house erected by the Pacific States Investment Company, as original contractor, for T. J. Rush, the owner. The plaintiff is a corporation.

The plaintiff's claim for the materials amounted to $6,261.95. The court allowed it only $461.95. It is of this reduction that the plaintiff complains. During the progress of the work on Merrick's subcontract, the principal contractor paid Merrick from time to time, sums amounting to $7,500 on the subcontract price, out of moneys received from the owner. This money Merrick deposited in his general bank account, in which he also kept other moneys derived from other sources. By checks drawn on this account he made payments to plaintiff amounting to $7,500. At the time each of these checks was drawn he had just received a large sum from the principal contractor as aforesaid, and the balance of his account was not then sufficient to have paid the check without drawing upon the money so received from the principal contractor. At that time he owed other debts to the

plaintiff amounting to $5,800, but he gave no directions to plaintiff as to the application of these checks. The plaintiff thereupon applied $5,800 thereof upon the other debts, the result whereof was that there still remained unpaid, on the debt for which the lien is claimed, the sum of $6,261.95 as above stated. The court refused to allow this application on the other debts, and credited the $5,800 on the $6,261.95, claimed to be due for the materials furnished to Merrick. The court took the view that by reason of the provisions of the lien law this application could not lawfully be made. In this it is claimed that the court erred.

[1] We do not find it necessary to determine the question thus presented. For other reasons about to be stated, we are of the opinion that the plaintiff was not entitled to any lien upon the property of Rush for any part of this claim. Section 1184 of the Code of Civil Procedure provides that any of the persons said to be entitled to a lien in section 1183 may give a notice to the owner that they have performed labor or furnished material, or both, to the contractor, for use in the building, or that they have agreed to do so, stating the amount of that done or furnished, or agreed to be done or furnished, and thereupon it proceeds as follows:

"And any of the said persons who shall on the written demand of the owner, refuse to give such notice shall thereby deprive himself of the right to claim a lien under this chapter."

After the plaintiff had begun to furnish materials to Merrick on this subcontract, and had furnished a large amount thereof, and during the progress of the work, while the owner still held enough of the original contract price unpaid to have satisfied the plaintiff's claim, if a stop notice had been given, the owner, Rush, served upon one Sackett, who was then the credit manager of the plaintiff, a demand, the material portions of which are as follows:

"Los Angeles, California, June 24, 1913.

"To Dr. T. J. Rush and Mrs. Eva Rush, Owners of Building at Northwest Corner of Orange and Bonnie Brae, Los Angeles:

"You are hereby notified that the undersigned has furnished materials, namely, * * * to be used in the construction of said building; that said materials were sold and furnished to * * * and that the value of said materials so furnished is the sum of $———, on which there is a credit of $———, leaving a balance of $———, still due, owing, and unpaid.

"You are hereby notified to withhold from any moneys due or that may become due from you for the construction of said building, a sum sufficient to pay the undersigned said sum of $———, together with costs, as provided by law.

"Please fill out the above and mail to me.

"Dr. T. J. Rush."

The description of the property in the complaint states that it is situated on the northwest corner of Orange and Bonnie Brae streets in the city of Los Angeles. The description in the above form of notice was sufficient to identify the property to which it referred as the same property on which the building was being erected, and for which plaintiff was furnishing materials. This paper was therefore, in substance and effect, a demand by the owner upon the plaintiff that it should give the stop notice provided for in section 1184 aforesaid. It further appears that the plaintiff never gave such stop notice, and that the owner had paid out to the original contractor all the moneys due on the contract price, as they became due, prior to the filing of the claim of the plaintiff in the recorder's office. It follows from this that the plaintiff is deprived of the right to claim any lien for any part of the materials furnished to the subcontractor.

Although these facts are all stated in the findings, the court below was unwilling to rest its decision upon this point, because of its doubt whether a demand served on the credit manager of the plaintiff could be deemed to be a demand upon the plaintiff. The defendants have acquiesced in this view, at least so far that they did not take an appeal from the judgment for $461.95. In resisting the plaintiff's appeal, however, they claim that because of these facts the plaintiff was not entitled to any lien, and, consequently, that he cannot complain of the action of the court in eliminating the $5,800 from his lien claim and reducing it to $461.95. We are satisfied that the demand upon the credit manager of the plaintiff was sufficient. The materials furnished to Merrick were sold upon credit, and the debts thus arising from Merrick to the plaintiff were a part of the credits of the plaintiff, of which Sackett was the manager. Prima facie, at least, his duties would embrace the determination of the advisability of giving this credit to Merrick and the taking of such steps as would be necessary or appropriate in the ordinary course of business to secure their payment. Among these would be the giving of the stop notice to the owner in order to have money withheld from the contract price out of which to pay this claim. It would be strictly within the scope of the duties of a credit manager to attend to this part of the business of the plaintiff. A corporation can act only by agents, and hence a demand upon an agent who is in charge of a particular branch of its business, on a matter relating to such branch and in the ordinary course thereof, is sufficient. This demand was sufficient to accomplish the desired end and the failure of the plaintiff to give the stop notice thus required brought it completely within the terms of the provision of section 1184, and prevents it from claiming or enforcing any lien thereon upon the property for any part of its claim. It has obtained by the judgment more than its lawful right.

The authorities fully support this conclusion:

"The officer or agent to whom the management of the business is thus intrusted may be called the 'manager,' 'general manager,' 'general agent,' 'superintendent,' etc., or he may be the 'president,' 'treasurer,' 'secretary,' etc. But his title, while it may raise a presumption as to the extent of his authority, does not necessarily determine his authority. The extent of his implied authority depends upon the duties with which he is intrusted. He may be intrusted with the entire management and control of the business, and in such a case his authority to act for the corporation is very broad. Or he may be intrusted with the management of a particular branch of the business only. In any case the extent of his authority depends upon the scope of his employment. * * * If he is intrusted with the management of a particular branch of the business only, his authority does not extend beyond such contracts and acts as are incident to the management of that particular branch." 3 Clark & Marshall on Corp. § 700; Hobbs v. Georgia Lumber Co., 74 Ga. 371; Love v. Anchor, etc., Co., 45 Pac. 1044.[1]

[2] The plaintiff suggests that the above-quoted provision of section 1184 is unconstitutional, that it operates to deprive persons bestowing materials or labor upon a building of a lien given to them by section 15, article 20, of the Constitution. The provision of the section is nothing more than a regulation of the exercise of the constitutional right to a lien. It is reasonable and just, and one which the Legislature has a right to make in the exercise of the police power, similar to that which it has to regulate the exercise of the right to make contracts by prescribing reasonable regulations respecting the form thereof.

The judgment is affirmed.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

---

178 Cal. 554

## CHURCHILL CO. v. KINGSBURY, Surveyor General. (Sac. 2798.)

(Supreme Court of California. July 24, 1918. Rehearing Denied Aug. 22, 1918.)

1. NAVIGABLE WATERS ⟹36(3)—LANDS UNDER WATER—PROPERTY OF STATE.
Lands bordering a navigable lake left uncovered in the fall by the natural recession of its waters are sovereign lands of the state.

2. NAVIGABLE WATERS ⟹36(1)—LANDS UNDER WATER—OWNERSHIP.
The shores of navigable waters and the soils under them were not granted by the federal Constitution to the United States, but were reserved to the states respectively, and new states have the same rights, sovereignty, and jurisdiction over such shores as the original states.

3. NAVIGABLE WATERS ⟹1(3)—DEFINITION—"NAVIGABLE."
In England, the only waters regarded as navigable are those in which the tide ebbs and flows, but in this country the broader rule prevails that all waters are deemed "navigable" which are really so.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Navigable.]

4. NAVIGABLE WATERS ⟹36(1)—LANDS UNDER WATER—TITLE OF STATE.
The title of the state to land under navigable waters extends, not only to the land underlying the part of the navigable waters over which navigation may be conducted, but to the entire bed, in particular to the land covered and uncovered by the ordinary rise and fall of the tide, stream, or lake.

5. NAVIGABLE WATERS ⟹1(1)—"NAVIGABLE LAKE"—EXTENT.
A "navigable lake" consists of a body of water contained within its banks as they exist at the stage of ordinary high water.

6. PUBLIC LANDS ⟹61(14)—LANDS UNCOVERED BY RECESSION OF WATERS—STATUTE.
Lands on shore of navigable lake, periodically left uncovered in fall by natural recession of waters, did not come within Pol. Code, §§ 3493m, 3493s, validating uncanceled certificates of purchase and patents made for lands as swamp and overflowed lands now uncovered or which may hereafter be uncovered by recession or drainage.

7. PUBLIC LANDS ⟹61(14)—VALIDATION OF CERTIFICATES OF PURCHASE AND PATENTS—EFFECT OF STATUTE.
Pol. Code, § 3493s, validating uncanceled certificates of purchase and patents made as for swamp and overflowed lands, merely validates certificates, etc., for lands at the time of the passage of the act belonging to one of the classes described in section 3493m.

In Bank. Petition for mandamus by the Churchill Company against W. S. Kingsbury, Surveyor General and ex officio Register of the State Land Office of the State of California. Alternative writ discharged, and proceeding dismissed.

Tapscott & Tapscott, of Yreka, and A. E. Bolton, of San Francisco, for petitioner. U. S. Webb, of San Francisco, and R. T. McKisick, of Sacramento, for respondent. C. E. McLaughlin and A. B. Reynolds, both of Sacramento, amicus curiæ.

SLOSS, J. This is a proceeding in mandamus, brought to compel the state surveyor general to perform the acts preliminary to the issuance to petitioner of a patent for 5,120 acres of land in Siskiyou county. An alternative writ was ordered. The material facts are admitted, either by answer or by stipulation.

On October 11, 1872, one Dorris made application under the law of 1868 (Stats. 1867–68, p. 507) for the land in question, as swamp and overflowed land. The county surveyor of Siskiyou county made a survey, and returned the same to the surveyor general. On October 4, 1874, the register of the state land office issued to Dorris certificate of purchase No. 4185 for said land, as swamp and overflowed land. Dorris and his successors in interest have ever since been in possession of said property, and have paid all taxes levied and assessed against it. On October 11, 1917, the petitioner, as successor to the interest of

[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 114 Cal. xvi.

Dorris, presented to the county treasurer the certificate of purchase, made tender of the amount due for the balance of principal and interest, and took the further steps required under the law to entitle it to demand a patent. The tender and demand having been refused, this proceeding followed.

The land lies at the edge of Little Klamath Lake, a navigable body of water about 18 miles long, and half as wide, lying partly in California and partly in Oregon. Little Klamath Lake has no outlet and no separate watershed. It receives its main supply of water from Upper Klamath Lake, which is in Oregon. From Upper Klamath Lake water flows to Little Klamath Lake through a branch of the Klamath river. There is but a slight fall in the channel between the two lakes, and water flows through it to Little Klamath Lake only when the water in Upper Klamath Lake is high. In ordinary seasons the water in Little Klamath Lake reaches its maximum height about the month of April in each year. During the summer months the water level gradually falls, reaching its lowest point from August to November. Ordinarily, the difference between the high and the low water levels of Little Klamath Lake is about three feet. The land in question is part of a wide strip which, in ordinary seasons is covered during the period of high water to a depth of about three feet, and is uncovered when the water is at its lowest stage; the latter condition continuing, usually, during the months of September and October. The strip which includes the tract in controversy slopes gently toward the center of the lake. At its inner edge there is an abrupt break or drop to a depth varying from four to seven feet. This break marks the edge or bank of the lake at low water. There is, also, a distinct rise of several feet at the outer border of the strip. The land thus annually uncovered is fertile and susceptible of cultivation without further reclamation than such as would be necessary to exclude the water of the lake from it. Klamath river itself, as well as Little Klamath Lake, is navigable. A survey of the region was made under the authority of the United States in August, 1872. In making that survey a meander line was run along the ordinary high-water line of the lake, and marked upon the land. No land was surveyed or lines run north or west of said meander line (i. e., below said high-water line), and no survey has ever been made by the United States of the lands (including those in controversy) beyond said meander line.

Whether the lands in question were swamp and overflowed lands, passing to the state by grant from the United States, or were lands lying under the waters of a navigable lake, belonging to the state by virtue of her sovereignty, the petitioner concedes that no right of purchase was vested in Dorris by the certificate, under the law as it stood when the certificate was issued. The statute then in force did not authorize the sale of swamp and overflowed land until six months "after the same has been segregated by authority of the United States." Pol. Code, § 3441; Garfield v. Wilson, 74 Cal. 175, 15 Pac. 620; Wren v. Mangan, 88 Cal. 274, 26 Pac. 100; Polk v. Sleeper, 143 Cal. 70, 76 Pac. 819. The pleadings and the stipulation of the parties show that there had been no segregation of the land below the meander line. So, likewise, the certificate of purchase was invalid if the land described in it was sovereign land of the state, there being at the time no law authorizing the sale of any such land, except tidelands. Edwards v. Rolley, 96 Cal. 408, 31 Pac. 267, 31 Am. St. Rep. 234.

[1] The petitioner relies upon the terms of the act of March 24, 1893, providing for the sale of lands uncovered by the recession or drainage of the waters of the inland lakes, and unsegregated swamp and overflowed lands. Stats. 1893, p. 341. This act, which, with its amendments, has been incorporated into the Political Code (section 3493m et seq.) contains a provision validating certificates of purchase theretofore made for any lands as swamp and overflowed lands which belonged to any of the classes offered for sale by the act. The petitioner claims, accordingly, that its certificate, although unauthorized by law at the date of its issue, was confirmed and made valid for all purposes by the statute just mentioned. Since the act authorizes the sale both of sovereign lands and of unsegregated swamp and overflowed lands, it might not be necessary for the petitioner to maintain that the lands in question fall within one of these classes rather than the other. It does, however, take the stand that the land is, in fact, sovereign land of the state, and in this we think it is clearly right.

[2-5] Since the decision of the Supreme Court of the United States in Pollard's Lessee v. Hagan, 3 How. 212, 229 (11 L. Ed. 565), there has never been any question of these propositions, there laid down:

"First, the shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, the new states have the same rights, sovereignty, and jurisdiction over this subject as the original states."

In England the only waters regarded as navigable are those in which the tide ebbs and flows. The different conditions prevailing in this country have, however, led to the adoption of the broader rule that "all waters are deemed navigable which are really so." Barney v. Keokuk, 94 U. S. 324, 336, 24 L. Ed. 224. The title of the state extends, not only to the land underlying that part of a navigable stream or body of water over which navigation may be conducted, but extends to the entire bed, and in particular to the land which is covered and uncovered by the ordinary rise and fall of the tide, stream, or

lake. Barney v. Keokuk, supra; McManus v. Carmichael, 3 Iowa, 1. The agreed facts in this case show that the land in controversy is a part of the bed of Little Klamath Lake, a navigable body of water. During the greater part of the year, in ordinary seasons, the land is covered by the waters of the lake. It is uncovered only at times of low water. The extent of land covered by any navigable water must necessarily vary with the tide, or the rise or fall of the stream or lake. There will always be some land that is covered or uncovered as the water is high or low. Such land is no less a part of the bed because it is extensive in area. The record does not sustain the respondent's claim that the waters covering the lands in question are flood waters. The stipulation refers only to the high and low water stages reached in ordinary seasons. The lake consists of the body of water contained within the banks as they exist at the stage of ordinary high water. See Miller & Lux v. Madera Canal, etc., Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A. (N. S.) 391. Such cases as Niles v. Cedar Point Club, 175 U. S. 300, 20 Sup. Ct. 124, 44 L. Ed. 171, and State v. Lake St. Clair Fishing & Shooting Club, 127 Mich. 580, 87 N. W. 117, relied on by respondent, are not in conflict with our conclusion. In each of them the decision was based upon the particular state of facts, which, in the view of the court, warranted a finding that the land was not a part of the bed of the lake, but was a marsh or swamp land adjoining the border of the lake.

[6] Section 3493s of the Political Code, which, as petitioner claims, validates the certificate of purchase, provides:

"All uncanceled certificates of purchase and patents heretofore issued, and payments heretofore made for any lands as swamp and overflowed lands, which belong to any of the classes described in section thirty-four hundred and ninety-three m, whether or not such lands were segregated or sectionized, are for all purposes valid, and have the same force and effect as if such lands had been at all times subject to sale as swamp and overflowed lands. * * *"

Section 3493m, which is referred to as describing the classes of land affected by the confirmatory provision, declares that:

"Any person desiring to purchase any of the lands now uncovered or which may hereafter be uncovered by the recession or drainage of the waters of inland lakes, and inuring to the state by virtue of her sovereignty, or the swamp and overflowed lands not segregated by the United States, must make an application therefor to the surveyor general. * * *"

As we have seen, the lands in question are not swamp and overflowed, and the petitioner can therefore prevail only by bringing them within the first class described in section 3493m, viz. "lands now uncovered or which may hereafter be uncovered by the recession or drainage of the waters of inland lakes, and inuring to the state by virtue of her sovereignty." We are satisfied that the effort to do this cannot succeed. The history of the legislation under discussion is well known. The act of 1893, which forms the basis of section 3493m, was passed for the purpose, primarily, of meeting the conditions created by the gradual recession of Tulare Lake. By that recession—which was believed to be permanent—large areas of land over which the waters of the lake had stood became uncovered. Provision was accordingly made for the sale of such land to private owners. When the act speaks of lands "uncovered * * * by the recession * * * of the waters," it obviously does not refer to such a temporary uncovering as will take place annually in the course of the ordinary fluctuations of the water level. What was contemplated was a recession permanent or apparently so, not one that was merely seasonal or periodical. The lands in question were not "now uncovered" when the act of 1893 was passed. Are they described by the further phrase, "lands which may hereafter be uncovered by the recession or drainage," etc.? The petitioner interprets this clause as meaning lands which might become so uncovered; in other words, lands whose future uncovering is within the bounds of possibility. We cannot assent to this interpretation. So read, the act would authorize the taking up of the entire bed of any inland lake, since, so far as any one can say, it is possible that such lake may at some time dry up entirely, or else be completely drained. But surely the Legislature did not intend that lands underlying the waters of a lake should be open to purchase. When it authorized the taking up of lands that "may hereafter be uncovered," it was applying to recessions, as and when they should occur in the future, the same rule that was being enacted for past recessions. In addition to offering for sale lands "now uncovered," it provided that, if in the future any lands should in fact become uncovered by the recession or drainage of a lake, those lands should then be subject to purchase in the same way as if the uncovering had taken place prior to the passage of the act. As illustrating and supporting the propriety of this construction of the words "may be," as used in our Code, we refer to two cases dealing with somewhat analogous employments of the phrase. Durfee v. Plaisted, 38 Cal. 80; Radcliffe v. St. L., etc., Ry. Co., 90 Mo. 127, 2 S. W. 277.

The lands embraced in the petitioner's application were not within the description of the statute. There is nothing in the pleadings, or in the stipulation of facts, to indicate that there had ever been any change in the natural conditions which we have outlined. The lands are still covered by the waters of the lake during the greater part of each year. Although the petition refers to the installation of reclamation works by the United States, it is not alleged, even inferentially, that these works have in fact lowered the plane of Little Klamath Lake so as to uncover the lands in question.

[7] Furthermore, we think section 3493s

could have no greater effect that to validate certificates, etc., for lands then (i. e., at the time of the passage of the confirmatory act) belonging to one of the classes described in section 3493m. By the new legislation the state authorized the sale of certain classes of land not theretofore offered for sale, and at the same time validated certificates, patents, and payments already made for any of such lands as swamp and overflowed lands. The validating section was intended to operate presently. By its terms it confirmed pending or past proceedings for the purchase of lands which then fell within the description of section 3493m. It did not provide for a prospective confirmation, contingent upon a change of conditions which might, at some future time, bring the lands within the classes offered for sale by the new legislation. The contrary view would leave the status of unauthorized applications for the purchase of lands under navigable lakes forever uncertain. Whatever may be said about the present status of the land, there is no pretense that it had been uncovered by recession or drainage at the time section 3493s went into effect.

It follows that the petitioner has not established his right to any relief. We need not, therefore, go into a discussion of the other points argued by counsel. It appears from the answer that various contests between this petitioner and opposing applicants for purchase of portions of the lands are pending in the superior court, pursuant to reference by the surveyor general. Pol. Code, § 3414. It should perhaps be said that the rights of the contestants are not foreclosed by our decision herein, which is, of course, based upon the facts as stipulated by the parties to this proceeding.

The alternative writ is discharged, and the proceeding dismissed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; LORIGAN, J.; MELVIN, J.; RICHARDS, Judge pro tem.

---

37 Cal. App. 592

## CATANIA v. BOARD OF EDUCATION OF CITY OF OAKLAND et al. (Civ. 2011.)

(District Court of Appeal, First District, California. June 20, 1918. Rehearing Denied by Supreme Court Aug. 19, 1918.)

1. SCHOOLS AND SCHOOL DISTRICTS ⟹141(2) —DISCHARGE OF TEACHERS — POWER OF BOARD.

Under Pol. Code, § 1617, subd. 7b (now section 1609 by amendment of 1917) and Oakland Charter, § 192, the power of the board of education to discharge plaintiff school-teacher for the ensuing fiscal school year by giving the notice required by statute is unrestricted and absolute.

2. MANDAMUS ⟹72—SUBORDINATE BOARDS—DISCRETIONARY POWERS.

Courts will not by mandamus disturb decisions and actions of subordinate boards and officers having discretionary powers, where they do not act arbitrarily or capriciously.

3. SCHOOLS AND SCHOOL DISTRICTS ⟹141(2) —DISCHARGE OF TEACHERS — POWER OF BOARD.

In the absence of constitutional or statutory provisions, the power of the board of education to discharge a teacher for the ensuing school year is always absolute.

4. SCHOOLS AND SCHOOL DISTRICTS ⟹141(2) —DISCHARGE OF TEACHERS — POWER OF BOARD—"REQUIRED."

Contention that school-teachers have, under Pol. Code, § 1617, subd. 7b (now section 1609 by amendment of 1917), permanency of tenure, subject first to the power of the board to remove at any time for insubordination, etc., under Pol. Code, § 1793, and second at the end of the school term, is without merit, the use of the word "required" being intended merely to designate the period in which the persons enumerated would be permitted to hold in the pleasure of the board.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Require.]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Suit by A. R. Catania against the Board of Education of the City of Oakland and others. Judgment that plaintiff take nothing by her action, and she appeals. Affirmed.

Gerald H. Catania, of Fresno (W. W. Sanderson, of San Francisco, of counsel), for appellant. W. H. L. Hynes, Dist. Atty., and Walter J. Burpee, Asst. Dist. Atty., both of Oakland, for respondents.

KERRIGAN, J. Plaintiff herein by mandate sought reinstatement in the school department of Oakland, and for her salary, amounting to the sum of $1,200 a year, during the time she had been deprived of her alleged right to teach. In the court below, after trial, the writ was denied; findings were waived, and judgment was had that plaintiff take nothing by her action.

From the facts it appears that the city of Oakland is organized under section 1576 of the Political Code as Oakland School District of Alameda county, and is governed by a city board of education elected under a freeholders' charter. Plaintiff, A. R. Catania, had for a number of years prior to July 30, 1916, been regularly employed by said district as a school-teacher. Previous to September 20, 1915, she had been a single woman, but on that date she intermarried with Gerald Catania. The Oakland board of education had a rule, adopted in 1913, which provided in substance that when a woman employé married her position should become vacant. Petitioner having placed herself within the operation of this rule, the board of education by resolution decided that it would no longer employ plaintiff, and written notice to this effect was served upon her.

The statute relating to the employment and discharge of teachers was at that time found in subdivision 7b of section 1617 of the Political Code, but is now contained in

section 1609 of that same Code by amendment of 1917, and reads as follows:

"The powers and duties of trustees of common school districts and of boards of education in city school districts are as follows: * * *

"(b) To employ the teachers, and immediately notify the county superintendent of schools, in writing, of such employment, naming the grade of certificate held by the teacher employed; also to employ janitors and other employés of the school; to fix and order paid their compensation, unless the same be otherwise prescribed by law; provided, that no board shall enter into any contract with such employés to extend beyond the close of the next ensuing school year, except that teachers may be elected on or after June 1st for the next ensuing school year, and each teacher so elected shall be deemed re-elected from year to year thereafter unless the governing body of the school district shall on or before the 10th day of June give notice in writing to such teacher that his services will not be required for the ensuing school year: such notice shall be deemed sufficient and complete when delivered in person to the teacher by the clerk or secretary of the governing body of the school district or deposited in the United States mail with postage prepaid addressed to such teacher at his last known place of residence," etc.

The charter of the city of Oakland contains a similar provision upon this subject. On June 8, 1916, the board of education passed a formal resolution, providing that the services of certain teachers and employés of Oakland school district would not be required, during the ensuing fiscal school year beginning July 1, 1916, and directed its secretary to give the notice required by the statute. Appellant was one of the teachers whose services were thus dispensed with. The general law and the charter provision are in conflict with reference to the time such notice should be given. Notice was given under section 1617 of the Political Code, and no question is raised as to the sufficiency of the notice in point of time. Shortly after receiving this notice plaintiff addressed a letter to the board, asking why she was dismissed. The secretary was directed by the board to reply by quoting to her the rule regarding the employment of married teachers. The rule is as follows:

"In case of the marriage of a woman employed by the board of education, her position shall at once become vacant."

At the next ensuing school term the board declined to permit plaintiff to teach. There had been no abolition nor consolidation of classes in the grade taught by plaintiff, and the class which plaintiff had taught was in charge of another teacher.

[1] The question, then, presented for consideration is the validity of the board's action in discharging plaintiff. The grounds upon which appellant relies for a reversal are two: (1) That the board of education was guilty of abuse of discretion in discharging plaintiff. (2) That under the statute plaintiff is entitled to her position until her services are no longer "required," subject only to removal for insubordination or other causes specified in section 1793 of the Political Code. With reference to the first contention it is the claim of petitioner that the rule, for the violation of which she was dismissed, is illegal and void, as it operates as a restraint upon marriage, and also discriminates against women, and in this respect violates the direct inhibition of article 20, § 18, of the state Constitution, which provides:

"No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation or profession."

[2, 3] She further claims that the rule is unreasonable and oppressive, for the reason that no educator has ever advocated the disqualification of married women as teachers, but, on the contrary, experts in pedagogy have warned against the present tendency to leave the instruction of our youth entirely in the hands of unmarried women, and have demanded a wider field in our educational system for the larger and broader and more sympathetic outlook of the teacher who has become a wife and, perhaps, a mother. Whatever the views of educators may be upon this subject, we are concerned only with the validity of the board's action in discharging plaintiff. It is a general rule that courts will not by mandamus disturb decisions and actions of subordinate boards and officers having discretionary powers. It is true that in the exercise of such powers an officer will not be permitted to act arbitrarily or capriciously. If, therefore, the statute contemplates that a dismissal must be for some reasonable cause, then the board is subject to judicial check in the exercise of its power of removal. In the absence of constitutional or statutory provisions, however, the power to discharge is always absolute. Here no civil service in relation to school district employés, of which plaintiff was one, is contemplated. On the contrary, there is no provision relating to the permanency of their tenure except that found in section 1617 of the Political Code and section 192 of the Oakland charter, and these sections provide for the manner of discharge, and contain no limitations upon its exercise except the statutory limitation as to time. If the contention of appellant be correct, teachers in a like position with appellant have the benefits of civil service rights and permanency of tenure. We are cited to the case of Richards v. District School Board, 78 Or. 621, 153 Pac. 482, L. R. A. 1916C, 789, Ann. Cas. 1917D, 266, as insuring such tenure. There a teacher was dismissed under a rule similar to the one here involved; but in that case the board was authorized to dismiss only for good cause shown, and it was for this reason that reinstatement was had. It was there held, however, in referring to the first section of the statute involved—which provided that the board should have power and authority to appoint and remove, hire, and discharge all teachers and employés—that if this section stood alone there would be ample reason to support the contention that

the power to dismiss was unrestricted. Here the right of removal stands alone; and it has been uniformly held in this state that boards of education may exercise an unlimited discretion in the employment and dismissal of teachers under like employment with appellant. Kennedy v. Board of Education, 82 Cal. 483, 22 Pac. 1042; Barthel v. Board of Education, 153 Cal. 376, 95 Pac. 892; Stockton v. Board of Education, 145 Cal. 246, 78 Pac. 730; Loehr v. Board of Education, 12 Cal. App. 671, 108 Pac. 325. This being so, it follows that the power of the board to discharge plaintiff was unrestricted and absolute.

[4] The second contention, that schoolteachers now have under the statute a permanency of tenure subject first, to the power of the board to remove at any time for insubordination, etc., under section 1793, Political Code, and, second, at the end of the school term when it is determined that, by reason of consolidation of classes, closing of schools, etc., her services will no longer be needed, is without merit. The use of the word "required" was intended merely to designate the period in which the persons enumerated would be permitted to hold in the pleasure of the board, and was never intended to insure any permanency of tenure beyond the period stated. The legislation clearly shows this intent. The argument that this construction might lead to a wholesale change in the personnel of the teaching force lends no weight. This is possible though, as counsel suggests, fortunately not common in the field of education. If the legislation is not wise, it is not our province to alter it. The remedy is elsewhere.

The judgment is affirmed.

We concur: BEASLY, Judge pro tem.; ZOOK, Judge pro tem.

---

37 Cal. App. 573

## SPAULDING & CO. v. CHAPIN et al.

(Civ. 2215.)

(District Court of Appeal, First District, California. June 18, 1918. Rehearing Denied by Supreme Court Aug. 17, 1918.)

1. JUDGMENT ⟸386(5)—VACATION—TIME FOR APPLICATION—VOID JUDGMENT.

A judgment rendered on a demurrable complaint but within the relief demanded, while erroneous, is not void and will not be set aside on motion after the time for appeal or vacation has expired.

2. JUDGMENT ⟸386(4)—VACATION—VALIDITY OF JUDGMENT—SERVICE OF NOTICE.

That the affidavit of service of notice of overruling of a demurrer to a complaint erroneously shows service to have been made on attorneys not representing defendant does not make the judgment void on its face, and subject to vacation on motion after the time allowed by Code Civ. Proc. § 473; the service in fact having been made on the proper counsel.

3. JUDGMENT ⟸386(5)—VACATION—TIME FOR APPLICATION—VOID JUDGMENT.

That the clerk of court errs does not render judgment based on his act void and subject to vacation on motion made after time prescribed by Code Civ. Proc. § 473, where his authority is undoubted; such error being correctable on motion or on appeal.

4. JUDGMENT ⟸346 — VALIDITY — "VOID JUDGMENT."

A judgment is "void" on its face when it so appears by an inspection of the judgment roll.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Void Judgment.]

5. JUDGMENT ⟸386(4)—VACATION—TIME FOR APPLICATION—VOID JUDGMENT—"RECORD."

Since proof of service of notice of decision on demurrer does not constitute part of the "record" within Code Civ. Proc. § 670, that the affidavit of service is defective does not make a judgment thereon void on its face and subject to vacation on motion filed after time prescribed by Code Civ. Proc. § 473.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Record.]

6. JUDGMENT ⟸380—VACATION—WAIVER.

A defendant who has obtained numerous extensions of time after service of notice of demurrer overruled cannot move to strike the judgment as being void on its face because of improper service of such notice.

7. JUDGMENT ⟸386(5)—VACATION—TIME FOR APPLICATION—AMOUNT—VOID JUDGMENT.

Where a judgment has been entered for an amount greatly in excess of what was actually due, the judgment is not thereby rendered void and subject to vacation on motion after the time prescribed by Code Civ. Proc. § 473, though it is the duty of counsel to see that defendant be credited with the excess amount.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Spaulding & Co., a corporation, against Katherine Chapin and husband. From an order setting aside a judgment, plaintiff appeals. Reversed.

Willard P. Smith and B. B. Blake, both of San Francisco, for appellant. Bert Schlesinger, of San Francisco, for respondents.

KERRIGAN, J. This an appeal from an order setting aside a judgment made after the time for appeal had elapsed and after the time when a motion to vacate the judgment might have been made under the provisions of section 473 of the Code of Civil Procedure. This court heretofore, on January 24, 1918, rendered its judgment on the appeal and reversed the order, but thereafter granted the petition of W. W. Chapin, the respondent, for a rehearing, and has heard further argument upon some of the questions involved.

In view of the fact that the judgment here attacked could properly have been set aside only in the event that it was void on its face, but two of the points discussed in the briefs and upon the arguments will require consideration at this time.

Respondent contends, in support of the action of the trial court in setting aside the judgment recovered against him, that the judgment was void on its face, and this for two reasons, namely: That the complaint

failed to state facts sufficient to constitute a cause of action against him; and that the proof of service of notice of the overruling of his demurrer was insufficient.

From the record it appears that the plaintiff brought suit against the defendants as husband and wife to recover the sum of $1,384.80, alleging in one count that this was the agreed price of certain merchandise sold and delivered to Katherine Chapin, the co-defendant of respondent; in another count that it was the reasonable value of those goods; and in a third count that it was the amount of an account stated between plaintiff and said Katherine Chapin. Judgment was asked against both of the defendants. The respondent was served with process, and in due time he served and filed a general demurrer to the complaint, which was overruled; and, the respondent having failed to answer within the time allowed by the court and by stipulations, default and judgment were entered against him. More than seven months thereafter, having employed other counsel, who now represent him, he moved to set aside the judgment on the ground, as before stated, that it was void on its face, and therefore an absolute nullity.

[1] There can be no doubt that the demurrer to the complaint should have been sustained; but the court had jurisdiction of the parties and of the subject-matter, and, as the judgment entered was within the relief demanded, it follows, under the authorities, that, although the judgment be erroneous, it is not void. It was so decided in the case of Blondeau v. Snyder et al., 95 Cal. 521, 31 Pac. 591. There both a mortgagor and the person to whom she conveyed the property, subject to the mortgage, were made parties defendant, and in the prayer of the complaint, in addition to other relief, the plaintiff demanded a deficiency judgment against both defendants. The action was dismissed as to the mortgagor; but her grantee, Mrs. Woodford, having failed to appear, a personal judgment was taken against her. There it was claimed that the complaint did not state facts showing a personal liability on the part of Mrs. Woodford for the mortgage debt, and therefore the court was without jurisdiction to declare such liability, and that the judgment in that respect was void. The Supreme Court held against this contention, saying:

"The judgment in this respect was within the relief demanded in the complaint and specified in the summons, and the court had jurisdiction, and indeed was required, to determine in that action whether upon the facts alleged the plaintiff therein was entitled to the relief which he demanded in his complaint. The court undoubtedly committed an error in finding such liability, but its judgment was not for this reason void. The error could have been corrected upon appeal from the judgment, or upon a proper showing by motion, if it had been made within the time limited by section 473 of the Code of Civil Procedure, but it is now too late to do so by motion."

See, also, In re James, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60; Canadian, etc., Co. v. Clarita, etc., Co., 140 Cal. 672, 74 Pac. 301; Brush v. Smith, 141 Cal. 467, 75 Pac. 55; McGinn v. Rees, 33 Cal. App. 291, 165 Pac. 52.

[2, 3] Nor is the judgment void on account of the clerical error in the affidavit of service of the notice of the order overruling the demurrer. Upon this question it appears that at the time the judgment was entered the original affidavit of service of notice of the overruling of the demurrer showed that such service was made upon certain attorneys who did not represent the respondent. Subsequently a corrected return of service was filed showing that service had in fact been made upon the true attorney of record for respondent, and that the statement in the original affidavit of service was an inadvertence. It is the contention of the respondent that the condition of the record at the time the judgment is entered controls, and as the record at that time failed to show a proper service that the judgment is void. In support of this position we are reminded that the clerk in entering a judgment acts merely in a ministerial capacity, and, unless he confines himself strictly within the statute, his acts can have no binding force. It is true that the clerk exercises no judicial functions, and that no intendments can be indulged in support of the validity of his acts. The statute directs the judgment. The clerk acts as the agent of the statute. If the law does not authorize the act, the judgment is without authority and is void. If, however, in a case where the authority of the clerk is undoubted and he errs, his act is not void, but only erroneous. His error can be corrected on motion made in time or on appeal. A judgment, therefore, based on his erroneous exercise of jurisdiction, until modified or reversed, is valid. Freeman on Judgments, §§ 129, 534; 1 Black on Judgments, § 88.

In asserting this doctrine we are not unmindful of the case of Reinhart v. Lugo, 86 Cal. 398, 24 Pac. 1089, 21 Am. St. Rep. 52, upon which respondent mainly relies, which is to the effect that, where the proof of service is defective at the time of entry of judgment, the act of the clerk is invalid and void. That case, however, was expressly overruled in Herman v. Santee, 103 Cal. 524, 37 Pac. 509, 42 Am. St. Rep. 145, as not being in harmony with the weight of authority upon the subject. Contrary to the doctrine laid down in the Reinhart Case, it is the fact of service which confers jurisdiction, and where the proof of such service is absent or defective it may be amended or supplied. So, as here, where the facts respecting the service of the notice as disclosed by the return on file were not sufficient to establish a valid service, still the judgment will be sustained, even when entered by default, by proof of the actual existence at the time of its entry of the requi-

site jurisdictional facts. This proof is permitted, not for the purpose of authorizing the court to enter a new judgment, but to show that the judgment previously entered was not without jurisdiction, and never was void. Freeman on Judgments, § 89b; Herman v. Santee, supra. In this respect we can see no reason in principle for any distinction between judgments entered by a court and those entered by the clerk in pursuance of the terms of the statute.

[4, 5] In Hallock v. Jaudin, 34 Cal. 167, it is said that, although entered by the clerk in conformity with the statute, the judgment is deemed in law to have been rendered by the court. See, also, 6 Ency. of Pl. & Pr. p. 102. To the same effect is Dillon v. Porter, 36 Minn. 341, 31 N. W. 56, where it is held that the action of the clerk in entering judgment in cases of this kind is to be taken as the action of the court, and the fact that a particular entry is improper, unauthorized, and erroneous does not render the judgment void any more than if it were entered under the immediate direction of the court itself. In this case it is stated that a contrary doctrine prevails in this state. This declaration no doubt is based upon expressions found in some of the earlier cases, culminating in the decision of Reinhart v. Lugo, supra. Aside from these considerations, we are of the opinion that the judgment was in no manner affected by the defective return. A judgment is void on its face when that matter is made apparent by an inspection of the judgment roll. Here the service of the notice was not jurisdictional, nor did it form any part of the judgment roll. Section 670 of the Code of Civil Procedure enumerates what documents constitute that record, and we find no mention of any proof of service of notice of decision upon demurrer, from which it must follow that failure to give such notice does not render the judgment void upon its face. Jacks v. Baldez, 97 Cal. 91, 31 Pac. 899; Cal. C. C. Co. v. Crescent City L. W. Co., 30 Cal. App. 619, 159 Pac. 209.

[6] Besides this, we are further of opinion that respondent is estopped from asserting that the notice was defective. It appears that his attorney obtained numerous extensions of time from appellant's attorney after the service of the notice within which to answer after demurrer overruled. Under these circumstances he cannot be heard to say that the time allowed him to answer does not begin to run until written notice of the order is given. Wall v. Heald, 95 Cal. 364, 367, 30 Pac. 551; Estate of Keating, 158 Cal. 109, 114, 110 Pac. 109; Bell v. Thompson, 8 Cal. App. 483, 97 Pac. 158.

[7] Our attention has been called to the fact that the clerk erroneously entered judgment for an amount greatly in excess of what was actually due. While this act does not, as claimed, affect the judgment (Bond v. Pacheco, 30 Cal. 530), it is the duty of counsel for the appellant to see to it that respondent be credited with the excess amount. It is only fair to state that, recognizing their duty as attorneys, counsel for appellant have expressed their willingness so to do, and beyond question the error will be rectified.

From what we have said it follows that, the court having no jurisdiction to set the judgment aside, the order so doing constituted error, and it is hereby reversed.

We concur: BEASLY, Judge pro tem.; ZOOK, Judge pro tem.

---

37 Cal. App. 473

## CITY OF PETALUMA v. HUGHES et al.

(Civ. 1798.)

(District Court of Appeal, Third District, California. June 6, 1918. Rehearing Denied by Supreme Court Aug. 5, 1918.)

1. EMINENT DOMAIN ⟸169—PROCEEDINGS—CONDITIONS PRECEDENT.
Although Petaluma City Charter did not contain a system providing for opening of streets, but permitted the authorities by ordinance to adopt a system, and the city never adopted any system, it nevertheless had authority to proceed under St. 1889, p. 70, the general statute relating thereto.

2. EMINENT DOMAIN ⟸167(4) — STREETS — CONDEMNATION—STATUTES.
In condemnation proceedings to open and widen streets, municipalities can act legally only in strict compliance with requirements of statutory law defining their activity.

3. APPEAL AND ERROR ⟸757(1) — MATTERS REVIEWABLE—BRIEFS.
On appeal under the alternative method, it is incumbent upon appellants to set out in their brief matter and portions of the transcript which they desire to call to the attention of the court.

4. EMINENT DOMAIN ⟸181—PROCEEDINGS—NOTICE—SUFFICIENCY.
Immaterial changes in the notice during publication, required by Act March 6, 1889 (St. 1889, p. 70), relating to opening and widening streets, does not invalidate the notice.

5. TRIAL ⟸29(1)—PREJUDGING CASE.
That the judge manifested a knowledge of the essential principles involved, and announced during the progress of the trial that the Supreme Court had made a certain decision in reference thereto, did not show that he prejudged the controversy.

Appeal from Superior Court, Sonoma County; Edgar T. Zook, Judge.

Condemnation proceedings by the City of Petaluma against Isabelle Hughes and others. From a judgment for plaintiff, defendants appeal. Affirmed.

W. T. Mooney, of Petaluma, T. J. Geary, of Santa Rosa, and C. W. Lynch, of San Francisco, for appellants. G. P. Hall, of Petaluma, and W. F. Cowan, of Santa Rosa, for respondent.

BURNETT, J. This is an appeal from a judgment in favor of plaintiff and against certain defendants, arising out of certain condemnation proceedings undertaken by the

City of Petaluma (a municipal corporation) for the widening and extending of a certain street within its corporate limits, the undertaking being commonly known as the "Douglass Street Extension."

It is the contention of appellants:

(1) "That the charter of the city of Petaluma does not contain a valid system providing for the opening of streets, but it permits the city authorities, by ordinance, to adopt such a system; that the city of Petaluma never adopted any system providing for the opening of streets, and is therefore without authority to proceed."

(2) Closely allied to this is the further claim that the said proceedings taken by said municipality are void ab initio, for the reason that they have been undertaken and pursued under a general law of the state of California, to wit, the act of March 6, 1889 (Stats. 1889, p. 70), which has no application to said city of Petaluma, instead of having been undertaken and pursued, as the charter requires, as hereinbefore stated.

(3) Further, that "even if we concede (which we do not) that the city had the right to proceed directly under the general law without consideration for the charter provisions cited above, the proceedings as actually taken were defective, in that there was not a posting and not a publication of the 'Notice of Public Work' in the matter given as required by the act of March 6, 1889. This being true, the city never gained jurisdiction to order the work and improvement."

(4) Defendants also raise the point that they were restrained from offering any evidence as to the assessment side of the proceedings taken, and in support thereof quote Los Angeles v. Dehail, 97 Cal. 13, 31 Pac. 626.

(5) They further contend that the trial court "practically" prejudged the controversy, before its presentation, by the use of the following language:

"The Court: You have authority to act under the general law. The Supreme Court has expressly held in four different cases the general law is incorporated."

[1] The first two contentions of appellants, virtually involving the same question, may be considered together, and it is probably sufficient to say that they have been answered by the District Court of Appeal for the First District in the case of In re Thomas et al., 33 Cal. App. 547, 165 Pac. 1021. Therein the learned author of the opinion, referring to sections 21 and 68 of article 3 of the charter of Petaluma, says:

"It seems clear to us, when these two sections of the city charter of Petaluma are read together, as they must be, that no preliminary ordinance was necessary to entitle the city authorities to proceed immediately under the state law in making the street improvement under review. The city charter did not itself embrace a procedure for the doing of such work; and the only requirement of section 21 of article 3 of its charter is that when this character of work is to be done it should be done by ordinances not in conflict with state laws. The particular state law adopted by the city for the purposes of this work provides that the contemplated improvement shall have its inception in an ordinance of the city, for such the resolution of intention is, as required by said state law. The passage of an additional ordinance by the city resolving to adopt this ordinance required by the state law would be doing of an idle act, and any construction of section 21 of article 3 of the charter which would require the doing of such act would do violence to the intendments of section 68 of article 3 of the same charter. We find no merit, therefore, in the appellant's contention in this regard."

A somewhat analogous case is Park v. Pac. Fire Extinguisher Co. et al., 173 Pac. 615, wherein it is said:

"Street lighting is a municipal affair; but the charter of the city of Berkeley, while conferring power upon the city to adopt a complete procedure for the creation of a system of street lighting, does not contain such a procedure. This is conceded. The city has power to provide such general scheme; but, not having done so, it is governed by general law in that respect and may in this case follow the provisions of the Improvement Act of 1911. Fragley v. Phelan, 126 Cal. 383, 58 Pac. 923."

In the Fragley Case it is said:

"It is not within the constitutional power of the Legislature, by approving a freeholders' charter which fails to make provision upon subjects pertaining to municipal affairs, to exempt that city from being subject to legislative control in reference to those subjects, nor can the city secure exemption from such control by omitting to make such provision in its charter."

The following cases are also opposed to these contentions of appellants: Osburn v. Stone, 170 Cal. 484, 150 Pac. 367; Clouse v. San Diego, 159 Cal. 436, 114 Pac. 573; Hellman v. Shoulters, 114 Cal. 156, 44 Pac. 915, 45 Pac. 1057.

[2] Of course, it is fundamental that, in proceedings like this, municipalities can act legally only in strict compliance with the requirements of the statutory law, defining their activities, or, to put it in the language of the decisions, that the mode is the measure of their power.

In the case of City of Napa v. Maxwell, decided by this court, reported in 171 Pac. at page 839, the court uses the following language:

"Of course, the rule is that proceedings for the improvement of streets are in invitum and purely statutory, and afford no opportunity for invoking any of the principles of equity, and the validity of an assessment therefore depends upon a statutory power, and the party seeking the right to enforce it must show that the statutory power has been strictly followed."

Therein, the proceedings were declared invalid because two commissioners, instead of three, were appointed, as provided for by section 6 of the act of 1889, to ascertain the benefits accruing or the damage resulting to property affected by the proposed improvement.

[3, 4] But in the instant case no such consideration is involved. Section 2 of said act of 1889 provides:

"Before ordering any work to be done or improvement made which is authorized by section one of this act, the city council shall pass a resolution declaring its intention to do so, describing the work or improvement and the land deemed necessary to be taken therefor, and specifying the exterior boundaries of the district of lands to be affected or benefited by said work or improvement, and to be assessed to pay the damages, cost and expense thereof."

Then follows a section requiring the street superintendent to post a notice of this resolution and also to publish it for ten days in a daily newspaper. The only asserted de-

fect as to this proceeding is pointed out in the opening brief of appellants by quoting from the transcript, as follows:

"Mr. Geary: 'It may be stipulated that all the proceedings which are set out in the complaint as having been taken by the council of the city of Petaluma were in fact taken by them.' The Court: 'With the exception of the fact, for a portion of the time of publication, the word "Stratton" appeared in the notice instead of the word "Harriman" and that there were not 10 full days of posting or publication of the "Harriman" in there.'"

There is nothing therein to show that respondent consented to the statement of the court and, besides, if it be regarded as a stipulation of the city of Petaluma, it is entirely unintelligible. It does not appear what difference it made whether the word "Stratton" or "Harriman" was used. It was incumbent upon appellants to set out in their brief the portions of the transcript upon which they relied to show error, the appeal being under the alternative method. Scott v. Hollywood Park Co., 169 Pac. 379.

They should have exhibited the evidence in their opening brief, in order that respondent might have an opportunity to make suitable reply. They waited, however, until the filing of their final brief to call the attention of this court to the entire proceeding in reference to said publication. But the record as exhibited in this final brief does not aid appellants in any manner. It does not show that the word "Stratton" or the word "Harriman" affected in the slightest degree the accuracy or sufficiency of the description of the property. As far as anything to the contrary appears, either word might have been used throughout, or both eliminated, and the full and definite information required by the statute still be contained in said publication. In other words, from the record we must assume that the clerical error was entirely immaterial and resulted in no prejudice whatever. Of course, no one would contend for the absurd proposition that an immaterial and unimportant change in the phraseology of the notice would invalidate it, the facts stated remaining essentially the same and corresponding with the requirements of the law. As to this we may adopt the language of the Supreme Court of Montana in reference to the publication of a notice of contemplated changes in the Constitution, reported in State v. Alderson, 49 Mont. 414, 142 Pac. 216, Ann. Cas. 1916B, 39, as follows:

"Indeed, to reach the very acme of absurdity, we need only say that the rule of literal compliance requires that every word be spelled correctly, and if in the last illustration the printer inadvertently omitted the letter 'a' from the word 'measures' and this was the only departure, the amendment would fail under the rule in question. A court which would nullify the expressed will of the people upon such a flimsy pretext, as any one illustrated above would deservedly forfeit every claim to the respect or confidence of the community."

The case of Ferri et al. v. City of Long Beach et al., 169 Pac. 385, decided December 11, 1917, has no application to this case. The notice therein contained the misstatement of a matter of fact. We, of course, agree that, "where the statute prescribes a certain kind of notice, a court is not justified in saying some other kind of notice would be equally effective." It would be absurd to contend that notice, for instance, by mail, would answer the requisite of newspaper publication or notice by posting; but, in the instant case, no such question is involved.

As to the fourth point, it is sufficient to say that appellants' brief set forth nothing from the transcript inviting attention even. However, the reading of the entire record discloses no such ruling as they claim. The case seems to have been tried with exceeding care and fairness, and appellants have no just cause for complaint.

[5] The charge that the trial judge had prejudged the cause seems particularly unfounded. The accusation apparently arises from the fact that he manifested a knowledge of the essential legal principles involved, and announced during the progress of the trial that the Supreme Court had made a certain decision in reference thereto. It is certainly somewhat novel that the familiarity of the trial judge with the law—however unusual it might be considered—should be the basis for criticism or animadversion.

Appellants suggest some other alleged errors, but they are not argued and we pass them by without further notice.

The appeal seems to be entirely destitute of merit, and the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

---

37 Cal. App. 683

SPURRIER et al. v. NEUMILLER, County Treasurer. (Civ. 1809.)

(District Court of Appeal, Third District, California. June 27, 1918. Rehearing Denied by Supreme Court Aug. 26, 1918.)

1. DRAINS ⇐85 — INVALID ASSESSMENT — PAYMENT—RIGHT TO CREDIT.

If Pol. Code, § 3466½, in its original form, created a vested right to a credit for an excessive amount paid by a landowner on a reclamation district assessment adjudged invalid, such credit was given by a subsequent assessment equalizing inequalities, requiring those who did not pay to pay their proportion of the former assessment as well as of the latter.

2. MANDAMUS ⇐10 — CREDIT ON ASSESSMENT—NECESSITY OF SHOWING INJURY.

To entitle landowners to mandamus to compel entry of a credit on a reclamation district assessment by reason of payments made on a former invalid assessment, it is incumbent on them to show that they are injured by failure to so credit their land.

3. MANDAMUS ⇐15 — RIGHT TO REMEDY — EFFECT INEQUITABLE OR UNJUST.

Mandamus will not lie where its effect would be inequitable or unjust as to third per-

sons, or will introduce confusion, or will not promote substantial justice.

4. MANDAMUS ⟸176—RELIEF—CREDIT ON ASSESSMENT—INTEREST NOT DEMANDED.

Where it appears landowners, seeking by mandamus to compel a credit of payments made on an excessive reclamation district assessment, have in fact been given credit therefor, and that they did not demand or claim interest, they are not entitled to the writ because interest was disregarded; they having elected to stand or fall on the claim that they were entitled to a credit for principal and interest.

5. DRAINS ⟸85 — RECLAMATION DISTRICT —PAYMENT—INVALID ASSESSMENT—RIGHT TO REIMBURSEMENT.

Pol. Code, § 3466½, in its original form, providing for reimbursement of those who may have paid amounts assessed against their lands not liable therefor, because of invalidity of a reclamation district assessment, does not entitle landowners to reimbursement where the payments were made by former owners, and there is nothing to show that they expended anything therefor, or incurred liability in consequence thereof.

6. DRAINS ⟸83—RECLAMATION DISTRICT—REASSESSMENT.

A reclamation district reassessment, pursuant to Pol. Code, § 3466½, as amended (St. 1911, p. 647), is a method of liquidating the indebtedness of the district, within the meaning of section 3478, as amended (St. 1911, p. 648), expressly declaring section 3466½, as amended, to be applicable to such a case, in enumerating an exception to its application.

7. CONSTITUTIONAL LAW ⟸105 — VESTED RIGHTS—PAYMENT OF INVALID ASSESSMENTS —RIGHT TO CREDIT.

The right of landowners, under Pol. Code, § 3466½, before it was amended, to be credited with payments made, where a reclamation district assessment is adjudged invalid, was not a vested right before the adjudication.

8. CONSTITUTIONAL LAW ⟸144 — OBLIGATION OF CONTRACTS — RIGHT TO CREDIT AGAINST ASSESSMENT.

Landowners were not deprived of any contractual right by being deprived by amendment of Pol. Code, § 3466½, by St. 1911, p. 647, of their statutory right to credit for payments made where a reclamation district assessment is adjudged invalid, and hence the amendment did not violate Const. art. 1, § 16, or Const. U. S. art. 1, § 10.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Mandamus proceeding by S. M. Spurrier and another against W. C. Neumiller, as County Treasurer of San Joaquin County. From a judgment for defendant, plaintiffs appeal. Affirmed.

D. V. Marceau and John A. Wilson, both of Stockton (S. M. Spurrier, of Stockton, of counsel), for appellants. Clary & Louttit, of Stockton, for respondent.

BURNETT, J. The controversy herein arises by reason of two assessments levied by reclamation district No. 17 in the county of San Joaquin. The first one, which we will denominate the "Bonbini assessment," was based upon a petition filed with the board of supervisors of said county on the 2d day of April, 1907; Charles and George Dangers being then the owners of the lands herein involved. The property was charged with an assessment of $3,270.63, against which a credit of $900.18 was allowed in consequence of a former assessment, and the balance, with interest, was finally paid on March 3, 1909. On May 9, 1911, by judgment entered in the superior court of said county, the Bonbini assessment was decreed to be invalid. Seven landowners within the district did not pay the Bonbini assessment. The other, which we may call the Spurrier assessment, was based upon a petition filed on the 16th day of October, 1911. In apportioning this assessment, the commissioners equalized the inequalities caused by the payment by some and the failure of payment by others of said invalid assessment. As to this the court found:

"The said commissioners did charge and assess against the said respective parcels of land situated in said district, against which the said prior assessment had been declared by a court of competent jurisdiction to be invalid, and which said assessment remained unpaid, with such proportion of the former invalid assessment as the benefits derived by the said respective parcels of land from the reclamation works for which said former assessment was levied bore to the whole amount of said former invalid assessment, and the said charges and assessment so fixed and levied by said commissioners against said respective parcels of land did charge the said last named parcels of land, and each of the other tracts of land within the said district, with its proper proportion of the costs of the reclamation of the lands therein; * * * that the land of plaintiffs has not paid, and it has not been charged with, more than its proper proportion of the costs of reclamation."

It is not contended that this finding is unsupported. Indeed, it was stipulated at the trial:

"That the commissioners, in levying and charging the lands in said reclamation district No. 17 in 1911, did charge and assess against the respective parcels of land situated in said district, and which said parcels of land did not pay the former invalid assessment, with such proportion of such former assessment as the benefits derived by said respective parcels of land from the reclamation works for which said former invalid assessment was levied bore to the whole amount of said former invalid assessment."

Notwithstanding the foregoing stipulation and finding, it is the contention of appellants that the county treasurer of said county should be compelled to enter a credit of the amount paid by said Charles and George Dangers on the Bonbini assessment to be applied pro tanto to the payment of the Spurrier assessment. The basis for the claim is found in the following language of section 3466½ of the Political Code as it formerly existed:

"In all cases in which an assessment shall have been levied since October first, eighteen hundred and ninety-six, or shall hereafter be levied, for reclamation purposes, upon the lands embraced within any reclamation district, and the assessment shall have thereafter been or shall be adjudged invalid, by any court of competent jurisdiction, and any landowner of the district shall have paid the amount assessed, in said assessment against land belonging to him,

before said assessment shall have been or shall be so adjudged invalid, the amount so paid by said landowner, together with the legal interest thereon from the date of its payment, shall be credited, by the treasurer of the county in which said land is situated, to the tract of land on which the same was paid, and shall be applied upon any assessment thereafter levied on the lands of the district to the payment, pro tanto, of the amount therein assessed against said tract of land."

In explanation of the course pursued in equalizing said assessment it is proper to say that by an amendment taking effect April 5, 1911 (St. 1911, p. 647), and prior to said Spurrier assessment, the said section 3466½ was made to read as follows:

"In all cases in which an assessment shall have been levied or shall hereafter be levied, for reclamation purposes upon the lands embraced within any reclamation district, and if the assessment upon any tract or tracts of land shall have thereafter been adjudged invalid by any court of competent jurisdiction, or if, for any reason, any tract or tracts of land shall not have been charged with said assessment, then such tract or tracts of land shall be charged in any subsequent assessment with such proportion of the former assessment, as the benefits derived by said land from the reclamation works for which said former assessment was levied bears to the whole amount of said former assessment; or a subsequent reassessment of such tract or tracts of land may be made separately for the purpose of charging said land with its proper proportion of the costs of reclamation."

In this connection we may state that the validity of this Spurrier assessment, under said section as amended, was upheld by the Supreme Court on an appeal taken by these same appellants in the case of Spurrier v. Reclamation District No. 17, 172 Cal. 157, 155 Pac. 840. In the leading opinion filed in said cause it is declared that:

"The legal effect of the amendment was, of course, to repeal the portion of the section which had been omitted, and leave the rights of those owners who had paid an assessment adjudged invalid unaffected by any express statutory provision as regards the obtaining of credit for such payment."

This language would seem to imply that there is no longer any statutory authority for allowing credit for the payment of the invalid assessment. It is fair, though, to say that the Supreme Court, in another portion of the opinion, specifically disclaimed the purpose of determining in that decision whether the appellants were entitled to credit for said payment, and in the concurring opinion of Mr. Justice Shaw it was suggested that:

"If the parties, who paid the assessment have any remedy for the interest afterward accruing thereon, it must be sought by some other mode than by including it in a reassessment upon the delinquent lands under the section as amended in 1911."

[1] But, assuming that said section 3466½ in its original form created a vested right to a credit in favor of appellant, which could not be impaired or destroyed by a subsequent amendment to the law, it is entirely apparent that appellants were not entitled to the mandate as applied for. This follows from the said stipulation and finding that there was an equalization of the inequalities which arose from the Bonbini assessment. In other words, those who did not pay said assessment were required by the Spurrier assessment to pay their proportion of the former assessment as well as of the latter. Thus, in effect, were appellants given credit for their payment of the Bonbini assessment, except the interest, as the others were compelled to make a similar payment. In other words, the situation was rendered practically the same as though all the landowners had paid their full proportion of the invalid assessment. In such condition how would credit be given? Suppose there were 4 landowners all together, and an invalid assessment of $100,000 had been levied and paid by them, $25,000 each, and it was necessary to raise another $100,000 by assessment. The money could not be raised by crediting the land with the payment of the invalid assessment. If it were desired to give each parcel of land specific credit for the payment of the invalid assessment, it would be necessary to petition for an assessment of $200,000, in order that, after full credit had been given, there might be available $100,000 to apply to the purposes of the second assessment. But it is obvious that no more would be required of each landowner if the assessment were for $100,000 and he be required to pay his proportion. The nonpaying landowners in the case at bar having been required to make good their delinquency on the invalid assessment, we have a similar situation to one wherein all the landowners have paid the invalid assessment.

[2] Of course, to entitle them to the writ, it was incumbent upon appellants to show that they were injured by the failure to credit the land with said payments. To the contrary, the finding is that the inequalities were adjusted, and that appellants were charged with no more than their just proportion of the cost of reclamation.

[3] It also appears that, if the writ were granted, appellants would gain an advantage over other landowners who have already been charged with an excess amount to equalize the burden. "Mandamus will not lie where its effect would be inequitable or unjust as to third persons or will introduce confusion or will not promote substantial justice." Board of Education v. San Diego, 128 Cal. 369, 60 Pac. 976.

[4] At any rate, appellants, in effect, have been given credit for the principal of their payments, and the only consideration of which they could complain is that interest on said payments was not regarded in equalizing said assessments, and this was probably the consideration that Judge Shaw had in view in making the suggestion hereinbefore quoted. But they made no such demand on the treasurer, nor is there any intimation in this proceeding that they desire such credit. They claim that they are entitled to credit

for principal and interest, and upon that claim they have elected to stand or fall.

[5] There is another view which, in my opinion, although not argued by counsel, is fatal to the claim of plaintiffs. While the language of the original section is that payment shall be credited "to the tract of land on which the same was paid" yet it is true as declared by the Supreme Court in Reclamation District v. Bonbini, 158 Cal. 206, 110 Pac. 580, that:

"The whole object and scheme of section 3466½ of the Political Code was to provide for the reimbursement of those who may have paid the amounts assessed against their lands where such lands were not liable therefor because of the invalidity of the assessment against them."

Plaintiffs herein did not pay said assessment, and hence the occasion does not call for reimbursement. It was paid, as we have seen, by the former owners of the property, and there is nothing to show that appellants expended a dollar therefor, or incurred any liability in consequence of it. It does not appear that the land cost them any more than if said assessment had not been paid by the Dangers brothers, or that said circumstance entered at all into the consideration for said purchase. In other words, we must assume that the plaintiffs are in exactly the same situation financially as though said payment had not been made by the former owners. In that view of the case, it would appear plain that no injury to plaintiffs has been shown.

[6] Moreover, we think the said section 3466½, as amended, is the law applicable to the case, and that it cannot be said that there has been a destruction or impairment of any vested right. Appellants call attention to the fact that several sections of the Political Code were amended at the same time as said section 3466½ in 1911, among them being section 3478 of said Code. The last made said amendment applicable to all reclamation districts, with three exceptions or provisions, as follows:

(1) "Any proceeding that shall have been already commenced for the levy or collection of assessments in such district when this section takes effect." (2) "Any act done or performed in relation to the affairs of such districts prior to such last mentioned date." And (3) it shall not affect "the indebtedness of such districts theretofore incurred, excepting as to the method of liquidating such indebtedness."

Only by virtue of these provisions could it be said, if at all, that the amended section does not control said Spurrier assessment. But without a specific analysis of these provisions it is sufficient to say that said assessment involved "the method of liquidating the indebtedness of the district," and therefore the amended statute is expressly declared to be applicable to such a case.

[7] The inquiry as to whether there was in plaintiffs, or the former owners of the land, any vested right to said credit, leads to the consideration, as suggested by respondent, of the nature of a reclamation district, the character of the obligation created by assessments, and the relation between the district and the landowner as to the assessment and its payment. These districts are undoubtedly "governmental agencies to carry out a specific purpose." Reclamation District No. 7 v. Sherman, 11 Cal. App. 407, 105 Pac. 277. And the local assessment levied in return for the benefits conferred upon the property assessed by the improvements for which the assessment is levied is a species of tax. Cooley on Taxation, page 416. It is true that the method of apportionment in the local proceedings is different from that involved in the general burdens imposed by taxation for state and municipal purposes, but in each case the assessment is an exercise of the taxing power.

Taxes are not debts, nor founded upon contract; but they are charges upon persons or property to raise money for public purposes. Perry v. Washburne, 20 Cal. 318. A swamp land assessment is a charge imposed upon property by authority of the Legislature, and the fact that it is only a lien upon the property assessed, and not a direct charge against the owner, is immaterial. People v. Hulbert, 71 Cal. 72, 12 Pac. 43. The levy of a street assessment is based upon the governmental power of taxation. Hornung v. McCarthy, 126 Cal. 17, 58 Pac. 303.

The Legislature must originate the power to tax and prescribe the rules under which taxes are to be levied, but the determination of the amount, even of a state tax, may be referred to some other authority. The amount of the local taxes is determined in various ways. In some cases they are fixed by the Legislature or under its direction and in other cases they are determined by local boards, which exercise a quasi legislative authority. Bixler v. Board of Supervisors, 59 Cal. 698. The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power or included within it. French v. Barber Asphalt Paving Co., 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879.

"A tax is an enforced contribution for the payment of public expenses. It is laid by some rule of apportionment according to which the persons or property taxed share the public burden, and whether taxation operates upon all within the state, or upon those of a given class or locality, its essential nature is the same." Houck v. Little River Drainage District, 239 U. S. 266, 36 Sup. Ct. 58, 60 L. Ed. 266.

These assessment charges are based upon the benefit which accrues to the property by reason of the improvement, and, therefore the liability therefor persists against the property until some suitable legislation is enacted which will enable the governmental agency to enforce the same.

Page and Jones on Taxation by Assessment, § 958. Hence, if an illegal tax is voluntarily paid, no recovery in the absence of statutory authority will be permitted. Justice v. Robinson, 142 Cal. 199, 75 Pac. 776. The method of levying taxes is a question of legislative policy and there exists no contract between the taxpayer and the Legislature that the same policy will be continued and that the method of levying taxes will not be changed. Bailey v. Magwire, 22 Wall. 215, 22 L. Ed. 850.

[8] Herein the Legislature, in amending section 3466½, changed the policy of levying reassessments in reclamation districts, and this did not, for the reasons heretofore stated, deprive appellants or their predecessors in interest of any contractual right. The case, relating, as it does, to the method of taxation for the promotion of a governmental purpose, does not involve section 10 of article 1, of the Constitution of the United States, or section 16, article 1, of our state Constitution, which plaintiffs claim would be violated if section 3466½, as amended, is to be applied to the situation. Of course, it cannot be said that the law "impairs the obligation of a contract," if there was no contract between the state and the owners of the land.

The broad ground upon which the United States Supreme Court declares the authority of the Legislature to change the law rests is that the lawmaking power "is not making promises, but framing a scheme of public revenue and public improvement," and where it announces its policy by the enactment of a statute "it may open a chance for benefit to those who comply with its conditions, but it does not address them and therefore makes no promise to them. It simply indicates a course of conduct to be pursued until circumstances or its views of policy change. It would be quite intolerable if parties not expressly addressed were to be allowed to set up a contract on the strength of their interest in, and action on, the faith of a statute, merely because their interest was obvious and their action likely, on the face of the law." Wisconsin v. Powers, 191 U. S. 379, 24 Sup. Ct. 107, 48 L. Ed. 229.

Moreover, assuming that a question of vested interest might arise under the application of said sections of the Code, still this case must fail since it was a mere expectant or contingent interest at the time of the amendment of the statute. Such rights are contingent when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting. Pearsall v. Great Northern Railway, 161 U. S. 673, 16 Sup. Ct. 705, 40 L. Ed. 838. The section prior to said amendment provided that, before credit should be given, three circumstances must exist: First, an invalid assessment; second, payment before judgment of invalidity; and, third, judgment of invalidity. The invalid assessment was paid in 1909; the amended statute became a law on April 5, 1911; but the judgment of invalidity was not entered until May 11, 1911, or after the repeal of the statute providing for the credit. The interest was not vested, therefore, and it ceased with the repeal of the statute. Anderson v. Wilkins, 142 N. C. 154, 55 S. E. 272, 9 L. R. A. (N. S.) 1145.

The right to credit for such payment is purely statutory. Hence, being in fieri at the time of the repeal of the statute, it ceased with such change in the law. The subject is thoroughly discussed in Moss v. Smith, 171 Cal. 788, 155 Pac. 90, and we think the principle set forth therein is applicable to the present situation. We conclude that in any event appellants have shown no injury or prejudice, and, besides, no reason exists for holding that the state entered into a contract with them, binding itself to give them credit for such payment, and, finally, that if the statute did create a right or interest that under certain contingencies could not be destroyed by subsequent legislation, such right or privilege being purely statutory and not being vested, fell with the law that give it birth.

Other considerations might be suggested for an affirmance of the judgment, but we think the foregoing sufficient; and the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

---

37 Cal. App. 818

## KROHN et al. v. RECLAMATION DIST. NO. 17 et al. (Civ. 1856.)

(District Court of Appeal, Third District, California. June 27, 1918. Rehearing Denied by Supreme Court Aug. 26, 1918.)

Appeal from Superior Court, San Joaquin County; John Hancock, Judge.

Action by Henry Krohn and another against Reclamation District No. 17 and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

D. V. Marceau and John A. Wilson, both of Stockton (S. M. Spurrier, of Stockton, of counsel), for appellants. George F. Buck and Clary & Louttit, all of Stockton, for respondents.

BURNETT, J. This action was brought to prevent the sale of the property of plaintiffs to enforce the lien of a reclamation tax, and is a companion case to Spurrier v. Neumiller, etc., 174 Pac. 338, this day decided. It is conceded that the decisive question is the same in the two appeals, and that is whether the land should be credited with the payment of said invalid assessment. Having reached the conclusion that the lower court was correct in holding that no such credit should be given, it follows that we should affirm the judgment in this case; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

37 Cal. App. 579

PEOPLE v. WILLIAM YEE. (Cr. 418.)

(District Court of Appeal, Third District, California. June 18, 1918.)

1. HOMICIDE ⊂=309(3) — INSTRUCTION ON MANSLAUGHTER—EVIDENCE.

In a prosecution for murder, in view of the evidence, showing a deliberate assassination, the elements of manslaughter not being involved, defendant, moreover, relying on an alibi, *held*, that the trial court properly refused to give an instruction defining manslaughter.

2. CRIMINAL LAW ⊂=730(5)—ARGUMENT — INSTRUCTION AS TO ACCESSORIES.

In prosecution of defendant, charged with two others with homicide, where district attorney in argument declared jury were justified in finding defendant guilty though they might find he did not himself do killing, it was necessary for court to read instruction embracing principle declared in Pen. Code, §§ 31, 971, as to accessories.

3. CRIMINAL LAW ⊂=59(4) — INNOCENT ACCESSORY.

One who innocently aids and assists or encourages another to commit an act which is criminal is not guilty as an accessory equally with the perpetrator of the act.

4. CRIMINAL LAW ⊂=792(3) — INSTRUCTION ON ACCESSORIES—"ABETTED."

In prosecution for murder, instruction that one aiding, assisting, and encouraging another in committing a criminal act is guilty equally with the perpetrator, and that to justify conviction it must be shown he aided, assisted, and abetted therein, was proper statement of law of accessories, declared in Pen. Code, §§ 31, 971; "abetted" implying knowledge of wrongful purpose of perpetrator.

5. CRIMINAL LAW ⊂=1173(2) — APPEAL — HARMLESS ERROR—INSTRUCTION.

In prosecution for murder, where all evidence, except what defendant offered in support of alibi, tended to show he himself did killing, omitting in instruction the element accessory must have guilty knowledge was harmless.

6. HOMICIDE ⊂=233—PROOF OF MOTIVE.

To convict of homicide it is not essential to prove a motive, which becomes material only to reinforce evidence merely circumstantial.

7. CRIMINAL LAW ⊂=720(9) — ARGUMENT OF DISTRICT ATTORNEY.

In prosecution of one Chinese for murdering another, where defense introduced testimony as to existence of a "tong" war, argument of district attorney declaring its existence, and that homicide resulted from it was proper.

8. CRIMINAL LAW ⊂=1171(1) — APPEAL—HARMLESS ERROR—ARGUMENT.

In prosecution of one Chinese for murdering another, district attorney's argument declaring existence of a "tong" war, and that homicide resulted from it, *held* harmless to defendant in view of the evidence.

Appeal from Superior Court, Sonoma County; George H. Cabaniss, Judge.

William Yee was convicted of murder in the first degree, and, from the judgment and an order denying his motion for new trial, he appeals. Judgment and order affirmed.

W. F. Cowan, of Santa Rosa, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant, jointly with two other Chinese, named, respectively, Toy Yock and Lee Sing Park was charged by information filed in the superior court of Sonoma county with the crime of murder. The defendant was given a separate trial and was convicted of murder of the first degree, the jury fixing the penalty at imprisonment for life. He appeals from the judgment and the order denying him a new trial.

The homicide occurred on Sunday, the 11th day of March, 1917, at about the hour of 3 p. m., on the farm of one Finley, situated between four and five miles north of the city of Santa Rosa. The deceased, one Hom Hong, at the time of the homicide, was employed as a laborer on the Finley ranch, as were some dozen or more other Chinese.

There is ample evidence from which the jury were warranted in finding these facts: That, at about the noon hour of the said 11th day of March, one Potter, a taxicab driver at Santa Rosa, received an order by telephone from Sebastopol, a town situated a short distance from Santa Rosa, for a taxicab; that, acting upon the order so received, he drove to Sebastopol, and, upon reaching a point near that town, was stopped by a Chinaman, who was standing in the middle of the road, waving his hand, evidently for the purpose of attracting the driver's attention and so stopping the machine. Potter brought the taxi to a stop, and shortly thereafter four Chinese entered the machine, three taking seats inside and one taking the outside seat, riding by the side of the driver. Acting under the direction of the man sitting by his side, Potter took a circuitous route to the Finley ranch. Upon arriving at a point a short distance from the gate leading into the ranch, Potter was told by the Chinese to stop the machine, and, upon doing so, the four Chinese left the taxi, instructing Potter to remain at the spot where he had stopped until their return, which, they said, would not be over 15 or 20 minutes. Three of the Chinese passed through the gate into the Finley premises and thence to the cabin near which an aged Chinese, one Won Fong You, who was employed as a foreman and who also devoted himself to looking after and attending the flower garden on the place, was walking about the garden. Won Fong You, observing the three Chinese, who were strangers to him, greeted and invited them into the cabin to partake of a cup of tea. The defendant and another of the three Chinese accepted the invitation, the third remaining outside of the cabin. At this time, Hom Hong, the deceased, and a number of other Chinamen were engaged in chopping wood near the cabin. Finishing the tea, the two Chinese left the cabin and immediately went to the spot where Hom Hong was engaged in chopping wood "on a block," about 30 feet

from the cabin, and the defendant at once opened fire upon Hong with a pistol, shooting at him five times, four of the bullets entering his body, almost instantly causing his death. The third Chinaman—the one who did not partake of tea—remained near the cabin door while the shooting was going on. After the killing of Hom Hong, the defendant threw the pistol with which he did the shooting into the hopfield near by, and thereupon the three Chinese hastened to the place at which they had left the taxi, entered the machine, and ordered the driver to take them back to Sebastopol. On reaching a point near what is known as "Old Chinatown," in Sebastopol, the Chinese got out of the machine. The taxi driver, upon receiving pay for his services, started back to Santa Rosa, leaving the three Chinese at Sebastopol.

The sheriff of Sonoma county, having been immediately notified of the homicide after it occurred, started post haste for the Finley ranch, where, upon his arrival, he found the dead body of Hom Hong lying "crumpled" on the ground. The sheriff, shortly after his arrival, found a pistol, with five chambers, in the hopfield a very short distance from where the body of Hom Hong lay. Five empty cartridge shells were found in the weapon. An inquest was held by the coroner on the evening following the day of the homicide, and at the same time an autoptical examination of the body of the deceased was made by Drs. Temple and Scamell. It is not necessary to present herein a description of the several wounds as given by the doctors at the trial. It is enough to say that the point of entrance of each of the four bullets which went into the body of the deceased was such as conclusively to show that, when shot, the deceased had his back or side toward his assailant. In other words, it is obvious, from the point of entrance into the body of each of the bullets, that the deceased was at no time squarely facing the man who did the shooting.

[1] The point first urged for a reversal grows out of the omission by the court to give to the jury an instruction defining manslaughter.

Instructions must be pertinent to the evidence received into the record, and, manifestly, it is not error to refuse or fail to give an instruction having no bearing upon any of the facts proved. The undisputed evidence in this case (synoptically given above) did not warrant an instruction defining manslaughter. According to the evidence, the deceased was assassinated—deliberately and wantonly shot to death without cause or provocation—and there was therefore no element of manslaughter in the act of killing. And certainly there was no such element in the case, so far as the defendant was concerned, for he relied upon and attempted to establish an alibi, and, as the position thus assumed by him in the case implied, he did not pretend to know anything about the homicide, how it occurred, or by whom perpetrated, and therefore introduced no proof which would reduce or tend to reduce the crime to that of manslaughter. It was, as stated, according to the evidence produced by the people, a cold-blooded murder and nothing less. The Supreme Court has time and again very properly held that, in such a case, it is not error for the trial court to refuse or omit to instruct the jury upon manslaughter. See People v. Turley, 50 Cal. 469; People v. Lee Gam, 69 Cal. 552, 11 Pac. 183; People v. Chavez, 103 Cal. 408, 37 Pac. 389; People v. Chaves, 122 Cal. 134, 140, 54 Pac. 596; People v. Fellows, 122 Cal. 233, 240, 54 Pac. 830.

[2-5] It is next contended that the court should have given to the jury a more definite definition of "an absent accessory and what acts were required of such accessory to constitute guilt" than it did.

According to the evidence, the defendant was not an "absent accessory," by which is meant a participant in the commission of the crime who was not present at the scene of the crime when it was committed and who did not actually commit the criminal act. As has been shown, the defendant, under the evidence, was either present at and took an active part in the commission of the crime, or, accepting the proof addressed to his attempted alibi, had no connection whatever with the crime or the commission thereof. Of course, it was proper, and indeed necessary, for the court to read to the jury an instruction embracing the principle declared in sections 31 and 971 of the Penal Code as to accessories in crime, for the reason that the defendant was charged with two others with the commission of the homicide, and for the further reason that the district attorney, in his argument to the jury, declared that, under the evidence, they were justified in finding the defendant guilty, although they might find that he did not himself actually do the killing. And the court did so instruct the jury as follows:

"If two or more persons plan and undertake the commission of a criminal offense, and pursuant to that agreement the actual criminal offense or act denounced by the law as a crime is committed by one of the several parties, he being aided and assisted and encouraged in so doing by the other or others with whom he has so planned or agreed, under our law the participants in a criminal act accomplished under those circumstances are alike guilty. That is to say, those, if such there be, who aided, assisted, and abetted the commission of the act or participated in the commission of the crime as just stated are deemed by the law as guilty of the act as they would have been, you might say, had it actually been committed by them or one of their number."

It may be conceded that, under the decisions, the first part of the above instruction, taken alone, falls a little short of stating the rule correctly, for it would then merely have told the jury, in effect, that one aiding and assisting and encouraging another in commit-

ting a criminal act would be equally guilty with the perpetrator of the act himself. This, as stated, does not correctly state the rule, because one might innocently aid and assist and encourage another to commit an act which is criminal. People v. Dole, 122 Cal. 486, 492, 55 Pac. 581, 68 Am. St. Rep. 50. But, as will be observed, the court followed the language thus referred to with the statement that, to justify the conviction of one who did not himself actually commit the criminal act, it must be shown that he aided, assisted, and abetted therein; the word "abetted," unlike the words immediately preceding it, including "knowledge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime." People v. Dole, supra; People v. Bond, 13 Cal. App. 175, 185, 109 Pac. 150. Thus the rule was clearly and correctly stated to the jury, and it cannot be doubted that they well understood from it that, to warrant the conviction of a person who did not himself actually commit a criminal act, it was requisite to show that he abetted, or what is the equivalent in legal signification to that word, criminally or with guilty knowledge and intent aided the actual perpetrator in the commission of the act. Moreover, even if the instruction involved an erroneous statement of the rule, it could hardly be said to be prejudicial in its effect upon the rights of the defendant, inasmuch as all the evidence, save that which he offered in support of his claim of alibi, tended to show that he himself actually committed the act of killing.

[6-8] The last point to which special attention is given in the appellant's brief is that the district attorney, for the purpose of developing in the minds of the jury a motive for the commission of the homicide, declared that there existed a "tong war" among the Chinese at about and before the date of the killing, and further declared that the defendant was a member of one of the hostile and warring tongs.

Conceding that there is no evidence in the record that a tong war was in progress and the killing of Hom Hong was the result of hostilities arising and existing between rival Chinese societies, still we do not think the defendant could have been harmed by the remarks of the district attorney in that particular. The evidence upon which the prosecution relied for a conviction was sufficient to warrant a verdict of guilty without showing motive or undertaking by argument to work one out of the evidence. While proof of motive is important in a case wholly dependent for its establishment upon circumstantial evidence, yet where the crime is brought directly home to the accused—that is, by direct evidence it is shown that he committed the crime—then the proof of motive is entirely unimportant. In this case, it is highly probable that the jury founded their verdict entirely on the direct testimony tending to show that the accused was one of the actual perpetrators of the crime and did not stop to look for a motive or pay any heed to the remarks of the district attorney relative to motive or the existence of hostilities between rival Chinese factions. But an examination of the record will disclose that there was in the testimony some reference to a tong war, and this testimony came from the defense itself. It was brought out in this way: A Chinese witness for the people, named Bing Lee, testified that he saw the defendant and his companions alight from the taxicab near old Chinatown, in Sebastopol, on the day of the homicide and after the killing had taken place. Several witnesses, among them a police officer of Sebastopol, who was acquainted with Bing Lee, were called by the defense to testify, and did testify, that Bing Lee had not been seen in or about Sebastopol for several days before or after the 11th day of March, 1917, and that he was not seen there on that day. Reference to page 517 of the transcript will show that counsel for the defense asked his witness Sing Wo if he did not hear that a tong war was on and, if so, when he first heard of it, to which the witness replied that he heard of such a "war" before the killing of Hom Hong. And on page 523 will be found a like question to the police officer, who testified that he had received information of tong hostilities before the date of the homicide. It is true that the defendant was not shown to have been connected with either one of the warring tongs; but, in argument, it is permissible for an attorney to deduce any legitimate theory of the case which the evidence may reasonably afford, and since the attorney for the defendant himself seemed to assume that a tong war was in progress, and in fact filed an affidavit made by the defendant and upon which he predicated a motion for a continuance, in which it was declared without qualification that a tong war was going on prior to, at the time of and after the homicide, we cannot say that the district attorney overstepped the record very far by referring to the existence of a tong war and the homicide as a probable culmination thereof. In any event, however, as above stated, the defendant could have suffered no prejudice from the district attorney's remarks.

The judgment and the order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(37 Cal. App. 652)

## PEOPLE v. LEE SING PARK. (Cr. 439.)

(District Court of Appeal, Third District, California. June 26, 1918.)

1. CRIMINAL LAW ⟸1168(1) — APPEAL — HARMLESS ERROR.

Conviction of murder will be affirmed in absence of argument by appellant, where court perceives nothing in any of rulings on testimony which, assuming same to have been erroneous, could have prejudiced unduly defendant's rights.

2. HOMICIDE ⟸250—MURDER — SUFFICIENCY OF EVIDENCE.

In a prosecution for murder, evidence *held* sufficient to sustain conviction.

Appeal from Superior Court, Sonoma County; Emmett Seawell, Judge.

Lee Sing Park was convicted of murder, and from the judgment and an order denying his motion for new trial, he appeals. Affirmed.

W. F. Cowan and Carl Barnard, both of Santa Rosa, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was convicted, in the superior court of Sonoma county, of the crime of murder of the first degree; the jury having, in the exercise of the discretion committed to them by section 190 of the Penal Code, adjudged that the accused be confined in the state prison for life. The defendant has appealed from the judgment and the order denying his motion for a new trial, but no brief has ever been filed in support of the appeals, nor was he represented by counsel when the cause was called for hearing and argument at the regular June term of this court, upon the calendar of which the case was regularly placed for hearing and argument. The Attorney General therefore submitted the case upon the record.

The defendant was jointly charged by information with one William Yee and one Toy Yock of the crime of murdering one Hom Hong, on or about the 11th day of March, 1917, at a ranch near the city of Santa Rosa, in the said county of Sonoma. He was given a separate trial, with the result as above stated.

[1] William Yee, one of the defendant's codefendants, was, previously to the trial of the present case, separately tried and convicted of murder of the first degree, the jury fixing the punishment in his case at imprisonment for life, and upon appeal the judgment and the order were affirmed by this court on June 18, 1918. The general facts of this case are stated in the opinion filed in the said case of William Yee, 174 Pac. 343, and it is therefore unnecessary to repeat them herein. Nor, since no argument, either oral or printed, was made before this court pointing out the errors, if any there were, upon which the appellant intended to rely for a reversal, is it necessary or even practicable for the court to consider herein the numerous exceptions reserved by the defendant to rulings admitting and excluding certain testimony. It must suffice to say, generally, that we have examined the record with care and perceive nothing in any of the rulings upon the question of the propriety or impropriety of the testimony which, even assuming some to have been erroneous, could have unduly prejudiced the rights of the accused or which had the effect of depriving him of a fair and impartial trial. Indeed, we are justified in saying that the record is comparatively free from error, and that the accused was accorded a perfectly fair trial. As to the instructions, we are prepared to declare that a careful examination of the entire charge delivered by the court to the jury has convinced us that thus the law of the case was clearly and correctly stated.

[2] There is no claim that the evidence was insufficient to support the verdict. Nor could such a claim find support in the record. The evidence, generally speaking, was, as above stated, the same as that presented in the case of People v. William Yee, and, as will be observed by an examination of the opinion in that case, it was amply sufficient to justify the jury, if they believed it, in finding the accused guilty. Indeed, we may say as to both cases that, under the evidence as it is presented to us, and as we are required to consider it, the accused can count themselves as singularly fortunate in having been saved from the extreme penalty which the law provides may be inflicted in a case of murder of the first degree; for the act of killing Hom Hong, by whomsoever committed, involved a deliberate and cruel murder, in the commission of which there appeared no circumstances of mitigation which justified the infliction of any punishment less than that of death.

The judgment and the order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(37 Cal. App. 251)

## BURNS v. BAUER. (Civ. 1769.)

(District Court of Appeal, Third District, California. May 15, 1918.)

1. CORPORATIONS ⟸80(11) — LACK OF CONSIDERATION—FRAUD—SUFFICIENCY OF EVIDENCE.

In action by assignee of corporation on note given in payment for its stock, evidence *held* to support finding there was no consideration for note, and that it was obtained from the maker by corporation through fraudulent representations.

2. GUARANTY ⟸46(1)—NOTE — DEMAND AND NOTICE—STATUTE.

Under Civ. Code, § 2807, transferee of note, after maker refuses to pay, and before bringing suit against him, has a right to call upon the transferor, a guarantor of the note, for payment, without demand or notice.

3. Bills and Notes ⟸525—Holder in Due Course—Sufficiency of Evidence.
In action by assignee of corporation on note given for its stock and procured from maker by fraud and misrepresentations, evidence *held* to justify finding that transferee was not an innocent purchaser, nor a bona fide holder.
4. Bills and Notes ⟸497(2)—Holder in Due Course—Burden of Proof.
In action by assignee of corporation on note given for its stock, and procured from maker by fraud and misrepresentations, burden was on assignee to prove he was an innocent holder.

Appeal from Superior Court, El Dorado County; N. D. Arnot, Judge.

Action by Mark L. Burns against G. F. Bauer. Judgment for defendant, and plaintiff appeals. Affirmed.

F. G. Eby, of Sacramento, for appellant. Abe Darlington and Wm. F. Bray, both of Placerville, for respondent.

CHIPMAN, P. J. Plaintiff brought the action to recover on a promissory note executed and delivered by defendant at Diamond Springs, Cal., September 7, 1915, to Great Western Securities Corporation, due one year after date at 7 per cent. interest, assigned to plaintiff by the following indorsement:

"Pay to the order of Mark L. Burns, Great Western Securities Corporation, by S. H. Whisner, Pres. Payment Guaranteed. [Signed] S. H. Whisner."

In his amended answer, defendant admits the execution of the note, but denies that it was executed or given for a valuable or any consideration, and alleges that it is without consideration and void; denies that plaintiff became the owner or holder of said note before maturity, or that he is the owner or holder thereof for value or otherwise; alleges that said note was given in payment of certain stock of said Great Western Securities Corporation, which said stock was represented to defendant by said corporation "to be valuable and to be reasonably worth the price at which it was sold to defendant, but stock was then, and ever since has been, entirely worthless and was known at the time of said agreement to sell the same to defendant by said Great Western Securities Corporation, a corporation, to be worthless and of no value whatever, and there was no other consideration for said promissory note"; that at the time said note was assigned to him, plaintiff knew that it was without consideration, and knew that it was void, and that the stock of said corporation was worthless, and that he did then and there conspire with said corporation to defraud defendant by having said note indorsed by said Whisner to plaintiff "for the purpose of preventing defendant from making his defense of want of consideration when suit should be brought upon said note"; that "no stock was ever issued to defendant by said Great Western Securities Corporation, a corporation, until the time of the pretended assignment of said note to plaintiff."

As a further and separate answer and by way of affirmative defense, defendant alleges certain facts, most of which were by the court found substantially as alleged, and may be stated as given in the findings, as it will shorten somewhat this opinion. The cause was tried by the court without a jury. At the close of the trial and the coming in of the closing brief, the court made the following minute order:

"In our opinion the plaintiff was not an innocent purchaser for value of the note sued on. The inadequacy of the consideration he paid for the note put him upon inquiry as to the circumstances under which the note was given and the consideration the payee had given Bauer. This was easy for him to have done. He could and ought to have communicated with Bauer. He did not even make inquiry of Whisner. His friend Eby was the secretary of the payee. He made no inquiry of him. His only concern was to ascertain if Bauer was good. There was no need of rescission because the stock was valueless. The motion to strike out is denied. Counsel for defendant may take ten days to prepare and serve findings herein. N. D. Arnot, Judge."

In due course the court made the following findings of fact: That said promissory note was given in part payment for 750 shares of the capital stock of said Great Western Securities Corporation (hereinafter referred to as the Securities Corporation), which said stock was and is of no value whatever; that on July 8, 1916, said Securities Corporation, by its president, S. H. Whisner, assigned said note to plaintiff for the consideration paid of $350, and at the making of said assignment the said Whisner personally guaranteed payment thereof, no part of which or interest thereon has been paid; that the stock of said corporation, in part payment for which said note was given was represented to defendant, at the time he contracted to purchase the same, to be valuable and reasonably worth the price at which it was sold to defendant, to wit, the sum of $1 per share, but in fact said stock was then worthless and of no value, which was well known to said corporation; "and plaintiff, at the time said note was assigned to him, knew that the Great Western Securities Corporation was involved in litigation, but made no effort to ascertain whether or not said note was given for a valuable consideration." The transaction, as found by the court, is set forth as follows in its findings:

"That on the 17th day of February, 1914, one J. S. Danner, the agent of said Great Western Securities Corporation, called upon defendant at his home in the county of El Dorado, state of California, and asked him to become a subscriber for shares of stock in Great Western Securities Corporation, a corporation. Said J. S. Danner represented to defendant that said corporation had been organized for the purpose of erecting a 20-story building in the city of Sacramento, state of California, and he further stated to defendant that said corporation had obtained an option on a lot on J street between Fifth street and Sixth street in said city, and

stated that work on said building would commence not later than October 31, 1914. That said corporation already had a building permit for said building and had a large portion thereof leased to prospective tenants, and further stated to the defendant that even if 30 per cent. of said building were idle and untenanted, the net income therefrom would be 15 per cent. * * * That the representations of said J. S. Danner, as agent of said corporation, as aforesaid, were false at the time said representations were made by said J. S. Danner, and said corporation knew that said representations were false at the time said Danner made the same. That it was reliance upon the representations of said J. S. Danner, made as aforesaid, that caused defendant to enter into the agreement to purchase 750 shares of the capital stock of said plaintiff corporation, and if it had not been for said representations aforesaid, defendant would not have entered into said agreement to purchase said stock. * * * That by reason of the representations of said corporation as above set forth, defendant entered into a contract with it for the purchase of 750 shares of its capital stock, and paid on account thereof a total of more than $622, and gave the promissory note mentioned in plaintiff's complaint for the balance of the agreed purchase price and interest remaining due at the date of said note. That if it had not been for the false and fraudulent representations of said corporation, as herein set forth, defendant would not have contracted for any of said stock. That the promissory note sued upon herein was assigned to the plaintiff by said Great Western Securities Corporation, by S. H. Whisner, its president, on the 8th day of July, 1916. That the consideration paid therefor was the sum of $350 that the plaintiff is, and was on said 8th day of July, 1916, a lawyer engaged in a general law practice. That the stock for which said note was given in part payment was not issued until said 8th day of July, 1916, but was issued on said day. That Mr. F. G. Eby, who is the plaintiff's attorney in this action, was the secretary of said Great Western Securities Corporation at the time said stock was issued and at the time this action was commenced. That plaintiff, at the time he purchased said note, knew that said Great Western Securities Corporation and other corporations organized and controlled by said S. H. Whisner were involved in much litigation. That plaintiff made no inquiry or effort to learn whether or not said note was valid and given for a valuable consideration, but did inquire into the financial condition of the defendant and learned that he was able to pay the note and then purchased the same, intending to bring suit upon it if it should not be promptly paid."

As conclusions of law the court found that said promissory note was procured by fraud and is void for want of consideration; that plaintiff is not an innocent purchaser nor a bona fide holder of said note; that plaintiff is entitled to take nothing by this action; that said note be canceled by the clerk of this court; and that defendant recover his costs of suit herein. Judgment was accordingly entered, from which plaintiff appeals.

[1] The evidence abundantly supports the findings that there was no consideration for the note sued upon, and that it was obtained by the Securities Corporation through false and fraudulent representations. Not only is defendant's narrative of the false statements made to him by the Securities Corporation's agents uncontradicted, but the record contains specimens of the literature, highly misleading, gotten out by the Securities Corporation and exhibited to its victims, including defendant, as inducement to purchase its shares. As part of this promotion propaganda is found in the record the photograph of an imposing structure of architectural beauty looming skyward to the ambitious height of 20 stories, twice the height of any of the finer business buildings in the city of Sacramento. These flaming photographs were accompanied by commendatory letters written by officials of prominent banks in said city which, while not indorsing the corporation, or its financial standing, spoke in encouraging terms of the project to erect such a building. In short, the evidence shows that a gross fraud was perpetrated by that corporation on defendant in inducing him to purchase its stock. It was to throttle in their infancy just such schemes as this that our "Blue Sky Law" (Investment Companies Act, Stats. 1913, p. 715) was enacted, and it was the imposition being practiced on a confiding public by promoters of such schemes which gave birth to the law.

The only question in the case worthy of further consideration is connected with the findings in respect of plaintiff's relation to the promissory note the subject of the action.

[2-4] The court found that the note sued on was assigned to plaintiff by the Securities Corporation on July 8, 1916, by S. H. Whisner, its president, and plaintiff paid therefor $350; that plaintiff at that time was a lawyer engaged in a general law practice; that the stock for which said note was given in part payment was issued on the same day; that plaintiff's attorney in this action was the secretary of said Securities Corporation at the time said stock was issued and at the time this action was commenced; that at the time he purchased said note, plaintiff knew the said Securities Corporation or other corporations organized and controlled by said Whisner were involved in litigation; "that plaintiff made no inquiry or effort to learn whether or not said note was valid and given for a valuable consideration, but did inquire into the financial condition of the defendant, and learned that he was able to pay the note and then purchased the same intending to bring suit upon it if it should not be promptly paid." The face value of the note when transferred was $423.33. It was therefore discounted to the extent of $73, and no explanation is given why the Securities Company was willing to sell the note, falling due in so short a time, for so great a discount, the maker of which concededly was able to pay it; nor is there any explanation of the fact that the president of the payee corporation was required by the plaintiff to personally guarantee the payment; nor why plaintiff did not, after the defendant had refused to pay the note, call upon the guarantor for payment before bringing suit against the maker, which, under the circumstances shown, would have been a natural thing to

do and upon whom he had the right to call immediately without demand or notice. Civ. Code, § 2807. Plaintiff testified that he made no inquiry from the president of the company as to his authority to assign the note, nor from the secretary of the corporation, his attorney herein, as to the consideration given for the note, nor as to any of the circumstances under which it was given, nor as to any fact from any person except to ascertain that defendant was able to pay it. Plaintiff was an attorney at law engaged in the practice of his profession, and did not claim to be a purchaser of commercial paper in the regular course of his business. Plaintiff testified that he did not purchase the note with the intention of bringing suit should defendant fail to pay, and that if he had supposed it would have been necessary for him to do so, he would have had nothing to do with it. The finding of the court is to the contrary, and if it was not justified in doing so, there remain findings sufficiently supported by the evidence to justify the judgment.

The rule in this class of cases is stated in Jordan et al. v. Grover et al., 99 Cal. 194, 33 Pac. 908. In that case plaintiffs purchased the promissory note in question "before maturity for one-half of its face value, with knowledge upon inquiry previously made of the maker's solvency, but without inquiry as to the consideration thereof; nor was there any reason or explanation given for the purchase of the note at a price so grossly inadequate to its actual value. These circumstances," said the court, "were of themselves sufficient to arouse the suspicions of an ordinarily prudent man and put him on inquiry as to the consideration, therefore material for the consideration of the jury in determining whether the purchase was made by plaintiffs in good faith." The rule there stated "as well settled" was:

"Where fraud or illegality in the inception of the note is shown by the maker, the burden of proof is then cast upon the indorsee to show that he is an innocent holder" (citing cases).

And the court said:

"The plaintiffs must, therefore, in order to sustain the burden thus cast upon them, show that they purchased the note before maturity in good faith, for value in the usual course of business, and 'under circumstances which create no presumptions that they knew the facts which impeach its validity.' 1 Daniel on Negotiable Instruments (4th Ed.) § 815."

It is a fair inference from the evidence that the president and secretary of the corporation knew that its stock, which was the consideration given for the note sued upon, was sold under false representations, and that there was in fact nothing of value given as a consideration for the note. We think, too, that the facts and circumstances elicited at the trial were such as justified the court in its conclusion "that plaintiff is not an innocent purchaser nor a bona fide holder of said note." The circumstances under which the note was sold to plaintiff, the heavy discount offered so near to the due date of the note, the maker of which was known by both the corporation and plaintiff to be able to pay, would have suggested to an ordinarily prudent man that there might be some infirmity in the paper, and that it might not be safe to rest wholly on an inquiry as to the ability of the maker of the note to pay it when due. We do not think that plaintiff sustained the burden which was cast upon him by proof that the note was tainted with fraud and was without consideration. Plaintiff was put upon inquiry which, had it been reasonably pursued, would have placed him in possession of the facts. He testified:

"I think Mr. Whisner [his guarantor] is able to reimburse me, and will do so, I think, if I am unsuccessful in this case."

It is not improbable that his reliance upon Mr. Whisner's ability to respond to his guarantee led plaintiff to be indifferent as to the circumstances surrounding the execution of the note. His investment was safe in any event.

We think the judgment should be affirmed, and it is so ordered.

We concur: HART, J.; BURNETT, J.

---

37 Cal. App. 673

HERMAN v. ROHAN et al. (Civ. 2357.)

(District Court of Appeal, First District, California. June 27, 1918.)

1. LANDLORD AND TENANT ⊜76(1)—RIGHT OF ASSIGNMENT — CONSTRUCTION OF CONTRACT.

Agreement whereby owners of market gave renter of stall the right to sell his interest in the stall upon condition that purchaser pay monthly rental did not condition renter's right to sell upon the suitability of purchaser, except as to payment of rent if that be classed as suitability.

2. LANDLORD AND TENANT ⊜76(2)—BREACH OF CONTRACT TO PERMIT ASSIGNMENT—DEFENSES.

Where owners of market agreed that occupant of a stall, who had purchased the right to the use thereof, might sell such right, owner's contention that no action of theirs could prevent occupant from selling such right, is no defense in action by latter against former for breach of such agreement, where former refused to permit latter's purchaser to occupy the stall.

3. FRAUDS, STATUTE OF ⊜44(4)—AGREEMENT NOT TO BE PERFORMED WITHIN YEAR—RIGHT TO SELL RIGHT TO USE MARKET STALL.

An agreement whereby owners of market gave renter of stall the right to sell his interest in the stall is not invalid under Code Civ. Proc. § 1973, subd. 1, invalidating all agreements not to be performed within a year.

4. LICENSES ⊜53—USE OF MARKET STALL—SALE OF PRIVILEGE.

Owners of market who had sold the right to use a stall, even considering the matter a personal privilege or license, could make valid agreement giving purchaser right to sell such privilege.

5. LICENSES ⊜44(2) — PRIVILEGE DISTINGUISHED FROM LEASE.

Where a market owner sold the right to use a stall, no term being agreed upon, a monthly rental being paid and occupant having right to sell, his interest was more than a privilege, it

being presumed, under Civ. Code, § 1943, that hiring was for one year, and possession beyond year, and landlord's acceptance of rent raising presumption, under section 1945, of a renewal upon same terms from month to month.

6. LANDLORD AND TENANT ⊂⊃75(3) — TENANT'S RIGHT TO ASSIGN LEASE—LESSEE OF MARKET STALL.

Aside from any agreement with lessor, the renter of a market stall whose lease expired, but who, by remaining in possession and paying monthly rental, under Civ. Code, § 1945, renewed lease upon same terms from month to month, had right to sell and assign his lease.

7. LANDLORD AND TENANT ⊂⊃76(1)—RENTER OF MARKET STALL—RIGHT TO ASSIGN LEASE —IMPLIED CONDITION OF SUITABILITY.

Agreement whereby market owner gives stall renter the right to sell his rights in the stall to any person who will pay monthly rental wipes out any implied condition as to suitability of person to whom stall lessee may assign his lease, and renter may sell to whomsoever he chooses, provided purchaser pays rent.

Appeal from Superior Court, Alameda County; W. M. Conley, Judge.

Action by Harry Herman against John C. Rohan and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Wm. R. Geary, of Oakland, for appellants.
M. J. Rutherford, of Oakland, for respondent.

BEASLY, Judge pro tem. Stripped of immaterialities, the facts of the case are as follows: The plaintiff Herman took a stall in an Oakland market from the defendants. He purchased the right to occupy the stall in another market than the one in question here from the defendants, who were the owners of that market, and from another person who occupied the stall so purchased, and paid the defendants and his predecessor a substantial sum of money therefor. Presently the defendants built a new market, and Herman was transferred to a stall therein, and from time to time purchased additional frontage, thus enlarging his stall, paying in each instance an additional sum to the defendants as a sort of bonus therefor, and paying in addition $1.75 per front foot per month for each foot of space embraced within the stall. At one of the times when the plaintiff purchased extra frontage from the defendants, paying $200 therefor, they agreed, in consideration of this purchase, that the plaintiff might sell all his right, title, and interest in the stall for any price he might obtain to any purchaser he might secure, upon the condition only that the purchaser should pay the $1.75 per front foot monthly rental charged for the use of the property. Plaintiff thereafter secured a purchaser who was ready, willing, and able to buy his right to the stall for the sum of $500, which he agreed to pay therefor, this sum being payment for whatever right and interest the plaintiff had in the market and for the fixtures in his stall. The defendants refused to permit this sale to be made, and refused to permit a transfer of the possession of the stall to the purchaser. Plaintiff thereupon began this action for breach of the defendants' contract with him, and obtained a judgment in the court below for $475 as damages therefor.

[1] On this appeal the defendants contend: First, that they did nothing more than agree that plaintiff could sell to a suitable person only. The answer to this is that the finding of the court, based upon sufficient evidence, is exactly as above set forth, and that there was no condition whatever in their agreement as to the suitability of the person to whom the plaintiff might sell, except that such person should pay the monthly rental, if that be classed as suitability.

[2] The second contention of appellants is that:

"No action of defendants could prevent plaintiff from selling that which he owned and had acquired by a proper conveyance."

But in this case the defendants could and did prevent Herman from selling by refusing to permit the person to whom he sold to take possession of the subject-matter of the sale, namely, the right to occupy the stall and the fixtures therein contained.

[3] Defendants' third contention is that:

"Even if the defendants had agreed to permit Herman to sell, it was an oral agreement, and had to be performed within one year."

But the answer to this is that the agreement was not one which, by its terms, was not to be performed within a year from the making thereof. Code Civ. Proc. § 1973, subd. 1.

[4] The defendants' fourth contention is that:

"Plaintiff claims no interest in the realty, and, if so, has failed to prove his title thereto by proper deed duly acknowledged."

This claim must be considered in connection with another which is argued more definitely, to the effect that the plaintiff's rights were in the nature of a personal privilege to occupy the market, and were therefore not assignable. In answer to this it may be said that, even considering the matter a personal privilege or license, there is nothing whatever in the law to prevent the defendants from making an agreement, if they saw fit, to the effect that this personal privilege might be assigned. The property was theirs; they were letting whatever privilege Herman had and whatever rights he possessed in the stall to him; and they could legally—and the court found that they did—agree that he might sell those rights as above set forth.

[5-7] The interest which Herman had in the stall, however, was something more than a privilege. He paid a monthly rental therefor; no term of his hiring was fixed, and no usage on the subject of the length of the term is shown. It is therefore presumed that his hiring was for one year from its commencement (Civ. Code, § 1943), and when he remained in possession beyond the year and

his landlords accepted rent from him the parties were presumed to have renewed the hiring upon the same terms from month to month. Civ. Code, § 1945. Aside, therefore, from the agreement, Herman had the right to sell and assign his lease; and if, because of the nature of the property as a market, there was an implied condition that in case of sale the purchaser should be a suitable person, that condition was wiped out by the point-blank agreement found by the court, to the effect that he might sell to whomsoever he chose so long as the purchaser would pay the rent.

The judgment is affirmed.

We concur: KERRIGAN, J.; ZOOK, Judge pro tem.

---

37 Cal. App. 706

## ROSEDALE CEMETERY ASS'N v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 2541.)

(District Court of Appeal, Second District, California. July 1, 1918.)

1. MASTER AND SERVANT ⇐405(2)—WORKMEN'S COMPENSATION ACT — INDEPENDENT CONTRACTOR—EVIDENCE.

In a proceeding to obtain compensation for personal injuries under Workmen's Compensation Act, evidence *held* to support a finding that one skilled in blasting was an employé of a cemetery association, and not an independent contractor.

2. MASTER AND SERVANT ⇐375(1)—WORKMEN'S COMPENSATION ACT — "CEMETERY WORK."

"Cemetery work" consists in platting, grading, planting, beautifying, and maintaining a tract of land in such manner as to render it a proper place for sepulture of the dead, and to preserve it as such, and includes the blasting of concrete foundations formerly supporting water tanks used in connection with irrigation, under the Workmen's Compensation Act.

3. MASTER AND SERVANT ⇐403 — WORKMEN'S COMPENSATION ACT—WILLFUL MISCONDUCT—BURDEN OF PROOF.

Under Workmen's Compensation Act, § 12, the burden is on an employer to show that a servant claiming compensation was guilty of willful misconduct.

Proceeding under the Workmen's Compensation Act by one Armstrong to obtain compensation for personal injury, opposed by the Rosedale Cemetery Association, a corporation, the employer. There was an award by the Industrial Accident Commission of the State of California, and the employer applies for a writ of review. Award affirmed.

Williams & Williams and Goudge, Robinson & Hughes, all of Los Angeles, for petitioner. Christopher M. Bradley, of San Francisco, for respondent.

WORKS, Judge pro tem. It is sought by the petitioner to annul an award of the respondent, whereby one Armstrong was allowed compensation for injuries suffered by him while in the rendition of certain services to the petitioner. Armstrong was skilled in the work of blasting and in the handling of explosives used in the conduct of blasting operations, and was engaged by the petitioner to remove from its cemetery property, in that manner, certain concrete foundations which had formerly supported some discarded water tanks once used in connection with irrigation. It was in the prosecution of this work that Armstrong was injured.

[1] The respondent found from the facts before it that Armstrong was an employé of the petitioner, and this finding is assailed as being without support in the evidence; the contention of the petitioner being that the injured man was an independent contractor in the performance of the service for which he had been engaged. There was no written agreement evidencing the employment of Armstrong. He testified that the conversation by which he was engaged took place between him and the superintendent and the secretary of the petitioner. These officers desired Armstrong to state to them the probable cost and duration of the work in contemplation. He answered that it could be done in a week and that the expense would depend upon the cost of powder. This figure he was asked to procure, and he was also to order the requisite amount of the explosive for the work. Under an ordinance of the city of Los Angeles it was necessary that a permit be secured from the city authorities allowing the work of blasting to be done. Armstrong was told by the superintendent to procure this permit, and he did so. Armstrong testified, as to his status in doing the work, as follows:

"And then as to my part of the work, it was talked of my taking a contract, and I said I couldn't take a contract, because I didn't know what I was up against, but that I would go out there and work for $5 a day to take it out, and that they were to furnish me help to dig out what digging was to be done, and give all the help necessary, so as to be able to take it out within a week's time."

Under this phraseology, it is a matter of some difficulty to determine the nature of Armstrong's employment. There are some features of the statement indicating that he was to be only an employé; others tending to show that he was engaged as an original contractor. It does appear, however, that he was to be paid by the day, and that there were no restrictions placed upon the power of the employer to direct and control his operations at will. The undisputed evidence is that the petitioner actually exercised no direction or control over the work during its progress. In support of its contention that Armstrong was an independent contractor, the petitioner cites many authorities to the general effect that, to quote from Green v. Soule, 145 Cal. 96, 99, 78 Pac. 337, 339:

"The chief consideration which determines one to be an independent contractor is the fact that the employer has no right of control as to the mode of doing the work contracted for."

---

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Whether, however, the employer has or has not such a right of control is necessarily to be determined from the contract of employment. The fact that there was no right of control cannot be predicated upon an absence of the exercise of it, in practice, if the contract in fact allows the right. The employer would be very likely to refrain from exercising a direction or control over an employé as to whom he had the undoubted right of control, merely because the employé had a greater knowledge concerning the nature of the work to be done than did the employer himself. Nothing more seems to have been the case here. There is nothing in the opinion in Brown v. Industrial Acc. Comm'n, 174 Cal. 457, 460, 163 Pac. 664, which conflicts with the views above expressed, as an examination of Anderson v. Foley Bros., 110 Minn. 151, 124 N. W. 987, cited in the opinion, will show. We are satisfied that the finding that Armstrong was an employé of the petitioner is supported by the evidence.

[2] The next contention of the petitioner is that the employment of Armstrong was both casual and not in the ordinary course of the business of the employer. It is admitted by the respondent that the employment was casual, but can it be said that it was not in the usual course of the petitioner's business? According to the superintendent of the petitioner, the business in which it engaged was cemetery work. That expression may be properly defined, we believe, in the statement that it consists in platting, grading, planting, beautifying, and maintaining a tract of land in such manner as to render it an appropriate place for the sepulture of the dead, and to preserve it as such. It can make no difference whether "cemetery work" is done by means of blasting or through the use of the wheelbarrow, the spade, or the spirit level. All these and other instrumentalities may be required to reduce a given tract, necessarily variable to some extent in character, to a proper condition for cemetery uses and to so maintain it. The employment of Armstrong was in the ordinary course of the business of the petitioner.

[3] The final contention of the petitioner is that Armstrong was guilty of willful misconduct in and about his work. This misconduct is alleged to have consisted of a violation of the terms of the permit granted by the city of Los Angeles. That permit was to the effect that not more than one stick of dynamite was to be used in each blasting charge. Armstrong used one and one-half or two sticks to the charge; but there is no evidence that his departure from the permit regulations in this regard either proximately or remotely caused his injury. It was necessary that such a showing be made. Workmen's Compensation Act, Act 2144a, Deering's Gen. Laws 1915, § 12a (3). Not only so, but the showing must have been made by the petitioner, for willful misconduct is an affirmative defense in these cases. United States Fid. & G. Co. v. Industrial Acc. Comm'n, 174 Cal. 616, 163 Pac. 1013. In addition to the utter failure of the petitioner to introduce evidence to support the burden of proof thus cast upon it on the hearing before the Industrial Accident Commission, there was some evidence on the part of the applicant tending to show that his injury was not the result of the use of the excessive charges of dynamite.

The award is affirmed.

We concur: CONREY, P. J.; JAMES, J.

---

(37 Cal. App. 545)

## BOOT v. BOYD. (Civ. 1566.)

(District Court of Appeal, Third District, California. June 15, 1918. On Petition for Rehearing, July 15, 1918.)

1. FRAUDULENT CONVEYANCES ⟸135 — CHANGE OF POSSESSION—SUFFICIENCY.

Under Civ. Code, § 3440, requiring a change of possession on the transfer of personal property, a sale, to be good against the vendor's creditors, must be accompanied by an actual and continued change of possession, such as to give notice to the world of the claims of the new owner.

2. FRAUDULENT CONVEYANCES ⟸150 — CHANGE OF POSSESSION—SUFFICIENCY.

Where real property is sold and a bill of sale for personal property located thereon is at the same time given the vendee, the fact that the vendee took possession of the real property is not sufficient evidence of a change of possession of the personal property.

3. FRAUDULENT CONVEYANCES ⟸147(1) — CHANGE OF POSSESSION—SUFFICIENCY.

What constitutes an immediate delivery and an actual and continued change of possession is to be determined on the evidence in each particular case.

4. FRAUDULENT CONVEYANCES ⟸147(3) — CHANGE OF POSSESSION — SUFFICIENCY — "SUSPICIOUS CIRCUMSTANCES."

That a vendee of personal property went upon the land where it was located and checked the property off, thus exercising an act of ownership over it, where the purported vendor continued in actual possession, was only one circumstance to be considered in determining whether there was a delivery and change of possession; the continued possession of vendor constituting a suspicious circumstance.

On Petition for Rehearing.

5. EXEMPTIONS ⟸93—WAIVER—DELAY.

Where peronal property was levied on under an execution, a delay by the alleged owner to make claim of exemptions after he had had almost a month's notice of the seizure of the property by the sheriff constituted a waiver of his claim for exemptions.

6. APPEAL AND ERROR ⟸173(2) — RESERVATION OF GROUNDS—EXEMPTION FROM EXECUTION.

The appellate court will not consider the question of exemption of property from execution when raised for the first time on appeal.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

---

Action by Leonard Boot against Jud. W. Boyd. Judgment for defendant, and plaintiff appeals. Affirmed.

George R. Freeman and Frank Freeman, both of Willow, for appellant. P. H. Coffman, of Red Bluff, for respondent.

HART, J. Action in claim and delivery, the defendant being the sheriff of Tehama county. On the 9th day of January, 1915, R. A. Boot and Nora Boot, his wife, in consideration of $15,642.50, by deed conveyed to plaintiff 170 acres of land in Tehama county, spoken of as the R. A. Boot ranch. On the same day, said R. A. and Nora Boot executed to plaintiff a bill of sale conveying certain personal property, consisting of mules, horses, wagons, farming implements, etc., it being stated therein that the consideration named in the above-mentioned deed was also paid for the personal property transferred by the bill of sale. On the 13th day of January, 1915, an action was commenced in the superior court of Tehama county by Jesse A. Brown, as plaintiff, against Robert Boot and James A. Boot, as defendants, to recover $2,691.83, the amount alleged to be due on certain promissory notes given by the defendants in said action in connection with a contract between the parties for the sale by said Brown to defendants of land adjoining the Boot ranch. A writ of attachment was issued and delivered to the sheriff, who made return that, on January 18, 1915, he levied upon certain personal property and also upon the Boot ranch. The court afterward ordered the attachment released as to the personal property, and it was returned to the defendants in said action. On July 7, 1915, judgment was entered in favor of plaintiff, Brown, for $2,691.83; an execution was issued, under which the sheriff levied upon the personal property in question and sold the same for the net sum of $896.95, which money was delivered to the plaintiff in said action. The present action was brought to secure judgment for the recovery of the possession of said personal property, or for $1,800, the value thereof, and for $1,000 damages for the alleged wrongful taking of the same. Judgment was in favor of defendant, from which plaintiff prosecutes this appeal.

Appellant states that:

"But one thing is involved in the action, namely, the validity of the sale, on January 9, 1915, of the property involved, to plaintiff by said Robert A. Boot and his wife. The trial court decided that the sale was invalid because there was no immediate delivery followed by actual and continued change of possession of the property such as is required by section 3440 of the Civil Code, * * * the alleged sale being void as against the execution creditor."

It appears from the testimony that plaintiff, Leonard Boot, resided in Glenn county. He stated that he received the bill of sale above referred to on the 9th day of January, 1915; that, with R. A. Boot and James Boot, he went to the R. A. Boot ranch, where the personal property was, checked off each item on the bill of sale, looked at every article on the ranch, and took possession of it. The property was assessed to him in the year 1915, and he paid the taxes on it. He stated that he authorized all the work that was done on the personal property, and paid those who had anything to do with it. On cross-examination he stated that the personal property in question had been on the R. A. Boot ranch, and had belonged to R. A. Boot for about two years; that when he took possession of it he did not take any of it away from the ranch, but put Robert (R. A.) Boot in possession of the property as manager and left it in his control. He said that he knew about the transaction in which Robert and James Boot entered into an agreement, about July, 1913, for the purchase from Jesse A. Brown of what was known as the Brown or Westlake ranch, and knew that said Robert and James were indebted to Brown on account of said purchase. Plaintiff remained overnight at the Boot ranch, on January 9th, and left there the next afternoon. In a few days he returned, looked over the place, and directed certain work to be done. He testified that thereafter he visited the ranch about once a week; that R. A. Boot conducted the ranch for him, and that he paid said R. A. Boot wages for looking after the property. A few hogs and some fruit raised on the ranch were sold by plaintiff after he received the bill of sale.

Jud. W. Boyd, the defendant, testified that, on the 11th of September, 1915, he levied upon and took into his possession the personal property in question; that at that time he found the property in the possession of Robert Boot on the Robert A. Boot ranch, and took the property from him; that plaintiff was not there at the time.

Jesse A. Brown testified that, in 1914, 1915, and down to September 11, 1915, the personal property was in the possession of Robert Boot; that, when farming Brown's ranch Robert and James Boot had the property there, and, about the 1st of January, 1915, they moved it to the Boot ranch. The witness stated that he was "about the Boot ranch a good deal" since the 1st of January, 1915, and that Robert Boot had charge of the property; that he never saw any change of possession of it, and never saw Leonard Boot exercise any act of ownership or control over it. On cross-examination the witness said that he had been on the Boot ranch but once since said 1st of January and that at that time he saw Robert Boot and no one else there; that he had seen him going back and forth, and had seen him sitting by the gate one day; that he knew that Leonard Boot claimed the property.

Dan Hamilton testified that, in the summer of 1915, he was employed by Robert Boot to work on the Boot ranch, and that he worked there for about three months; that he was there on the 11th of September when the

sheriff took the property under the execution; that while witness was on the ranch Robert Boot had charge and control of the personal property; that Leonard Boot was there three or four times, but did nothing with the property that witness knew of; that plaintiff worked one day in the dry yard, and he worked, picking fruit for the Chinamen a day or two.

Elmer Oakes, who lived across the road from the Boot ranch, testified that, since the 1st of January, 1915, the property taken by the sheriff had been in the possession of Robert and James Boot, and that he saw no change in the possession of it during that time. Ray Barker testified to the same facts.

In rebuttal, R. A. Boot testified that during the summer of 1915 he was conducting the ranch for Leonard Boot, who paid all the bills incurred.

[1] The single point submitted here for decision involves an attack upon the finding that there was not an immediate and continuous change of possession of the chattels from the owner to the purported vendee, within the meaning and intent of the law. The case as made by the evidence was one peculiarly for the decision of the court, before which it was tried without a jury. In other words, we do not see our way clear to declare, as a matter of law, that there was at any time a change of possession of the chattels involved from R. A. Boot and wife to Leonard Boot. We, therefore, adopt and approve the following portion of the learned trial judge's opinion rendered and filed in deciding the case, and which is incorporated in the brief of respondent:

"The sheriff as a defense sets up his official capacity, and that as such sheriff he took the property under attachment (execution) in a suit wherein one Jesse A. Brown was plaintiff and Robert Boot and James A. Boot were defendants, and at the time he took the same said property belonged to Robert Boot.

"The plaintiff claims that before levy thereon by the sheriff he had bought, for a valuable consideration all the said property from said Robert Boot, and that it was his property, and not liable to process in the suit of Brown against Boot.

"I have considered the evidence carefully and the authorities cited by the respective parties, and am satisfied that the plaintiff has not shown title good against the process held by the sheriff in said action.

"Section 3440 of the Civil Code provides: 'Every transfer of personal property, other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession.'

"The Supreme Court, in considering this section, has held uniformly that a sale of personal property, to be good against the creditors of the vendor, must be accompanied by an actual and continued change of possession, and that this means not a mere formal change, but that the possession of the vendee must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee, and it must be such as to give notice to the world of the claims of the new owner, and must be continuous.

"From the evidence introduced in this case, about which there is no conflict, it is clear that if any person who had been familiar with the property and its ownership a week before the alleged sale to the plaintiff, had visited the premises a week thereafter, he would have seen or noticed nothing in the management of the property, its possession and location, that would have given him any notice that there had been a change of ownership from Mr. Robert Boot to the plaintiff in this action.

"The case seems clear to the court, and judgment and findings are ordered for the defendant."

[2] The position of the appellant is that the fact that the land on which the personal property involved herein was kept was conveyed, and possession thereof taken by him while the personal property was still on the said land and at the time the bill of sale for the former property was delivered to him amounted to the taking by him, and therefore a change of the possession of the personal property. We do not think this was sufficient to evidence that change of possession of personal property which the law requires. Nor do we find that it is so held in any of the many cases cited by the appellant in support of his position.

In Banning v. Marleau, 101 Cal. 238, 35 Pac. 772, the gist of the decision as to the question whether there was a change of possession of the chattels therein involved is, generally stating it, that the findings were not specific enough to show upon what theory the case was decided—"that is, whether it was upon the theory that plaintiff was not the owner of the property in any sense, or upon the theory that a sale of said property by Hannon to plaintiff was void as against creditors, for want of delivery and an immediate and continuous change of possession under section 3440 of the Civil Code."

In Porter v. Bucher, 98 Cal. 454, 33 Pac. 335, the plaintiff, who was the wife of one Howard B. Porter, with whom she lived on a farm upon which her husband had duly filed a declaration of homestead, was the owner as her separate property of a hundred or more head of cattle, which were kept on said homestead. The plaintiff bought from her husband a large quantity of hay grown on the homestead for the purpose of feeding it to her cattle. After the hay was cut and stacked in corrals on the premises, the plaintiff and her husband together went to the stacks, "estimated the quantity of hay, agreed upon the price, and the husband, by words, delivered the hay to the appellant (his wife), who thereupon closed and fastened the gates of the corrals, made a payment of $10 and a few days later made another payment of $30, and, in accordance with the agreement of sale, assumed the payment of certain specified debts of the husband, amounting, with

the cash payments, to about $870, and which debts she afterwards paid." The husband later became an insolvent debtor, having been duly so adjudicated, and thereupon the assignee of the estate of the husband made a demand for and finally seized the hay as being a part of the husband's assets. At the trial of the action by the wife in claim and delivery for the return of the hay to her possession, the trial court instructed the jury that there was no evidence justifying a finding that there was immediate delivery of the possession of the property followed by an actual and continued change of possession. The Supreme Court, reversing the judgment entered upon the verdict against the plaintiff, merely held that the evidence was such that the question whether there was the delivery and change of possession required by the law to make the sale valid as against creditors should have been submitted to the jury.

The many other cases cited by appellant are, as we understand them, no more in point in this case than those to which we have above given special attention.

[3] As above stated, we think it is absolutely correct to say here, as is said in Porter v. Bucher, supra:

"That what constitutes an immediate delivery and an actual and continued change of possession is a fact to be determined upon the evidence in each particular case."

[4] Much stress is, however, laid upon the testimony of the plaintiff that, upon buying the farm and the personal property, he went to the land and checked off the personal property, thus exercising an act of ownership over it. But that was only a circumstance to be considered by the court in determining whether there was a delivery and change of possession. The other fact remains that in point of fact the purported vendor of the property continued in the actual possession of the same. In Hickey v. Coschina, 133 Cal. 81, 65 Pac. 313, the plaintiff bought a certain stock of cigars, goods, and fixtures from his son-in-law, one Offield. Some of the goods were shortly after the sale transferred to the rooms of the plaintiff, while a part of them remained for some time thereafter in the rooms of Offield, and finally all removed to a store. Offield remained with the plaintiff as an employé in and about the cigar store. The goods and fixtures were subsequently attached by the defendant as a constable, in an action to recover a debt due from Offield. The plaintiff prevailed in the court below, and the judgment was affirmed on appeal. The court, among other things, said:

"It is urged that plaintiff, after the sale, employed Offield, his son-in-law, in and about the cigar store. While this was a suspicious circumstance, and one that should have been carefully weighed by the jury, and the court below, yet it was by no means conclusive. It was a circumstance that might be, and was, explained."

So in the case at bar. The continued possession of the personal property by R. A. Boot, although the land upon which it was then situated was at the same time transferred to the purported vendee of the chattels, constituted what the court below well might and no doubt did consider a "suspicious circumstance," and sufficiently suspicious to lead it to conclude, in considering it in connection with other evidence in the case, that there was not that actual delivery and change of possession of the property requisite to make the sale valid as against creditors.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Petition for Rehearing.

PER CURIAM. For the first time the point is made in the petition for a rehearing of this case that the personal property in dispute herein, and which was seized and sold by the sheriff on an execution in satisfaction of the judgment referred to in the original opinion filed herein, is exempt from execution by virtue of the provisions of section 3440 of the Civil Code. It is conceded that no claim of exemption was at any time asserted by any one as to the property, but it is vigorously contended that, under the terms of the section named, a claim of exemption is not required to place exempt personal property within the protection of the law against seizure under legal process for the satisfaction of a judgment against the owner, and in support of this contention the recent case of Williamson v. Monroe, 174 Cal. 462, 163 Pac. 662, is cited. In that case, a part of the property levied upon by the sheriff and sold under an execution consisted of the farming utensils, implements of husbandry, and other personal property essential to the prosecution of farming. The property had been sold to the plaintiff, Williamson, by the owner, one Fonnesbeck, and at the time of said sale it was under attachment issued at the behest of a creditor of the vendor. A part of the consideration of the sale was that Williamson would cause the attachment to be released, and this he did. At no time after the levying upon the property or before the sale thereof under the execution, the purpose of which was to satisfy a judgment secured by one Merkeley against the said Fonnesbeck and one Holmes, did Williamson make a specific claim that any of the property was exempt from execution under section 3440, supra. It was argued in that case that none of the property was exempt from execution "unless a claim to that effect was made, and that consequently the proviso [referring to the exemption clause of section 3440 of the Civil Code] does not apply in this case." But the Supreme Court held adversely to that contention, saying:

"The exemption is not declared to be conditional upon the assertion of a claim of exemption by the debtor. Its status as exempt property comes from its character and use, and not from any claim for exemption."

The court, in that case, though, further said:

"It is true that the right of exemption may be waived, and that, when the officer actually makes a levy upon such property, if the debtor does not claim his right within a reasonable time thereafter, the delay may be sufficient evidence of such waiver. Gavitt v. Doub, 23 Cal. 78, 80. But here, when the sale was made on November 14, 1910, the vendee assumed the burden of the attachment lien then existing, and immediately discharged it. There was no occasion at that time to claim the exemption, and no person to whom such claim could be made. No other execution or attachment was outstanding. The sale then became complete, there was no waiver of the exemption, the title vested in Williamson, and the exempt property was not afterward subject to execution against Fonnesbeck."

[5] In the present case the contention that the property in question is exempt under the terms of the statute necessarily proceeds upon the assumption that said property, when seized by the sheriff, belonged to Robert A. Boot—that is to say, the assumption to support the theory of exemption is that the trial court's judgment that the purported sale to the plaintiff was, as against creditors, fraudulent and void, is sound, for if the sale were a valid one as against creditors, there would be no occasion for the assertion of a claim of exemption by the plaintiff, who was not affected by the judgment to satisfy which the execution was issued and the property thereupon sold. That Robert A. Boot made no claim of exemption at any time is, as above stated, conceded, and we think that he had a reasonable time within which to do so, and that his failure to make the claim within such time amounted to a waiver of the claim. The judgment upon which the execution was issued was given and entered on the 7th day of July, 1915. The execution was taken out on the 28th day of July, 1915, and on that day delivered to the sheriff. On the 11th day of September, 1915, the sheriff levied upon and took into his possession from the possession of Robert A. Boot the property in dispute, and on the 2d day of October, 1915, said sheriff sold the said property as commanded by the said execution. Thus, it will be observed, Robert A. Boot had almost a month's notice of the seizure of the property by the sheriff under the execution, and that much time within which to have asserted the claim that the property was exempt from execution. As before stated, we think that under these circumstances he should be held to have failed to set up his claim of exemption within a reasonable time, and, therefore, waived his right to do so.

But, as stated at the beginning of this opinion, the proposition that the personal property involved herein is exempt from execution has been raised for the first time in the petition for a rehearing of this case. No such issue was presented by the pleadings, no such claim made at the trial, and no claim or point involving that proposition is presented or discussed in the original briefs filed herein by counsel for the appellant. In fact, counsel for the appellant themselves in their opening brief state the question which was submitted to and tried and decided by the trial court and submitted here as follows:

"The action is an ordinary action in claim and delivery, and but one thing is involved in it, namely, the validity of a sale, on January 9, 1915, of the property involved to plaintiff by said Robert A. Boot and his wife."

And the discussion in the briefs, both in the opening and closing by appellant, is confined entirely to the proposition as thus stated. There is, as in effect before declared, not the slightest intimation, either in the record or the briefs, that the question of the right to claim exemption of the property from execution was or would be relied upon.

[6] It has long been the rule in this state that the appellate courts will not review or consider points which have not been made in the court below. In the very early case of Morgan v. Hugg, 5 Cal. 409, it was held:

"Errors cannot be relied upon in an appellate court which are not taken advantage of and raised at the trial."

This rule, which is a most salutary one, has been uniformly adhered to by the reviewing courts of this state down to the present day. See, also, McDonald v. Bear River & A. W. & M. Co., 13 Cal. 220; King v. Meyer, 35 Cal. 646; Stoddard v. Treadwell, 29 Cal. 281; Williams v. McDonald et al., 58 Cal. 527; Anderson v. Black, 70 Cal. 231, 11 Pac. 700; Adams v. Crawford, 116 Cal. 495, 48 Pac. 488; Sprigg v. Barber, 122 Cal. 573, 55 Pac. 419.

We are satisfied with the conclusion announced in our former opinion upon the other branch of the discussion.

The petition for a rehearing is denied.

---

37 Cal. App. 313

## CHARLES HING v. JOE LEE et al.

(Civ. 1751.)

(District Court of Appeal, Third District, California. May 20, 1918. Rehearing Denied by Supreme Court.)

1. EXEMPTIONS ⇐50(1) — LIFE INSURANCE POLICY—ANNUAL PREMIUMS.

Proceeds of life insurance endowment policy, on which annual premium was less than $500, *held* exempt from execution, under Code Civ. Proc. § 690, subd. 18.

2. BANKS AND BANKING ⇐165—PROCEEDS OF INSURANCE POLICY—TRUST FUND.

Where, upon maturity of endowment policy, insured sent check for proceeds to bank, to whom policy had been assigned as security, making it payable to insured and bank, and insured, after signing check and authorizing bank to deduct from proceeds his indebtedness to bank and to a third party, directed bank to hold balance until he could call for it, the bank held such balance in trust for insured.

3. BANKS AND BANKING ⟸165 — TRUST FUND—CHANGE OF RELATIONSHIP—DEBTOR AND CREDITOR.

Where bank holds proceeds of collection, the trust relationship can be changed to that of debtor and creditor by custom or agreement; but bank cannot, at its own convenience, divest itself of the trust relation, and make beneficiary without his consent a depositor.

4. BANKS AND BANKING ⟸169—TRUST FUND—BANK'S DUTY AS TRUSTEE—EXECUTION.

Bank which, holding proceeds of insurance policy in trust for insured, paid over proceeds to sheriff on an execution, without first ascertaining if insured wished to claim exemption of such proceeds from execution, was guilty of breach of trust; its duty having been to protect trust fund for benefit of insured, the beneficiary of the trust.

5. EXEMPTIONS ⟸50(1)—EXECUTION—INSURANCE POLICY PROCEEDS—BANK DEPOSITS.

Where proceeds of insurance policy, exempt from execution under Code Civ. Proc. § 690, subd. 18, were deposited in bank, the deposit was exempt from execution.

6. BANKS AND BANKING ⟸169—DEPOSITS—EXEMPTION FROM EXECUTION—BANK'S DUTY TO NOTIFY DEPOSITOR.

Where proceeds of collection exempt from execution were levied on without knowledge of depositor, it was bank's duty, where bank knew deposit was exempt, to notify depositor before paying over the money to sheriff, and upon its failure so to do, making it impossible for depositor to claim privilege of exemption, bank is liable for amount lost.

7. EXEMPTION ⟸89—WAIVER.

Exemption from execution is a personal privilege, which judgment debtor may waive, but which exists until he, or some one authorized to do so for him, waives it, either by express words, overt act, or by waiting more than reasonable time before attempting to claim it.

8. PLEADING ⟸129(1) — ALLEGATIONS OF COMPLAINT—FAILURE TO DENY.

Allegation in complaint, not denied in answer, is deemed admitted.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Charles Hing, sometimes known as Hoo Hing Chong, against Joe Lee, the First National Bank of Merced, a corporation, and others. Judgment for plaintiff, and the last-named defendant appeals. Affirmed.

Terry W. Ward, of Merced, for appellant. John Outcalt, of Merced, for respondent.

BURNETT, J. On the 1st of April, 1901, the Equitable Life Assurance Society of the United States issued to respondent an endowment policy of life insurance. Thereafter respondent borrowed from said society the sum of $1,000 and assigned to appellant the said policy as security for the payment of said indebtedness; the bank undoubtedly acting as agent of the insurer in the matter.

[1] The policy matured on the 1st of April, 1916, and there became due plaintiff the sum of $1,325.94, being the face value of the policy and the surplus reduced by said $1,000 loan. The insurer sent to appellant a check for said amount, payable to said bank and to plaintiff, which was received by appellant on the 4th day of April, 1916. At this time respondent was indebted to appellant in the sum of $431.45 on certain promissory notes, and also to one J. H. Simonson upon a promissory note for the sum of $436, which note was held by the bank, as security for the payment of a loan by it to said Simonson. The annual premium on said policy was less than $500, and therefore "all moneys, benefits, privileges or immunities accruing or in any manner growing out of" said policy were exempt from execution. Subdivision 18, § 690, Code Civ. Proc.; Briggs v. McCullough, 36 Cal. 542; Holmes v. Marshall, 145 Cal. 780, 79 Pac. 534, 60 L. R. A. 67, 104 Am. St. Rep. 86, 2 Ann. Cas. 88.

[2] On receipt of said check the cashier of the bank sent a clerk with the check to plaintiff's home, a few blocks distant, with a request that plaintiff sign it, which he did. It was understood and agreed between plaintiff and the bank that out of the proceeds of the policy the said indebtedness of respondent to appellant and to said Simonson should be paid. Plaintiff was credited with these payments on the 5th day of April, and the balance of said check for $1,325.94, or the sum of $458.49, was deposited in said bank by the cashier to the credit of plaintiff. The next day the sheriff of the county, under and by virtue of an execution issued out of the superior court of said county upon a judgment recovered in said county by one Joe Lee against said plaintiff and others, previous to the 6th day of April, 1916, for a sum in excess of $458.49, levied upon the money of plaintiff in the hands of said bank, and the said bank, through its president and cashier, delivered to said sheriff upon said execution the said sum of $458.49. Plaintiff knew nothing of the levy until some days after the money had been paid over to the sheriff, and therefore had no opportunity to claim any exemption from execution. He afterward made a demand upon the bank for the payment of said amount, but it was denied. The court held that the proceeds of the insurance policy constituted a trust fund in the custody of said bank, and that appellant was not legally justified in paying it over to the sheriff, without affording the plaintiff an opportunity to make his claim of exemption. The finding as to the trust relation is supported by the testimony of plaintiff. His testimony was given in somewhat broken English, but, after stating that Mr. Hart, the cashier of the bank, called him up by telephone, he proceeded:

"He told me, 'you know the money came all right;' he told me to sign the name on the check. I say, 'You leave the money in there, and I go up where I get well with my foot, when I go up there; I will pay Mr. Simonson, and the balance I leave in the bank to pay the Chinaman.' I owe the Chinaman two or three hundred dollars. I borrow money to pay on that life insurance two or three years ago from two Chinamen; he go home now. I no tell Mr. Hart to deposit the money. I said, 'The balance

you leave; I want to take that money and pay the Chinamen.'"

There can be no doubt that the check was the property of plaintiff, and that he directed the said officer of the bank to cash it, pay the claim of the bank and of Simonson, and hold the balance until plaintiff could call for it. The situation is covered by the principle announced in section 313, page 634, 7 C. J., as follows:

"The deposit of mortgages and other specific instruments for collection or the drawing of a draft on a debtor and giving it with specific instructions to collect and remit is a trust transaction and the money, if collected, is affected with the trust."

As to this point several instructive cases are cited by respondent, one of which is Hall v. Beymer, 22 Colo. App. 271, 125 Pac. 561. Therein Beymer placed with Rocky Ford Bank a note for collection. The bank sent the note to a Colorado Springs bank, which collected it and remitted the proceeds in the form of a draft. This was received by the Rocky Ford Bank on December 28th, which, on the same day, sent it to a Pueblo bank to the credit of the former. On December 31st the Rocky Ford Bank placed the amount of the collection to Beymer's credit on its books, and the same day said bank ceased to do business. The testimony showed that Beymer was asked by the president of said bank if he "wanted to put the proceeds in as a deposit," and he replied, "No; I wanted it for myself; I wanted the collection." The court held that the Rocky Ford Bank was Beymer's bailee, not his debtor.

[3] The facts of that case present a similar situation to the one herein involved. There seems to be no essential difference. It is true, as the authorities hold, that in such cases "the trust relation might be changed by custom or agreement into that of debtor and creditor after the collection of the proceeds"; but it is equally true that "a bank cannot divest itself of the trust relation and assume the other at its own convenience." 7 C. J. 634.

[4] Of course, it is the duty of the trustee to protect and preserve such property for the benefit of the beneficiary. 39 Cyc. 325. It was a clear violation of this primary obligation for the trustee to pay over the property to the sheriff without making any effort to preserve it for plaintiff. The bank sustained to respondent a relation of trust and confidence, and it had no right to withhold from the latter information that was essential to the protection of plaintiff's interests. Indeed, rather than permit the property to be lost to plaintiff without an opportunity to assert his claim of exemption, the bank should have informed the sheriff that the money was exempt from execution, and would not be paid over until it could be ascertained whether plaintiff desired to waive his privilege. It is manifest, also, that the bank could have lost nothing by pursuing this course. Within a few minutes plaintiff could have been notified, and, unless he claimed his privilege immediately, he would have been justly deemed to have waived it. The bank was apparently more anxious to have the judgment creditor satisfied than to exercise the utmost good faith toward plaintiff. Debts should be paid, but public policy recognizes the exemption of certain property belonging to debtors as even more important than the payment of his debts. Otherwise it would not be protected by the law from execution. But of what avail to the debtor is the privilege, if he have no opportunity of exercising it? He is not required to claim the privilege until an occasion arises whereby the property is liable to be taken away from him. Here he had no such opportunity in consequence of appellant's violation of its duty to notify him of the occasion for the exercise of his privilege. We consider it a plain case of breach of trust on the part of appellant, and we cannot believe that the moral sense of the community, or the common practice of banks, or any provision of the statute, justifies the course which was herein pursued to the prejudice of respondent.

[5] We think that the case is governed by the fundamental principle of good faith which characterizes the status of a trustee; but, even if we concede that, by virtue of the deposit of the money, the bank became merely the creditor of plaintiff, the debt was exempt from execution. The reason for this view is clearly set forth in the Holmes Case, supra. Therein it is said:

"Appellant contends that by the deposit of the money in the bank the money lost its identity, and that thereafter the bank owed Annie J. Jenkins the money; that the debtor thus voluntarily parted with the money, which was exempt, and acquired in lieu thereof a credit due by the bank. Such construction would seem to be unreasonable, and no authority is cited which supports it."

The court proceeds to a more detailed consideration of the subject, and reaches the conclusion that appellant's contention involves an absurdity, which must be rejected.

[6] Considering it thus a deposit, we feel satisfied that, in view of the ignorance of plaintiff of the levy of the execution, it was the duty of the bank to notify him before paying over the money to the sheriff. If it had been other personal property belonging to plaintiff, in the possession of defendant, a sale would be required, and it would have made no particular difference whether the bank gave notice or not, since the sheriff would have been required to give notice to plaintiff before the sale. But, it being money, the conduct of the bank made it impossible for plaintiff to claim this privilege of exemption, and hence appellant should be held responsible for the amount lost. In Freeman on Executions (3d Ed.) § 416, it is said:

"Although as a general rule the exemption of property from execution can only be claimed

by its owners, yet the rule does not apply to proceedings by garnishment. If the garnishee has in his possession any property or credit of the defendant not subject to execution, he certainly may, and he probably must, assert the fact of such exemption, and thereby prevent the property from being taken and applied under the execution. * * * When, however, the person summoned knows of a defense, as that the debt or property sought to be reached is exempt from execution, we believe that it is his duty to assert such defense, or, at least, to inform his creditor of the proceeding, and give him an opportunity to act for himself, and, if the duty is not performed, that no judgment or order against the person summoned can protect him from liability to his creditor."

In the case at bar the garnishee knew, or, at least, had reason to know, that the property was exempt from execution, and that the judgment debtor had no knowledge of the garnishment, and hence the payment of money to the sheriff does not protect appellant from liability to the judgment debtor.

[7] We agree with respondent in the statement of these propositions:

"(1) Respondent was the owner of the policy in question and of that part of the proceeds thereof here in controversy at the time of the receipt of the same by the bank on April 4, 1916, and continuously up to and including the time of the levy. (2) The proceeds of said policy were exempt from execution under subdivision 18 of section 690 of the Code of Civil Procedure. (3) It was not the respondent's duty to claim exemption before the levy, or to make such claim upon anybody other than the levying officer, or to make such claim after it would have been an idle and ineffective act. (4) Appellant bank was a trustee of the proceeds of said policy for respondent's benefit. (5) The bank could not make respondent its depositor without his consent. (6) Though exemption is a personal privilege, which the judgment debtor may waive if he choose, yet the privilege exists until he himself, or some one authorized to do so for him, waived it, either in express words or by overt act, or by waiting more than a reasonable time before attempting to claim it; and a garnishee, whether trustee or mere debtor, cannot waive it for him, or deprive him of the opportunity to claim it without being liable to him in damages." 18 Cyc. 1449; Smyth on Homestead and Exemptions, § 562; Southern Ry. Co. v. Fulford, 125 Ga. 103, 54 S. E. 68, 5 Ann. Cas. 168.

In some of the cases cited in support of the lower court's decision, the garnishment proceedings involved a formal suit in court; but, manifestly, the same principle must apply with greater emphasis to our summary proceeding of garnishment, wherein more easily may a judgment debtor be deprived of his statutory privilege of exemption.

[8] Another point, upon which appellant lays some stress, relates to the proof of the demand claimed to have been made upon appellant for the payment to respondent of said sum of money. The allegation of the complaint, however, as to that, was not denied in the answer, and, of course, it is deemed admitted. We need not, therefore, consider the sufficiency of the proof.

Some other questions are argued by appellant, but we think the foregoing covers the material considerations in the case.

We are satisfied that the decision of the lower court is just and the judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

---

37 Cal. App. 289

MENDOZA et al. v. CENTRAL FOREST CO. et al. (Civ. 1584.)

(District Court of Appeal, Third District, California. May 17, 1918. Rehearing Denied by Supreme Court July 15, 1918.)

MECHANICS' LIENS ⊂⊃24—IMPROVEMENT SUBJECT TO LIEN — FARM DEVELOPMENT — "STRUCTURE."

Farm development, consisting of ditches, drains, embankments, and roads, so correlated as to form one harmonious entity, designed to convey water to and distribute it over the land, and constituting a permanent improvement to the land, increasing its value, is a "structure," within Code Civ. Proc. § 1183, providing for mechanic's lien on specified improvements "or other structure."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Structure.]

Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Action by Antonio Mendoza and others against the Central Forest Company and others. Judgment for plaintiffs, and defendant named appeals. Affirmed.

Frank Freeman and George R. Freeman, both of Willow, for appellant. Harmon Albery, of Colusa, and Duard F. Geis, of Willow, for respondents.

CHIPMAN, P. J. Plaintiffs commenced the action to enforce certain service liens against the real property belonging to defendant Central Forest Company. These liens consist of two classes: (1) Labor performed; and (2) liens for appliances, teams, and power furnished and supplied. The trial was by the court without a jury, and plaintiffs had judgment, from which defendant Central Forest Company appeals.

Appellant states in its closing brief that "since the brief was prepared the laborers have been paid and the judgment has been satisfied so far as it affects the laborers." Appellant asks that the judgment be reversed as to plaintiffs J. A. Davis and Eldon E. Thwaites, whose claims fall under the second class above referred to. Section 1183 of the Code of Civil Procedure is as follows:

"Mechanics, materialmen, contractors, subcontractors, artisans, architects, machinists, builders, miners, teamsters and draymen, and all persons and laborers of every class performing labor upon, or bestowing skill or other necessary services, or furnishing materials to be used or consumed in or furnishing appliances, teams and power contributing to the construction, alteration, addition to or repair, either in whole or in part, of any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, wagon road or other structure, shall have a lien upon the property upon which they have bestowed labor or furnished materials, for the value of such labor done and materials furnished

and for the value of the use of such appliances, teams or power, whether at the instance of the owner, or of any other person acting by his authority or under him, as contractor or otherwise; and every contractor, subcontractor, architect, builder or other person having charge of the construction, alteration, addition to or repair either in whole or in part of any building, or other improvement as aforesaid shall be held to be the agent of the owner for the purposes of this chapter."

It is alleged in the complaint:

"That at all times herein mentioned, the defendant J. S. Westphal was the contractor, agent, and representative of the defendant Central Forest Company, a corporation, in the work and construction under the contract hereinafter mentioned, and represented defendant Central Forest Company in that behalf. That on the 15th day of May, 1914, said defendant J. S. Westphal made and entered into a contract with the defendant Central Forest Company, a corporation, to do the farm development, consisting of plowing, preparation of soil, leveling, checking, ditching, draining and building roads under and pursuant to the terms and specifications of said contract in and upon the above described land, the property of the defendant Central Forest Company, a corporation. That said contract was in writing and subscribed by the parties thereto, and the same was filed for record in the office of the county recorder of the county of Glenn, state of California, the same being the county in which said property is situate, a copy of which said contract is hereto annexed, marked 'Exhibit A,' and made a part of this complaint. That the said defendant J. S. Westphal, contractor and agent of and for said defendant Central Forest Company, a corporation, commenced the building and construction of said farm development under and pursuant to the terms and conditions of said contract, and under and pursuant to the specifications and plat thereof attached, on or about the 18th day of May, 1914, and continued said work until on or about the 1st day of September, 1914."

The specific purpose for the development of appellant's tract of land was so to prepare it that it could be seeded to alfalfa and could be readily and economically irrigated. It will be perceived from the provisions of the contract, some of which will presently be stated, that the work to be done constituted a permanent improvement to the land, installed thereby a permanent system for utilizing it for greater profit and greatly increasing its productive capacity, and added to its value certainly at least the contract price for the work, which was $24 per acre. The character of the work, and the necessity for its being carefully planned and supervised by a competent engineer, will be seen from the contract itself, under which the work was done; some of its provisions being as follows:

"The said contractor hereby promises and agrees to and with the said company that the contractor will, for the consideration hereinafter mentioned, do the farm development, which shall consist of plowing, preparation of soil, leveling, checking, and draining, and building roads; the work to be done according to plans shown on the accompanying blueprint attached hereto and made a part of this contract on the south half of the north half of section seventeen, township twenty north, range three west, M. D. B. & M., and agreed for the consideration mentioned to furnish all necessary labor, tools, machinery and equipment for such work; said work to begin within ten days after acceptance of and signing of this contract and to be completed before the 25th day of August, 1914. All of said work to be done under the direction of and completed to the satisfaction of John P. Ryan, the engineer of the company.

"Consideration.—The said company hereby promises and agrees to and with the said contractor that when and as said work is completed the said company will * * * well and truly pay or cause to be paid unto said contractor at the rate of $24 per acre of work done; such acreage not to include roads at the rate of $100 per mile for roads built hereunder. * * *

"Order of Work.—The contractor shall commence his work at such points as the engineer in charge may direct, and shall conform to said engineer's orders and directions as to the order of time in which different parts of the work shall be done. * * *

"Change of Plans.—The company shall have the right to make such changes in alignment, dimensions, or character of work to be done as in the opinion of the engineer the interest of the work or company may require.

"Prosecution of Work.—Should the contractor fail to begin work within the time required, or fail to prosecute the work with not less than 40 head of stock, or if at any time the contractor is not carrying out the provisions of this contract in its true intent and meaning, * * * the company in such case shall have power to terminate the contract or withdraw any portion of the work under said contract; or the company may employ other parties to carry the contract to completion, or hire such force and tools, appliances, materials, and animals at the contractor's expense as may be necessary for the proper conduct of the work and for the completion thereof. * * * In the determination of the question of whether there has been such noncompliance with the terms of this contract as to warrant the termination thereof, the decision of said engineer shall be binding upon all parties.

"Payment of Men.—The said parties hereto further agree as follows: That the said contractor shall pay punctually the men who shall be employed on the aforesaid work, and the persons who shall furnish the materials therefor, and before the said contractor shall be entitled to any of the progress or final payments, as herein provided, he shall first satisfy, or cause to be satisfied, all claims for labor expended or materials used, or stock hired, in the construction of said work that may in any event become a lien upon said property, or may in any way become binding upon or chargeable to the said company, and shall furnish, if demanded, to the said company satisfactory evidence that all claims are satisfied. * * * In estimating extra work, only the time of the men and teams actually employed, the foreman immediately in charge of the work, and the material consumed shall be considered chargeable to the work. * * *

"Specifications.

"Stakes and Marks.—All lateral and drain work performed under the terms of this contract shall be indicated by center stakes only; grades shall be given where necessary. The engineer shall give one set of inspection levels, when asked for by the contractor. Border checks shall be located by the contractor in accordance with the plans attached.

"Excavation.—All excavation shall be deposited in embankment or shall be evenly wasted over adjoining area as directed by said engineer.

"Construction of Embankments.—Borrowing for embankments shall be made at such points as said engineer shall direct; the material for the construction of levees may be borrowed where the contractor deems best, keeping in mind that the land between checks shall be level transversely with a continuous slope longitudinally.

"Finish.—Tops and slopes of embankments and

bottom of cuts shall be finished in a workmanlike manner and be true to line and grade, and ordinary scraper finish being required. No high points shall be left in bottoms or laterals or drains or between border checks. A continuous downward slope shall be demanded on border checks."

The testimony of plaintiff Davis was that the contractor, Westphal, hired from him 15 mules, with their equipment of harness, stretchers, lines, and other appliances—a complete outfit ready to be used, and which were used, in the development work being done by Westphal under his contract with the defendant corporation. The mules rented to Westphal by plaintiff Thwaites were similarly equipped and so used by the contractor, "grading and scraping and all the development work." In their reply brief, respondents, we think, fairly described this work and its purpose as follows:

"When the farm development was finally complete, its component parts constituted a unified structure, arranged, built, and constructed of earth, with ditches and laterals built from the source of water supply to convey the water to the farm development, and with laterals to distribute the water over the land. At regular intervals on the farm development there were checks (small embankments of earth) thrown up parallel to each other, for the purpose of holding the water on the parts or portions of the farm development desired; thus, the land between any two of these checks could be irrigated separately and independently of any other unit of the farm development. The land between the checks was required to be level transversely, with a continuous slope longitudinally, so as to insure the successful operation of the irrigation system, and in order to comply with the contract. Thus, when the alfalfa in any one unit had been sufficiently irrigated, gates in the lower end of the unit were opened, and the water was automatically taken from the unit and removed by gravity away from the farm development. This could be done without interfering with the irrigation of the other units of the system. The land lying between the checks, or small embankments, consisted of specially leveled and highly prepared and cultivated seed beds, and it was in these beds that the alfalfa seed was planted. It is thus readily apparent that the farm development was an entity, consisting of integral component parts, each part of which was necessary and vital to the successful operation of the whole."

We are called upon to decide whether the phrase "or other structure," as used in section 1183, supra, may safely be said to apply to a completed undertaking such as was contemplated by this contract. The court made the following, among other, findings of fact:

"That the completed farm development erected upon the south half of the north half of section seventeen, township twenty north, range three west, Mt. Diablo base and meridian, situate in Glenn county, California (the said lands being the lands of the Central Forest Company herein and heretofore mentioned), under or pursuant to the contract of May 15, 1915, heretofore found to have been made and entered into by and between defendant J. S. Westphal and defendant Central Forest Company, a corporation, constitutes and is a structure."

The court also made the following finding as conclusion of law:

"That the farm development erected upon the lands of the Central Forest Company, as aforesaid, constitutes and is a structure within the meaning of section 1183 of the Code of Civil Procedure of the state of California."

In Williams v. Mountaineer Gold Mining Co., 102 Cal. 134, 34 Pac. 702, 36 Pac. 388, Mr. Justice Temple, speaking for the court, construed these terms as follows:

"The use of the phrase 'other structure' in the above extract (from section 1183) shows that the word 'structure' comprehends all the properties specifically enumerated, and is broad enough to include any similar thing constructed, should the enumeration prove incomplete."

The definition found in 27 Am. & Eng. Ency. of Law (2d Ed.) p. 191, is as follows:

"In the broadest sense a structure is any production or piece of work artificially built up or composed of parts joined together in some definite manner; any construction."

What was said in Caddy v. Rapid Transit Co., 195 N. Y. 415, 88 N. E. 747, 30 L. R. A. (N. S.) 30, we think quite true, namely:

"In cases like this, lexicographers' definitions are useful as guideposts; but they do not take us to our destination. The statutory meaning of a word or phrase must be gathered from the purpose for which the law containing it was enacted."

In the present case, we think, the definition given by Judge Temple, supra, will lead us to our destination. The statute gives the lien to all persons—

"furnishing materials to be used or consumed in or furnishing appliances, teams and power contributing to the construction, * * * either in whole or in part, of any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, wagon road or other structure * * * for the value of such labor done and materials furnished and for the value of the use of such appliances, teams or power, whether at the instance of the owner, or of any other person acting by his authority," etc.

The farm development here contemplated was a finished piece of work, composed of integral parts, some of which the statute expressly designates as structures, and, when completed, consisted of ditches, drains, embankments, roads, so correlated as to form one harmonious entity, designed to accomplish a particular object, and constituting a permanent and valuable improvement to the land, and necessary to its highest and most profitable uses. When finished, it stood out as obvious and visible in its usefulness and its purpose as would a house, or barn, or any other of the structures enumerated in the statute. Viewing the statute with that liberality with which we are not only authorized, but by the statute itself we are enjoined, to regard it, we feel no hesitancy in holding with the learned trial court that the work to which plaintiffs contributed, as shown, constituted a structure.

Appellant's contention, that the only section of the Code applicable is section 1191, and that, as plaintiffs have not brought themselves strictly within that section, they are without remedy by way of lien, and must look alone to the contractor, we do not think maintainable. If, as we think, they have shown that the improvement or farm de-

velopment, towards which they contributed teams for the power necessary to its accomplishment, constituted a structure, they had a right to look to section 1183 for relief.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

(37 Cal. App. 586)

BENNETT et al. v. HILLMAN. (Civ. 2414.)

(District Court of Appeal, Second District, California. June 18, 1918. Rehearing Denied by Supreme Court Aug. 15, 1918.)

1. JURY ⇐25(4) — DEMAND — FAILURE — EXCUSE.

Trial court *held* not to have abused discretion in denying defendant's motion, under Code Civ. Proc. § 473, for order setting aside assignment for trial to court without jury, made on ground defendant had failed to ask jury trial in time on account of attorney's ignorance of addition to section 631 of subdivision 4, predicating waiver of right to jury trial on failure to announce desires when cause is first set for hearing.

2. JURY ⇐31(5)—TRIAL BY JURY—DENIAL—FAILURE TO DEMAND.

Code Civ. Proc. § 631, subd. 4, predicating waiver of right to jury trial on failure of party to announce desires when cause is first set for hearing, is not violative of Const. art. 1, § 7, securing right of trial by jury to all, but providing trial by jury may be waived.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Edmon G. Bennett and others against C. D. Hillman. From judgment for plaintiffs, defendant appeals. Affirmed.

Wm. Hazlett, of South Pasadena, and Haas & Dunnigan and Arthur C. Vaughan, all of Los Angeles, for appellant. Oscar Lawler and Bertin A. Weyl, both of Los Angeles, for respondents.

WORKS, Judge pro tem. The plaintiffs are attorneys at law, and the action was brought to recover from defendant the value of services rendered to him by them and to recover cash advances made by them in connection with the services. The plaintiffs had judgment for nearly $21,000, and the defendant appeals.

The first contention of the appellant is that he was improperly denied the right of trial by jury in the action. The question presented largely concerns the provisions of subdivision 4 of section 631 of the Code of Civil Procedure. That subdivision was added to the section by the Legislature through an act passed May 20th and which took effect August 8th, both in 1915. So much of the section as is material to the present controversy, including subdivision 4, is as follows:

"Trial by jury may be waived by the several parties to an issue of fact * * * in manner following: * * * (4) By failing to announce that a jury is required, at the time the cause is first set upon the trial calendar if it be set upon notice or stipulation, or within five days after notice of setting if it be set without notice or stipulation."

On a day between December 22d and December 27th, both in 1915, the parties entered into a written stipulation that the action might, on the latter day, be set for trial. On that day it was by the court set for May 4, 1916, in a department of the court in which jury trials are not held ordinarily, and also on that day, December 27th, notice that the cause had been set down for May 4th in the department mentioned was served on the counsel for the appellant. At the time the cause was set for trial, the appellant did not announce that he desired a jury trial thereof. Under notice dated April 28, 1916, the appellant notified the respondents that on May 1, 1916, he would move the court "for an order setting aside the assignment" of the action "to the court and without a jury and setting said action upon the trial calendar to a jury or transferring said action to a department of the court where a trial by jury may be had." The notice was accompanied by affidavits of the appellant and of the attorney who was then his sole counsel, to the effect that the appellant had always desired and intended that the action should be tried by a jury; that at about the time the answer was filed, which was before December 22, 1915, the appellant instructed his counsel to demand a jury trial; that thereupon his counsel informed him that under the law a jury could be demanded at any time before the commencement of the trial, that a jury trial could be had upon such demand, and that he, the counsel, would make the demand in proper time; that the appellant knew nothing about the law in the premises except as it was so imparted to him by his counsel; that the counsel did not know until April 27, 1916, that subdivision 4 had been added to section 631 of the Code of Civil Procedure; that he first informed the appellant of that change in the law on that date; that the appellant had no knowledge, until that date, that such was the law or that his counsel had not theretofore demanded a jury trial; that on April 27, 1916, the appellant informed his counsel that he had relied upon such counsel to procure for him a jury trial and that he desired and still insisted that the action be tried by a jury; that the last time the appellant's counsel had demanded a jury trial of any action was shortly before the amendment of section 631, adding subdivision 4, had become effective; that pursuant to such demand the court had ordered a jury trial at a time long after the cause wherein the demand was made had been first set upon the trial calendar for trial; and that the counsel fully believed, until April 27, 1916, that a jury could be demanded in this action at any time before 10 o'clock of the forenoon of May 4, 1916; and

that the appellant had the right to demand a jury trial at any time prior to that date. There was also an affidavit of merits.

Upon the making of the motion and the submission of the affidavits, the trial court entered an order denying the motion on the ground that a jury trial had been waived. In the order it was recited that the department of the court in which the action had been set down was, and had been at all times during the pendency of the action, a department designated by the court for the trial of civil actions without a jury; that there was no jury in attendance in that department; that there were at all times two or more departments of the court in which civil actions in which juries were demanded were regularly set and tried; that the assignment of causes for trial as above indicated was pursuant to rules of the court duly adopted and in effect for many years past; and that, were the motion to be granted, it would be necessary to transfer the cause to the department of the presiding judge for reassignment to a jury department in which the cause would, in the ordinary course of the business and practice of the court, be reset for trial before a jury at a date many months in the future.

[1] The appellant's motion was made under section 473 of the Code of Civil Procedure, which entitles a party to be relieved from the effect of an order entered or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The section expressly provides that the right to such relief rests in the discretion of the court; and that discretion is, of course, not subject to review on appeal except in cases in which its abuse is plainly shown. Blumer v. Mayhew, 17 Cal. App. 223, 119 Pac. 202; Vinson v. Los Angeles Pac. R. Co., 147 Cal. 479, 483, 82 Pac. 53. Under all the facts before the trial court we cannot say that there was an abuse of discretion in denying the motion presented to it by the appellant. On the contrary, it appears that the court was amply justified in ruling as it did upon the question.

[2] The appellant insists that subdivision 4 of section 631 is unconstitutional, under the language of section 7 of article 1 of the state Constitution, to the effect that:

"Trial by jury may be waived * * * in civil actions by the consent of the parties, signified in such manner as may be prescribed by law."

This language of the section follows a statement that "the right of trial by jury shall be secured to all, and remain inviolate." The appellant argues that the consent which will amount to a waiver of the right to jury trial must be express and that it will not do for the Legislature to predicate it upon a failure of a party to announce that he desires a jury at the time his cause is first set for hearing. This contention has been answered, in effect, in City of Los Angeles v. Zeller, 167 Pac. 849, in which the constitutionality of a section of a certain act of the Legislature regulating the right to trial by jury in street opening cases was established. That section was, in legal effect, substantially like subdivision 4 of section 631 of the Code. We say the case cited answers the contention of the appellant in effect, for the reason that the precise point now made seems not to have been presented to the Supreme Court in that case. Nevertheless, the reasoning of the opinion sufficiently answers it. We conclude that subdivision 4 of section 631 shows a proper exercise by the Legislature of the power to prescribe the manner in which the right to trial by jury may be waived.

The final contention of the appellant is that the findings by which the trial court determined that the respondents were employed by the appellant, and fixed the value of their services, are not supported by the evidence. There was evidence of the employment, as well as of the experience and qualifications of the respondents, and the record shows, in hundreds of typewritten pages, of what the services of the respondents consisted. The nature of the services rendered was stated in questions addressed to prominent members of the bar, and four or five of them testified that the reasonable value of the respondents' labors for the appellant was in a sum much in excess of the amount found due them by the court. The record surely shows an ample basis for the findings made. The finding as to the value of the services has a sufficient support in the testimony, alone, of the members of the bar who appeared as witnesses. Prince v. Kennedy, 3 Cal. App. 498, 86 Pac. 609.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

37 Cal. App. 709

SOBAJE et al. v. SCHUBERT. (Civ. 1797.)

(District Court of Appeal, Third District, California. July 1, 1918. Rehearing Denied by Supreme Court Aug. 29, 1918.)

1. BROKERS ⟸54—COMPENSATION.
The readiness, willingness, and ability of the purchaser presented by a broker were admitted by the owner, where he accepted the purchaser's proposal and accepted him as a satisfactory purchaser.

2. BROKERS ⟸60—COMPENSATION.
When a broker employed simply to negotiate a sale of land has found a purchaser ready, able, and willing to purchase on the vendor's terms, the right to the agreed commission is complete and is not contingent on the consummation of the sale.

Appeal from Superior Court, Madera County; Wm. M. Conley, Judge.

Action by Garabed Sobaje and others against P. M. Schubert. From a judgment for plaintiffs, defendant appeals. Affirmed.

J. J. Coghlan, Harry I. Maxim, and F. A. Fee, all of Madera, for appellant. Harry Sarkisian, of Fresno, for respondents.

CHIPMAN, P. J. The action is for the recovery of $650 as commissions for procuring a purchaser of certain real property. The cause was tried by the court without a jury, and plaintiffs had judgment for the amount claimed by them. The appeal is from this judgment and is here on a bill of exceptions.

It is alleged in the complaint that plaintiffs are copartners under the firm name of New England Real Estate & Insurance Company; that on or about April 15, 1916, plaintiffs "entered into the service of the defendant, P. M. Schubert, at his special instance and request as his agents to sell and dispose of the following described real property (describing it) * * * for the sum of $13,000, payable at the times and upon the terms and conditions agreed to and suggested by the said defendant, for which services defendant agreed in writing to pay plaintiffs therefor the sum of 5 per cent. as commission on the said sum of $13,000, such commission amounting to $650"; that plaintiffs did, on or about April 20, 1916, "procure a purchaser for the defendant's said lands, who was then and there ready, willing, and able to complete the purchase of the defendant's said real property upon the terms and conditions fixed and agreed to by the defendant with plaintiffs herein, by bringing together the said intended purchaser and the defendant and procuring from the said intended purchaser a written offer to purchase the said lands to and for defendant herein, which offer to purchase the defendant, on or about the 23d day of April, 1916, * * * did then and there accept and agree to make the sale"; that defendant, though often demanded to do so, has failed and refused and still refuses to consummate said sale; that plaintiffs have performed all the conditions in said contract on their part to be performed.

The answer is a specific denial of the averments of the complaint. As further answer, defendant sets forth a written agreement, of date April 15, 1916, signed by defendant, by which he agreed to pay to plaintiffs a commission of 5 per cent. for effecting a sale of said land, the sale price being $13,000, to be paid: $500 cash and the balance in installments as set forth. This appeared to be the agreement referred to in plaintiffs' complaint on which they rely. The answer then sets out what purports to be a proposal, made on or about April 23, 1916, by John Boornutian, the purchaser referred to in plaintiffs' complaint, to purchase said land upon terms and conditions fully set out; the price to be paid being the same as stated in defendant's agreement of April 15, 1916, but including some provisions not found in that agreement. This proposal was directed "to P. M. Schubert, P. O. Box No. 87, Madera, Calif." It is alleged that "defendant then and there accepted by indorsing his acceptance upon said agreement aforesaid"; that subsequently said Boornutian offered to pay defendant $500, but did not offer any written contract for the sale of said land; that defendant "is ready and willing to carry out the terms of said contract with said Boornutian, provided the said Boornutian will pay the said sum of $500 and enter into a contract containing the usual covenants and restrictions usually contained in contracts for the sale of real estate but without giving or conferring upon the said Boornutian the right of possession except for the purposes mentioned in said agreement," which were for planting and cultivating trees and vines, etc.

The court made the following findings of fact:

"II. That on or about the 15th day of April, 1916, defendant employed plaintiffs as such copartners to sell the real property described in the complaint for the sum of $13,000, and agreed to pay plaintiffs the sum of 5 per cent. of said amount as commission, in the event that plaintiffs should obtain a purchaser ready, willing, and able to purchase said property upon terms satisfactory to the defendant.

"III. That on or about the 20th day of April, 1916, the plaintiffs as such partners did procure a purchaser for said defendant's land upon terms and conditions satisfactory to defendant, who was then and there ready, willing, and able to purchase said real property upon such terms and conditions and introduced such purchaser to defendant and also procured from said purchaser a written offer to purchase said lands upon terms and conditions satisfactory to the defendant, which said offer was on the 23d day of April, 1916, accepted by defendant."

The court also found that the averments of the answer, paragraphs 5 and 6, were true. Paragraph 5 sets forth the agreement between defendant and plaintiffs upon which plaintiffs rely. Paragraph 6 sets out the

proposal of Boornutian above referred to. The court found that plaintiffs have fully performed the terms and conditions of their contract with defendant, that they have made demand upon defendant for payment of said commissions, and that defendant has refused to pay the same. As conclusion of law the court found that plaintiffs are entitled to recover from defendant the sum of $650 and costs.

There was evidence that defendant indorsed his acceptance of the offer made by Boornutian, the latter of whom had been introduced as a purchaser by plaintiffs; this fact is also admitted in the answer; that subsequently the parties met in the city of Madera. Witness V. K. Sarkisian, one of said plaintiffs, testified: That the parties at that meeting "endeavored to reach an agreement on terms different from those contained in the offer and acceptance, but could not do so for the reason that Schubert and Boornutian could not agree; * * * that Boornutian at such meeting declared and said that he would not buy the premises from Schubert on any other terms than the terms mentioned in the offer he had made, which Schubert had accepted and that, if Schubert refused to sell, he (Boornutian) would employ a lawyer to take the matter to court." The witness testified that effort was made to bring the parties to an agreement without result. "Finally," testifies the witness, "I gave up and said to defendant: 'I have got you parties together and you have made a contract for the sale of this property. You got to pay me my commission whether you do or do not agree to different terms and conditions of sale.'" Boornutian testified that he tendered to defendant the cash payment of $500, which defendant took and held for 15 minutes and then handed the money back, stating that he could not take the money.

Defendant testified that he signed the Boornutian offer in the latter's absence, and that at the time V. K. Sarkisian, one of plaintiffs, told him it was only preliminary to a final contract that was to be drawn up on the payment of $500. He testified that, when Boornutian tendered the $500, he said he told Boornutian "to take the $500 to plaintiffs and sign a definite contract and it would be all right"; that no subsequent agreement had ever been presented to him; that he was ready at any time to make a sale of the land "in accordance with the terms of said commission agreement, whenever a binding contract is entered into by any proposed vendee" upon the terms of said commission agreement. Defendant made the same offer in open court:

"The Court: Now, Schubert, are you willing to sell this property to this man upon the same terms contained in his offer which was accepted? A. Yes, sir; if some things in there are changed. The Court: Then you don't want to sell this property upon the terms contained in the offer and acceptance, but will sell on terms different and more favorable to yourself? Isn't that true? A. Yes, sir."

The record then states:

"On cross-examination this same witness admitted that the only reason why he did not complete the sale was for the reason that the time of payments had been deferred a long time and he had leased the premises and the lessee could not be moved out before the end of the cropping season of the year 1916, and that he could not make the sale unless the purchaser was willing to take the place subject to said lease."

[1] There was no direct evidence as to Boornutian's financial ability to meet the payments called for in his proposal. But we think that his readiness, willingness, and ability were admitted by defendant to be sufficient in accepting his proposal and in accepting him as a satisfactory purchaser presented by plaintiffs. The memorandum prepared by defendant as a substitute for some of the provisions in the Boornutian offer was properly refused admission for the reason that it changed the terms of said offer, and, though prepared by one of the plaintiffs, it was not prepared with Boornutian's knowledge or consent nor agreed to by him. Defendant's expressed willingness to enter into a contract with Boornutian, provided that contract contained "the usual covenants, agreements, and penalties contained in agreements for the sale of real property," does not, it seems to us, meet the situation. The offer of Boornutian was definite in its terms and was accepted. The duty of formulating a contract in accordance therewith, if needed, was upon defendant as much as it was upon Boornutian. The answers given by defendant to the court show that the true reason for not going forward and completing the transaction was that he was, on reflection, unwilling to sell his property "upon the terms contained in the offer and acceptance."

Appellant's contention, aside from what appears above, is that the offer of Boornutian and acceptance of appellant "is but a tentative preliminary arrangement to form the basis of a contract to be subsequently entered into, all of which is apparent and satisfactorily appears from said agreement itself." It is true that the offer contemplated the happening of certain things and stipulated certain conditions. But, whatever they were, appellant accepted Boornutian as a purchaser upon the conditions laid down in the offer. Plaintiffs had performed their contract by bringing the parties together and establishing the relation between them of seller and purchaser and upon terms to which they had both subscribed. Their failure afterwards to consummate the sale was in no wise attributable to plaintiffs.

[2] The law is well settled that when a broker employed simply to negotiate a sale of real estate has found a purchaser ready, able, and willing to purchase upon the vendor's terms, his right to the agreed commission is complete (Gunn v. Bank of California,

99 Cal. 349, 33 Pac. 1105), and the right of the plaintiffs was not contingent upon the consummation of the sale. (Jauman v. McCusick, 166 Cal. 517, 137 Pac. 254).

We think the evidence sufficient to support the findings, and, as the findings sustain the judgment, it is therefore affirmed.

We concur: BURNETT, J.; HART, J.

---

37 Cal. App. 728

## CAMPBELL v. INGRAM. (Civ. 1740.)

(District Court of Appeal, Third District, California. July 3, 1918.)

1. TRIAL ⟸388(4)—FINDINGS—SUFFICIENCY.
In suit to determine rights in water, where cross-complaint alleged that the lands were situated in an arid climate and the allegation was not denied, a specific finding that the water claimed was necessary for irrigation was not necessary.

2. WATERS AND WATER COURSES ⟸152(6)—APPROPRIATION—PRESUMPTION.
The use by a landowner and his predecessors for many years, without objection from adjacent owners, of 75 inches water from a ditch for agricultural purposes, raises the inference that such water was necessary to produce profitable crops.

3. WATERS AND WATER COURSES ⟸143—APPROPRIATION—QUANTITY.
Where lands of plaintiff and defendant were riparian, and defendant's predecessor constructed a dam, maintained it for over 30 years, and diverted a given amount of water, and plaintiff's grantors recognized defendant's right to divert that amount, judgment authorizing defendant to divert the same amount of water for agricultural purposes was warranted.

4. WATERS AND WATER COURSES ⟸152(11)—APPROPRIATION — ACTIONS — JUDGMENT — SUFFICIENCY.
In controversy over water rights, judgment authorizing defendant to maintain a dam and divert water was not defective for failure to state the amount of water which plaintiffs might have, when defendant conceded that he must permit plaintiff to take as much water as was needed for plaintiff's purposes.

5. APPEAL AND ERROR ⟸761—ARGUMENTS ON APPEAL—PRESUMPTIONS.
Where appellant fails to reply to appellee's argument, the court may infer that appellant deems the argument unanswerable, and is justified in concluding that the judgment was proper.

Appeal from Superior Court, Lassen County; H. D. Borroughs, Judge.

Action by Ira Campbell against John Ingram, wherein defendant filed a cross-complaint. From the judgment rendered, plaintiff appeals. Affirmed.

R. M. Rankin and Grover C. Julian, both of Susanville, for appellant. Dodge & Barry, of Reno, Nev., for respondent.

BURNETT, J. The action involves conflicting claims to the use of the water of Beaver creek, in Lassen county. Defendant answered plaintiff's complaint, and also filed a cross-complaint, some of the allegations of which were denied by the plaintiff. The court found that certain lands of both parties were riparian to the stream, and also found:

"That in the year 1870, at a time when said William Coen was in the possession and entitled to the possession of said northeast quarter of section twenty-five (25), he entered upon said Beaver creek at a point in the northwest quarter of section thirty (30), township thirty-seven (37) north, range six (6) east, in the county of Lassen, state of California, where all of the waters of said creek were flowing in their natural, well-defined channel, between well-defined banks, and constructed a dam in the channel of said stream, and then constructed a ditch two shovels in width and one shovel deep, and by means of said dam and said ditch diverted water from said stream to his said lands, and said William Coen and his grantors (grantees?) have ever since maintained said ditch and dam and conveyed water by means thereof to said lands for the irrigation of crops of hay and grain and garden growing thereon, and for the watering of stock and for domestic purposes, and that at the time said William Coen first constructed said dam and ditch as aforesaid, the lands upon which he constructed said ditch were public lands of the United States; and said William Coen and his grantors (grantees?), ever since said first diversion and appropriation of water, have continuously maintained said dam and ditch and diverted said waters for the irrigation of land in said northeast quarter of section twenty-five (25), township and range aforesaid.

"That said ditch was gradually enlarged, until the year 1901, when it was capable of conveying seventy-five (75) inches of water measured under 4-inch pressure; and defendant has ever since said year 1901, diverted and conveyed 75 inches of water measured under a 4-inch pressure, by means of said dam and ditch, from said stream to and upon the said lands of defendant for the irrigation thereof; and that in said year 1901 the grantors of the plaintiff, who were then the owners and in the possession and entitled to the possession of the lands of the plaintiff, recognized and acknowledged the right of the defendant, who was at said time in the possession and entitled to the possession of defendant's said lands, to divert 75 inches of water measured under a 4-inch pressure, through said ditch to the above described lands of defendant; and that neither the plaintiff nor any of his grantors, down to the year 1913, ever interfered with or denied the right of defendant to maintain said dam and ditch and divert 75 inches of water measured under a 4-inch pressure to and upon the said lands comprising the William Coen homestead."

The judgment decreed that defendant was entitled to divert from said stream by means of a dam and ditch, described in the answer and cross-complaint, 75 inches of water measured under a 4-inch pressure for the use of a part of his land known as the William Coen homestead and of the remaining waters of said creek the plaintiff should have 53/100 and the defendant 47/100, and that the parties in the same proportion should pay the expense of maintaining the dam in the creek.

Appellant contends: (1) That there is no finding that irrigation is necessary on said William Coen homestead and no evidence to support such finding; (2) "there is no evidence to show or tending to show that 75 inches of water is necessary for the irrigation of the lands of defendant or that the continuous flow of 75 inches during the irrigating season has been used"; and (3)

that the findings and judgment are uncertain and void, for the reason that the amount of water that defendant shall permit to flow through the dam to water plaintiff's stock in the corral below the dam is not specified.

[1] As to the first contention, it may be said that by the allegations and admissions of the pleadings it appears that the lands herein involved are situated in an arid climate and besides there is no denial of the allegation of the cross-complaint:

"That the character of all of said lands and the soil thereof and the climatic conditions of the neighborhood in which all of the lands are situated are such that artificial irrigation is necessary."

In view of this condition of the pleadings, no specific finding as to the points was required. Moreover, it is a fair inference from the findings, which were made, that irrigation is necessary in said premises, and we think there can be no doubt that the record, both as to the evidence and the determination of the court satisfies the requirement of section 1411 of the Civil Code that the appropriation of the water "must be for some useful, or beneficial purpose." We deem it unnecessary to quote the testimony in that regard. We may, however, refer to the fact that one of the witnesses testified that irrigation was necessary even for the wild hay.

[2, 3] There is no specific finding, nor do the pleadings admit that 75 inches of water are necessary for the irrigation of said tract of land, but it is found that this amount has been used by respondent for many years, without objection from appellant, for the irrigation of hay and grain and for garden purposes. From such use it would be proper to infer that it was necessary in order to produce profitable crops. Making such reasonable deductions from the facts found by the court we find sufficient support for the judgment. It would have been more satisfactory, of course, if there had been a specific finding as to the necessity of the use; but we do not think the cause should be reversed for this defect, which has not resulted in a substantial injury.

[4] The judgment does not award a specific amount of water to the plaintiff for the use of his stock in the corral, but it does provide that the defendant has the right "to maintain said dam as the same has been heretofore maintained, and the ditch leading therefrom." And as to how it has been maintained the finding of fact is:

"That said dam has continuously since said date been maintained and repaired by the defendant and his grantors, but in such a way as to permit water to flow through said dam sufficient for watering stock in the corral immediately below said dam."

In this respect, also, are the findings and judgment somewhat open to criticism; but it is conceded by respondent—and we think the judgment is susceptible to that interpretation—that by the decree of the court defendant is required to permit plaintiff to use whatever water is needed for the use of his stock in the corral, and as to that appellant could ask for no more. Indeed, the uncertainty in that respect is rather in favor of appellant, and respondent has the greater cause for complaint. The difficulty, if not impossibility, of determining in advance the amount that may be required for this purpose, is quite apparent from the record.

[5] Some cases bearing upon the foregoing considerations are cited by appellant, but respondent points out wherein they are not controlling here, and no reply brief has been filed by plaintiff. Since appellant has not deigned to reply to the argument of respondent, we have a right to assume that the former deems the argument of the latter unanswerable, and we are justified in concluding, without further delay, that the judgment should be affirmed; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

---

37 Cal. App. 638

## MALALEY v. CITY OF MARYSVILLE.

(Civ. 1765.)

(District Court of Appeal, Third District, California. June 25, 1918.)

1. OFFICERS ⊂⊃40—DE FACTO OFFICER—NECESSITY FOR EXISTENCE OF OFFICE.
There can be no de facto officer unless there is a de jure office.

2. OFFICERS ⊂⊃95—DE FACTO OFFICER—COMPENSATION.
A de facto officer is entitled to receive the compensation prescribed for the services performed in executing the duties of the office.

3. SCHOOLS AND SCHOOL DISTRICTS ⊂⊃46—CHARTER PROVISION AS TO SUPERINTENDENT OF SCHOOLS—REPEAL BY POLITICAL CODE.
Pol. Code, § 1617, prescribing powers and duties of boards of education in city school districts, among others, to employ a city superintendent of schools, etc., did not repeal charter provisions of city of Marysville providing county superintendent of schools of Yuba county shall act as superintendent of schools of city, and fixing his compensation.

4. STATUTES ⊂⊃158—REPEALS BY IMPLICATION.
Repeals by implication are not favored, and the courts will not declare such a repeal unless the two statutes as to vital matters are irreconcilably inconsistent with or repugnant to each other.

5. SCHOOLS AND SCHOOL DISTRICTS ⊂⊃21—CO-EXISTENCE WITH CITY—SEPARATE CORPORATE ENTITIES.
A school district, the territorial boundaries of which are coterminous with the boundaries of the city in which it is situated, is a corporate entity separate and distinct from the city as such an entity.

6. SCHOOLS AND SCHOOL DISTRICTS ⊂⊃25—CITY AND DISTRICT—EXERCISE OF IDENTICAL POWERS.
Though they are separate corporate entities, a municipality, and a school district having the same territorial boundaries, if Legislature elects to give right, may exercise same power with respect to matters connected with public school

system in so far as city and district are concerned.

7. Schools and School Districts ⊂=25—City's Provision for Superintendent of Schools.

A city had the right, by virtue of its charter provisions, to provide for a superintendent of city schools and his compensation, even though the school district of the city extended territorially beyond the limits of the municipality.

Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Action by Jennie Malaley against the City of Marysville. From a judgment for plaintiff, defendant appeals. Affirmed.

W. P. Rich, of Marysville, for appellant. W. H. Carlin, of Marysville, for respondent.

HART, J. At the general election in November, 1914, plaintiff was elected county superintendent of schools for the county of Yuba and assumed the duties of that office on the 4th day of January, 1915. She also performed the duties of city superintendent of schools of the city of Marysville for 20 months, commencing on said 4th day of January, 1915. She brought the action to recover compensation for her services as such city superintendent, alleging that the salary provided by law to be paid to her by defendant was the sum of $50 per month, and also alleging that that sum was the reasonable value of the services so rendered by her. The trial was before the court, sitting without a jury. Findings of fact followed the averments of the complaint, and judgment was rendered in favor of plaintiff for $1,000. The appeal is by defendant from said judgment.

The city of Marysville was first incorporated in 1855 (Stats. 1855, p. 23). There were amendments in 1857 (Stats. 1857, p. 40) and in 1866 (Stats. 1865–66, p. 69), and in 1876 (Stats. 1875–76, p. 149) the city was incorporated. In none of these charters or amendments is there any reference to schools or educational matters. By the terms of an act of the Legislature, approved April 1, 1870 (Stats. 1869–70, p. 583), there was created a board of education for the city of Marysville, of which board the superintendent of public schools of the county was declared to be ex officio a member. It was also provided that said county superintendent should be ex officio superintendent of public schools for the city of Marysville. The act specified what duties he should perform and fixed his salary at $50 per month, "payable in the same manner as the salaries of other city officials." In 1874 (Stats. 1873–74, p. 153) the Legislature passed another act regarding said city superintendent, and his duties and all conflicting acts were repealed; but there was no material change from the act of 1870.

Appellant admits that respondent has acted and is acting as superintendent of schools of the city of Marysville, and concedes that she "has been and now is the de facto superintendent of schools of the city of Marysville," but contends that her compensation for rendering services as such superintendent must come from the board of education of said city, or, in other words, from the school fund, which is under the exclusive control of said board, and not from the city of Marysville.

[1, 2] Of course, there can be no de facto officer unless there is a de jure office, and the concession of the appellant necessarily assumes and further concedes that there is such an office of superintendent of schools of the city of Marysville existing by virtue of some law. And, if the respondent is a de facto officer, she has become so by virtue of her office as county superintendent of schools and not by employment by the board of education of the school district. However, as is conceded by the appellant, a de facto officer is entitled to receive the compensation prescribed for the services performed in executing the duties of such office.

The question to be decided here must therefore, as appellant has suggested, depend upon the solution of the further question whether the provisions of the Political Code relating to the establishment and maintenance of schools in cities as part of the common school system of the state have had the effect of repealing those provisions of the Marysville charter providing that the county superintendent of schools of Yuba county shall act as superintendent of schools of said city and fixing the compensation for the services so performed at fifty dollars per month.

The Constitution of the state (article 9, § 5) provides:

"The Legislature shall provide for a system of common schools, by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established."

In pursuance of said section, the Legislature has established a system of common schools and has gone into much detail in relation to the organization, government, and maintenance of the system, and has enacted provisions specially applicable to common schools in cities. Pol. Code, c. 3, tit. 3, pt. 3.

Section 1617 of said Code contains, among others, the following provision:

"The powers and duties of * * * boards of education in city school districts, are as follows: '(1) * * * (2) * * * (3) * * * (4) * * * (5) * * * (6) * * * (7) * * * To employ a city superintendent of schools and when necessary deputy or assistant city superintendent of schools, and to fix and order paid the compensation of the same unless the same be otherwise prescribed by law.' "

[3, 4] The above is the only provision of the Political Code of the many relating to the common school system and having special application to city common schools which

might be said to have the effect of nullifying or repealing the provision of the city charter under the authority of which the respondent purports to exercise the functions of the office of school superintendent of and for the city of Marysville; but we see nothing in the language of the Code provision which compels us to hold that it effected a repeal of the charter provision. Under subdivision 7 of the Code section named, the board of education has the power to employ a superintendent of schools for the city, and it would probably be its duty to do so if the situation required such action. This is as far as the provision goes, and we cannot see why the charter provision cannot stand, even in the face of the power so conferred upon the board of education of the city, as a valid and enforceable part of the charter.

"Repeals by implication are not and have never been favored, and the courts will not so construe the effect of a subsequent statute upon a prior legislative enactment, where there is no express repeal of the prior statute by the later one, unless the two are, as to the vital matters to which they relate, irreconcilably inconsistent with or repugnant to each other." Mansfield v. Chambers, 26 Cal. App. 499, 505, 147 Pac. 595.

There is no inconsistency or repugnancy between the provision of the Political Code conferring upon the boards of education of cities the power to employ a school superintendent and the provision of the charter authorizing the county superintendent to perform the duties of the office for the city. The general purpose of the two provisions is precisely the same, and the result of the existence of the two provisions is merely the providing of two different sources from which the city may receive the benefit of the services of such an officer. According to the stipulated facts of this case, the board of education of the city of Marysville has never exercised nor attempted to exercise the power conferred upon it by the Political Code to employ a superintendent of schools, and the duties of that office, if, indeed, it is in fact an office under the Code until a person is duly employed to discharge the duties of a school superintendent, have always been performed by the county superintendent of schools of Yuba county under the authority of the charter provision above referred to.

[5] It is, of course, to be conceded, as appellant points out, that a school district, the territorial boundaries of which are coterminus with the boundaries of the city in which it is situated, is a corporate entity, separate and distinct from the city as such an entity. It was so held in Los Angeles School Dist. v. Longden, 148 Cal. 380, 83 Pac. 246. In that case the governing board of a school district, which, territorially, comprised the city of Los Angeles and certain contiguous outlying lands, inaugurated proceedings looking to the issuance of bonds of the school district for the purpose of erecting a schoolhouse, and after the holding of an election at which the question whether bonds should be issued was submitted to the voters of the district, who, by the requisite number of votes, approved the proposition, the board of trustees of the district duly certified to the board of supervisors of the county all the proceedings had in the premises, as required by section 1884 of the Political Code. The board of supervisors refused to issue the bonds, as provided by the section last mentioned, claiming that the city of Los Angeles, as a municipal corporation, and under its charter and the general laws of the state, was alone vested with the power to issue bonds for the purpose specified. The court, in that case, said among other things:

"That school districts may in proper cases issue bonds is, of course, not disputed. It remains to be considered whether this general power to issue bonds which has been granted to school districts has been taken away from this particular school district by force of the charter of the city of Los Angeles. Upon this proposition the contention of respondent is that all matters touching schools within the corporate limits of a city are 'municipal affairs,' and that as, under the provisions of section 6 of article 11 of the Constitution, the charter of a city is supreme in municipal affairs, the charter of Los Angeles thus becomes the sole guide, authority, and power for the issuance of school bonds; that the charter of Los Angeles denies the power to its board of education to take the initiatory steps towards the issuance of school bonds, and confers that power upon its city council; and that its city council, under the provisions of section 78 of the charter, draws its power from the provisions of the General Improvement Act of 1901. Herein reliance is placed upon the language of this court in the case of Law v. San Francisco, 144 Cal. 384 [77 Pac. 1014]. There this court had under consideration the question of the power of the municipality to issue bonds for the erection of new schoolhouses and the improvements of existing schoolhouses, and the case of In re Wetmore, 99 Cal. 151 [33 Pac. 769], was cited and quoted from, to the effect that, as schoolhouses are essential aids in the promotion of education, their erection is but incidental to the maintenance of the schools, and falls as completely within the functions of a municipal government as does the erection of a hospital for its indigent poor or buildings for its fire engines. It thus may be taken as decided and settled that a city, as such, may bond itself for public school purposes, and that this power extends to all cases where the object is in furtherance, and not in derogation of or in conflict with, the general school system established by the state. For in this connection it must be remembered, as was said in Hancock v. Board of Education, 140 Cal. 554 [74 Pac. 44], that the school system of the state is a matter of general concern, and not a municipal affair."

The court then, after explaining, as first above indicated, that a school district and a city, although their territorial boundaries are coterminous, are, nevertheless, distinct and separate corporate entities, deriving their powers as such from different sources, proceeds to say:

"What, therefore, the Wetmore Case (99 Cal. 146 [33 Pac. 769]) and the Law Case (144 Cal. 384 [77 Pac. 1014]) decided was that the erection of schoolhouses within the corporate limits of a municipality was justly to be regarded as a

municipal affair, and that the city therefore, as such, could create a bonded indebtedness for such and like purposes, even though power to do the same thing was, under the general school system of the state, vested in a school district which, while occupying the same territory as that of the city, was still in point of law a distinct corporate entity. It follows therefore that the declaration of this court that the issuing of bonds for the building of schoolhouses by a city is a municipal affair constitutes in no sense a negation of the fact that another corporate entity—the school district—may, under the general school system of the state, do the same thing for the same purpose."

[6] The above excerpts are thus brought into this opinion, not because we feel prepared to hold that a superintendent of city public schools, or the matter of the appointment or employment of one, is a municipal affair, but because the principle thereby enunciated and approved and as applied to the situation considered in that case supports the proposition for which the respondent contends here, viz.: That, notwithstanding that they are different and separate or distinct corporate entities, a municipality and a school district, the territorial boundaries of which are the same as those of the city, may, if the Legislature elects to give them the right to do so, exercise precisely the same identical power with respect to matters connected with and calculated to further the interests of the public school system, in so far as such city and school districts are concerned, and that therefore, merely because the Political Code, in its provisions establishing a system of common schools, confers upon the board of education of the city of Marysville power to employ a superintendent of city public schools, non constat that the provision of the charter of the city of Marysville has become a dead letter; that, on the contrary, the provision being one whose object is and has always been in furtherance and not in derogation of the general school system, cannot be held to be inconsistent or in conflict but perfectly consistent therewith.

Of course, the provision of the charter with respect to the superintendent of schools for the city need not necessarily be observed; it may be put in abeyance by the exercise by the board of education of the power conferred upon it to employ a superintendent of the city schools, but this does not mean that thus the charter provision would be rendered null and void or be repealed or that it is inconsistent with the power conferred upon the board of education with respect to the subject to which it relates.

There was by the attorneys on both sides a sort of stipulation, somewhat vague in meaning and scope, from which it might be inferred that the Marysville school district not only embraces all of the city of Marysville but a small strip of adjacent territory in which some 20 or 30 persons reside. The city attorney, representing the appellant, argues that the board of education and not the city of Marysville ought to pay the salary of the city superintendent of schools, because in that case the Marysville school district, including the outside territory, would be taxed for the purpose of raising this money to pay the superintendent's salary. "On the other hand," he continues, "if the salary of the school superintendent of the city of Marysville is paid by the city of Marysville, then the only property taxed to pay her salary will be the property within the corporate limits of the city of Marysville."

[7] While, if it be true that the Marysville school district covers more territory than that comprehended within the municipal limits of the city of Marysville, it would only be just that those living outside the city limits and owning property situated in the outlying portion of the district should be made to bear their just and proper proportion of the tax necessary to pay the salary of the superintendent of schools of the city, yet the fact that they may not do so is no argument in impeachment of the proposition that the city of Marysville has the right, by virtue of the provisions of its charter, to provide for a superintendent of city schools and his compensation for performing the duties of that office, even though the district may extend territorially beyond the limits of the municipality. Nor, obviously, is it an argument supporting the proposition that the provision of the Political Code, empowering the board of education of Marysville to employ a superintendent of city schools, has had the effect of repealing by implication the provision of the city charter under which the county superintendent is acting, ex officio, as city superintendent of schools. The city of Marysville, when making provision in its charter for employing and compensating the county school superintendent to perform like services for the city, undoubtedly considered and determined that so much of the school district as lay within the limits of the city would be benefited by such services commensurately with the burden thus placed upon its taxpayers. At any rate, the fact that there may be other territory than that of the city proper included within the school district can, in our judgment, have no material bearing upon the question whether the provision of the city charter we are considering is still a valid, existing law, notwithstanding the provision of the Political Code in question.

Our conclusion is that the judgment is correct, and it is therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

37 Cal. App. 1

## PEOPLE v. AH GEE. (Cr. 428.)

(District Court of Appeal, Third District, California. April 16, 1918. Rehearing Denied by Supreme Court June 14, 1918.)

1. CRIMINAL LAW ⟸59(2)—PRINCIPALS AND ACCESSORIES—COMMMON LAW—"PRINCIPAL IN FIRST DEGREE"—"PRINCIPAL IN SECOND DEGREE"—"ACCESSORY BEFORE THE FACT."

At common law, a principal in the commission of a crime was of two degrees, one who was the actual actor or absolute perpetrator being a principal in the first degree, and one who was present, actively or constructively aiding and abetting the fact to be done, being a principal in the second degree; and one who, absent at the time of the crime, procured, counseled, or commanded another to commit it, was an accessory before the fact necessary to be prosecuted, tried, and punished as such, and not as principal.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accessory before the Fact; Principal.]

2. CRIMINAL LAW ⟸59(5) — "PRINCIPALS" — JOINT COMMISSION OF CRIME—STATUTES.

Under Pen. Code, §§ 31, 971, providing that all persons concerned in the commission of a crime, whether a felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, are principals, and that the distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated, and that all persons concerned in the commission of a felony shall be prosecuted, tried, and punished as principals, if two persons conspire to commit a crime together, one to perform the actual criminal act, the other to do something conceived as necessary, and if such other aids and abets in the commission of the crime, though not present when the final criminal act is committed, he is a principal, whatever the character, nature, quality, or extent of the assistance contributed by him to the consummation of the offense or execution of the joint intent.

[Ed. Note.—For other definitions see Words and Phrases, First and Second Series, Principal.]

3. CRIMINAL LAW ⟸59(2)—"ACCOMPLICE"—"ACCESSORY."

An "accessory" to a crime is always an "accomplice," while an accomplice is not necessarily or always an accessory in the commission of the crime in whose consummation he has aided and abetted, since he may have advised and encouraged the crime, and so rendered himself an accomplice, and yet be punishable as a principal for an offense distinct therefrom, yet associated therewith, to which the law attaches a distinct punishment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accessory; Accomplice.]

4. CRIMINAL LAW ⟸80 — "PRINCIPAL" AND ACCESSORY—ACCUSATION AND TRIAL OF ACCESSORY—STATUTES.

Under Pen. Code, §§ 31, 971, an accessory is not only to be charged in the accusatory pleading as a principal, but is also to be tried as a principal, so that it is immaterial what the proof shows was the nature of the part he took in the commission of the crime, that is, it is not a material matter whether it is shown that he has been the actual perpetrator, or only to have aided and abetted in its commission, since in either case he is a principal.

5. HOMICIDE ⟸162—EVIDENCE—PARTICIPATION IN CRIME BY DEFENDANT.

Where defendant was charged with murder jointly with two others, the prosecution was entitled to prove the charge by any testimony which would reveal defendant's connection with the crime, and the testimony of witnesses, one of whom testified that he saw defendant fire a shot into the body of decedent, the other of whom testified that defendant fired a couple of shots at deceased, which apparently failed of their mark, and then disappeared from the scene of the shooting, was material, relevant, and competent, and admissible as tending to prove the ultimate fact in issue, that defendant killed and murdered deceased, and was not objectionable on the ground that it tended to establish two different theories on which defendant might have been a participant in the crime.

6. CRIMINAL LAW ⟸1159(4) — APPEAL — REVERSAL FOR CONFLICTS IN TESTIMONY.

Appellate courts are not authorized to reverse the result reached at nisi prius because of conflicts, inconsistencies, or disparities in the testimony of witnesses produced by the people in support of the charge.

7. CRIMINAL LAW ⟸1159(1) — APPEAL — REVERSAL—INCONSISTENT TESTIMONY.

Appellate courts will not reverse a conviction of crime merely because the testimony presented to sustain the charge tended to disclose two different theories of how defendant committed the offense, unless both theories are inherently improbable.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Ah Gee was convicted of murder. From the judgment, and an order denying his motion for a new trial, he appeals. Judgment and order affirmed.

Ben Berry and D. P. Eicke, both of Stockton, and Roy Bronson, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. Defendant and two others, Toy Lee and Foo Kee, were jointly charged, in an information filed by the district attorney of San Joaquin county, with the murder of one Lee Wun, in the city of Stockton, on March 21, 1917. Separate trials of the defendants were had, and Ah Gee was convicted of the crime of murder of the first degree and was sentenced to imprisonment in the state prison for the term of his natural life. The appeal is from the judgment and from an order denying defendant's motion for a new trial.

The record discloses that Lee Wun met his death during a tong war. He and the three defendants above named were engaged in the shooting, and Foo Kee testified that he was fired upon by one Lim Buck Hee. There is but one point urged for a reversal, and it is this: That the prosecution presented its case upon two distinct and inconsistent theories, to wit: (1) That the defendant aided, abetted, and assisted Toy Lee in the murder of Lee Wun, and (2) that Ah Gee himself actually killed and murdered said Lee Wun.

In support of this proposition, appellant

calls attention to the testimony of the witnesses C. W. Potter and A. F. Peterson, who testified to having been eyewitnesses to the homicide and who gave testimony for the people. Potter, a police detective of the city of Stockton, testified that he was in a store on East Market street; that he heard shooting, went out of the store, and saw three men in the street (the three defendants) shooting at Lee Wun; that as he looked out of the door he saw Ah Gee step up and fire two shots. The witness "hollered" at defendant, who turned and started to run west. Foo Kee fired a shot and ran east. Lee Wun was backing away and firing and Toy Lee kept advancing. At the final shot by Toy Lee the deceased fell to the ground. Witness said that after he saw Ah Gee and Foo Kee running away he gave all his attention to Toy Lee and Lee Wun and saw nothing more of defendant. Peterson testified that he heard shots and saw Ah Gee shooting at a man who was running. He testified:

"He was running and he was firing at him as he ran. He just had his gun out, all he had in his hand; he was bang, bang, bang, bang at this man. It seemed to me like when this man fell * * * defendant stopped and started to go down—he first started off at a walk, then he took a little dog trot. * * * I had my eye on nothing else but him and never took my eye off him till the minute he was caught."

The witness said he saw no one but the defendant shooting and saw no other Chinaman with him. According to the testimony of Potter, so the argument goes, the defendant, having fired two unavailing shots at the deceased and then ran away or disappeared from the scene of the homicide, merely aided, abetted, and assisted Toy Lee in the commission of the crime, while, on the other hand, according to the testimony of Peterson, the defendant actually fired the shot which produced the death of Lee Wun. Hence, so the argument proceeds, there were presented by the people two inconsistent theories of the part taken by the defendant in the commission of the crime, and this, it is claimed, is fatal to the result reached by the jury. The position of the defendant, as above set forth, is not well taken.

[1, 2] Under the common law, a principal in the commission of a crime was of two degrees, viz.: One who was the actual actor or absolute perpetrator of the crime, who was the principal in the first degree; (2) one who was present, actually or constructively, aiding and abetting the fact to be done, who was a principal in the second degree. 4 Cooley's Black (4th Ed.) p. 34. One who, being absent at the time of the crime committed, procured, counseled, or commanded another to commit the crime, was an accessory before the fact, and under the common law it was necessary to prosecute, try, and punish him as such accessory and not as a principal. Id., p. 37. The distinction between a principal in the second degree and an accessory before the fact, it will be observed, was founded upon the presence or nonpresence at the commission of the crime of the party aiding and abetting the actual perpetrator of the act which constituted the final consummation of the crime in its commission. Both, though, were nevertheless principals. However, the act of an accessory before the fact was treated by the common law as constituting a substantive offense, distinct from, though growing out of, the principal fact itself. A number of reasons are given by the learned English commentator why the distinction was maintained by the common law. Among these the most substantial from a present-day point of view was that the accused might know how to defend himself when indicted; "the commission of an actual robbery being quite a different accusation from that of harboring the robber." There are other reasons given for the distinction which are not at all germane to our system, as, for instance, the right of an accessory after the fact to claim the benefit of clergy, notwithstanding that the punishment prescribed to both principal and accessory, whether before or after the fact, was the same; the principal's offense not being clergyable. But there cannot logically be said to be less moral turpitude or a less or different degree thereof in the act of a person who, though not actually committing the act constituting the crime, and is not present when it is committed, has actively, with the intent that it shall be committed, contributed to or aided and abetted, by advice or counsel or command or otherwise, in its commission, than there is in the act of the person who actually perpetrated the crime. Indeed, abstractly speaking, from no point of view can there be found any logical reason for the distinction. If A. and B. join in the formation of an intent to commit a crime and assign to each other different parts for the execution of that intent—one actually to perpetrate the act and the other to perform some other part which they conceive to be necessary to consummate the crime—how may it logically be said that the one is not equally a principal with the other? It is the execution of the joint criminal intent which constitutes the crime, and it is immaterial, so far as the degree of guilt is concerned, how or by whom of the two it is actually accomplished. If the one aids and abets in the commission of the crime, though not present when the act, the final step in its commission, is committed, he is logically a principal, whatever may have been the character, nature, quality, or extent of the assistance contributed by him toward its consummation or the execution of the intent jointly formed by him and the actual perpetrator of the act to do the wrongful act.

Thus, undoubtedly, our Legislature viewed the proposition, and therefore by express mandate has abrogated the mere formal distinction (and it was no more than this) ex-

isting at common law between principals in the commission of crimes and accessories before the fact, or those participating in their commission without actually perpetrating the acts which, with the intent, constitute the crime. Therefore whatever may be the law in other jurisdictions the rule in this state, as laid down by the Legislature, is that:

"All persons concerned in the commission of a crime, whether it be for a felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission * * * are principals in any crime so committed." Pen. Code, § 31.

Again, the rule, as promulgated by the Legislature is that:

"The distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not being present, shall hereafter be prosecuted, tried, and punished as principals, and no other facts need be alleged in any indictment or information against such an accessory than are required in an indictment or information against his principal." Pen. Code, § 971.

[3] Of course, there should be no confusion arising from the distinction existing between accomplices and accessories in crime. An accessory necessarily presupposes a principal in the very crime committed and at the same time he is an accomplice of the principal, while, on the other hand, "it is not a legal criterion of an accomplice that he must be indictable as principal for the same identical crime as that charged against the defendant on trial. He may have advised and encouraged that crime, and so be an accomplice therein, and yet be punishable as principal for an offense distinct therefrom, yet associated therewith, to which the law attaches a distinct punishment." People v. Coffey, 161 Cal. 433, 119 Pac. 901, 39 L. R. A. (N. S.) 704. In brief, an accessory is always an accomplice, while an accomplice is not necessarily or always an accessory in the commission of the crime in whose consummation he has aided and abetted.

[4] Under our Code sections, above quoted herein, an accessory is not only to be charged in the accusatory pleading as a principal, but is also to be tried as a principal; hence it is immaterial what the proof shows was the nature of the part that the accused took in the commission of the crime; that is, it is not a matter of material importance whether he is shown to have been the actual perpetrator of the criminal act or only aided and abetted in its commission. In either case, he is a principal, and it can make no difference in the proof of the charge what particular act he did or part he took in the execution of the criminal act that made him one.

[5] In the present case, the defendant, jointly with two others, is charged in the information with the murder of Lee Wun. There is but one count in the information, and that is the usual or common one by which murder, as defined by the law, is charged. There is no attempt at describing how or in what manner the act was committed, or any allegation that the defendant was merely an aider and abettor of the crime, an allegation which is not required under our law. The prosecution was entitled to prove the charge by any testimony which would reveal the defendant's connection therewith. It happened that, while one of the witnesses presented by the people to support the charge testified that he saw the defendant fire a shot into the body of Lee Wun, another witness, likewise presented, testified that the accused fired a couple of shots at the deceased, which apparently failed of their mark, and then disappeared from the scene of the shooting. Even according to the common law, the defendant would be a principal under the testimony of the witness Potter. But the testimony of both witnesses was material, relevant, and competent, and therefore clearly admissible in any event as tending to prove the ultimate fact in issue, viz. that the defendant killed and murdered Lee Wun. Indeed, the objection to the testimony on the ground that it tended to establish two different theories upon which the defendant might have been a participant in the commission of the crime does not go to the proposition that said testimony does not show or tend to show the guilt of the accused of the crime charged but to the proposition that he was a party to the commission of the crime in two different ways. As we view the situation, the proposition is no different in principle from a case where one witness for the people had testified that the deceased had been killed by a blow with a club in the hands of and wielded by the defendant, while another witness for the people had testified that the death of the deceased had been produced by the defendant by means of a knife; the particular manner in which death was produced not being alleged in the indictment. But, as stated, the people had the right to make the proof as it was made and leave to the judgment of the jury the question whether upon the whole the evidence was of sufficient probative force to warrant the conviction in their minds that, beyond a reasonable doubt, the defendant, whatever might have been the nature or extent of the part he might have taken in the commission of the act, was guilty as charged.

[6, 7] But, after all, we can see in this case nothing very much different from what is to be found in the large number of criminal cases which find their way to courts of appeal, for it may safely be said that there is rarely to be encountered a criminal case in which there is not to be found some conflict upon vital questions of fact between witnesses whose testimony is presented by the people in support of the charge. The

same may be said to be true in some measure of witnesses whose testimony is offered in support of the defense. But the courts are not authorized to reverse the result reached at nisi prius because of such conflicts or because of inconsistencies or disparities in the testimony of any one witness. These are matters for the jury to resolve. That is one of their important functions. Nor will the courts reverse a case merely because, as is the claim here, the testimony presented to sustain a criminal charge tends to disclose two different and inconsistent theories of how the accused committed the act charged. Such a situation might affect the evidential strength of the people's case, but it involves a question solely for the jury's determination, unless it plainly appears that, upon the testimony as it is presented in the record up for review, both theories are inherently improbable. We may add that there would not be many criminal cases which could escape the fate of a reversal if for such reasons courts of review were required to nullify the verdicts of juries.

The judgment and the order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

---

37 Cal. App. 180

## PEOPLE v. ALLEN. (Cr. 436.)

(District Court of Appeal, Third District, California. May 8, 1918. Rehearing Denied by Supreme Court July 2, 1918.)

1. CRIMINAL LAW ⊜594(3)—CONTINUANCE—APPLICATION TOWARD END OF TRIAL.
Where motion for continuance is made when case is nearing its conclusion, on the ground of absence of witness, but no assurance was given that witness could be found, it would have been an unreasonable exercise of discretion for court to grant continuance.

2. CRIMINAL LAW ⊜595(4)—CONTINUANCE—ABSENCE OF WITNESS—MATERIALITY OF EVIDENCE—INTENT.
In prosecution for selling intoxicating liquor in dry territory, court's refusal to continue trial because of absence of witness was not reversible error, where expected evidence all bearing on question of the intent of accused would have been immaterial; the undisputed evidence being that the bottle accused sold contained whisky.

3. INTOXICATING LIQUORS ⊜229 — PROSECUTION—EVIDENCE AS TO INTENT—ADMISSIBILITY.
In prosecution for selling liquor in dry territory, evidence that purchaser was a spy trying to discover violations of the no-license law was inadmissible as tending to prove that accused intended to play a joke on purchaser by selling liquor that merely resembled whisky, the intent of accused being inadmissible, undisputed evidence having shown liquor sold by accused to have been whisky.

4. INTOXICATING LIQUORS ⊜224—INTENT—INFERENCE.
In prosecution for illegal sale of liquor, where there is evidence beyond reasonable doubt that accused sold the liquor, an intent to violate the law will be implied.

5. CRIMINAL LAW ⊜448(7) — OPINION EVIDENCE—WHISKY.
The drinking of whisky is so common an occurrence that liquor can be prima facie shown to be whisky by the opinions of persons accustomed to its use.

6. EVIDENCE ⊜355(5)—MEMORANDA.
Code Civ. Proc. § 2047, providing that a witness may refresh his memory by memoranda, does not authorize the introduction of memoranda in evidence in corroboration of what the witness has testified to without the aid thereof.

7. CRIMINAL LAW ⊜1186(4)—APPEAL—HARMLESS ERROR.
Under Const. art. 6, § 4½, providing that no judgment shall be reversed unless there has been a miscarriage of justice, the admission of written notes to corroborate witness who had made the notes was not reversible error; the facts having been fully testified to before memorandum was admitted.

Appeal from Superior Court, Modoc County; Clarence A. Raker, Judge.

Felix Allen was convicted of selling alcoholic liquors in no-license territory, and he appeals. Affirmed.

Oscar Gibbons, of Alturas, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was informed against by the district attorney of Modoc county for the crime of unlawfully selling alcoholic liquors, to wit:

"That on or about the 29th day of May, 1917, and before the filing of this information, at and in the county of Modoc, state of California, said Felix Allen then and there, within the incorporated limits of the town of Alturas, in said county, which was then and there no-license territory, willfully and unlawfully did sell and furnish alcoholic liquor, to wit, whisky, to one Lulu Sisson, contrary," etc.

The cause was tried before a jury, and defendant was found guilty. Judgment on the verdict was that defendant pay a fine of $400 and in default of payment that he be confined in the county jail of said county one day for each $2 of said fine. Defendant appeals from the judgment and from the order denying his motion for a new trial.

It is now urged that the court committed the following errors: (1) In refusing a continuance of the trial for the purpose of giving defendant the opportunity to produce the witness A. Gibson; (2) admitting expert testimony as to the character of the liquid introduced by the prosecution; (3) rejecting testimony offered by defendant tending to show that prior to the 29th day of May, 1917, the prosecuting witness, Lulu Sisson, was a spy; (4) permitting the witnesses Lulu Sisson and Mrs. Geo. Campbell to be corroborated by their notes in writing made of matters to which they had testified; (5) in giving instructions Nos. 1 and 5.

The information was filed on November 22, 1917, and defendant, being in court, was given until the next day, November 23d, in which to answer the arraignment, and on that day defendant pleaded not guilty, and

the cause was set down for trial on December 5, 1917. The cause then being called for trial, defendant moved for a continuance, and the matter was continued to December 7, 1917. The proceedings had at the arraignment on motion for continuance were read, and the court denied the motion and ordered the jury to be drawn. The motion for continuance was based in part upon the shortness of time between the arraignment and the date set for trial, defendant's attorney claiming that he had not sufficient time in which to prepare his defense, but principally the ground for the motion was based upon other facts set out in the defendant's affidavit filed in support of the motion, and which related to the testimony of one A. Gibson, who, it is alleged, was a necessary witness in the case for defendant. It was stated in the affidavit that affiant was informed and believed that at said time the said Gibson was "either out of the state of California or at the southern extremity of the same, in the government service"; that on November 23, 1917, defendant had caused to be issued a subpœna for said Gibson and placed in the hands of the sheriff of Modoc county, and that said sheriff has ever since been unable to locate said witness in said county of Modoc; that on the 26th day of November, 1917, defendant prepared an affidavit entitling him to a foreign subpœna for said witness but, owing to the absence of the judge of said court, was not able until the 27th day of November to obtain the necessary order, and on the 28th day of November he caused said subpœna to be deposited in the United States post office at Alturas, inclosed in a sealed envelope addressed to the sheriff of San Diego county, Cal., at San Diego, with postage prepaid thereon and inclosing therewith a letter instructing said sheriff to serve the said subpœna and informing him that the said Gibson was in a United States training camp in San Diego county; that no return has ever been made by said sheriff of his proceedings under said subpœna, and no word has been received by defendant or his attorney in response to said communication; that said sheriff maintains an office in the city of San Diego, Cal., between which city and Alturas there is a regular communication by mail; and that the two places are more than one thousand miles apart. It is further alleged in the affidavit:

"That said A. Gibson is a necessary and material witness in this action, and without his testimony being had and taken at said trial I cannot safely proceed to trial; that I expect to prove by said witness that on the 29th day of May, 1917, between the hours of 1 and 2 o'clock in the afternoon thereof, I went to the drug store then and there owned and operated by said A. Gibson in said town of Alturas, in company with divers other persons, and did then and there tell said A. Gibson, in the presence of said other persons, that I had been asked by the Lulu Sisson mentioned in the information in this action to furnish her (the said Lulu Sisson) with a bottle of whisky; that I further told him that I desired to have his (the said A. Gibson's) assistance in mixing a bottle of liquid resembling whisky as far as possible in color, smell, and taste, save that the same should not contain more than 1 per cent. of alcohol; that said A. Gibson thereupon furnished certain appliances and assisted me in preparing said described liquid; that thereupon said liquid was placed in a quart bottle in the presence of said A. Gibson and said other persons, and was wrapped in a piece of paper and by me taken to the house of said Lulu Sisson, in said town of Alturas."

It is further alleged that the said Gibson is the only witness by whom affiant could prove that the said liquid contained only 1 per cent. of alcohol or by whom he could prove the quantity or quality of all the ingredients contained in the liquid delivered to the prosecuting witness, Lulu Sisson. Affiant further states in his affidavit:

"I further expect to prove by said A. Gibson that at divers times and places prior to the 29th day of May, 1917, that I have stated that Lulu Sisson was in my opinion trying to earn a reward by asking people to furnish her liquor, and that in my opinion any one would be very foolish to accede to her requests."

He further states that said A. Gibson will testify to the matters above set forth if his presence be had at said trial or if his deposition be taken, and that said Gibson is at present in or around the United States training camp in San Diego county.

[1] On December 8th, while the trial was progressing, counsel for defendant again renewed his motion for a continuance based on information which that day had been received by the sheriff of Modoc county by letter written to him by the sheriff of San Diego county, dated December 4, 1917, in which it was stated, among other things:

"I am returning herewith subpœna In re People v. Felix Allen, which was sent to me for service. On going to the Camp Kearney, I found that this man had been discharged October 6, 1917."

Considered with this second motion were the proceedings taken at the time the first motion was heard. As to the ruling of the court on defendant's motion made after the letter from the sheriff of San Diego county was received and the subpœna returned by him "Not found," we cannot say there was prejudicial error. No additional facts were produced at this time and no assurance offered that the witness could be found. The case had progressed nearly to its conclusion. It would have been an unreasonable exercise of discretion for the court to continue the case at that stage to an indefinite period and to excuse the jury with leave to return to their homes until such period might arrive. As to the ruling on the motion made at the arraignment and before the day for the trial was set and at the opening of the trial, we think enough appeared to justify the court in granting the continuance asked. But we cannot say, in view of the showing made, that its refusal demands a reversal of the judgment. The defense, indeed the only defense made, was that defendant knew the

prosecuting witness, Lulu Sisson, to be a spy, and was engaged in an effort to induce him to sell her a bottle of whisky in order to obtain the county reward offered; that he conceived the idea of "playing a joke upon her" by selling her a bottle of liquid resembling whisky, but in fact containing less than 1 per cent. of alcohol; that he explained his scheme to several different persons, and Dr. Gibson, a druggist in the town, who, as defendant testified, prepared a bottle of the simulated whisky, gave it to defendant, who immediately took it to Mrs. Sisson's home and sold and delivered it to her; and that this was the bottle and only bottle of liquid of any kind delivered by him to her.

It is perhaps best at this point to state the evidence on which the verdict was based, as it necessarily has much to do with our conclusion upon the several assignments of error. The evidence was that Mrs. Sisson was engaged in ferreting out violations of the no-license law; that she suspected defendant of being engaged in the illicit traffic in alcoholic liquor; that to confirm her suspicions, and, as she admitted, to earn the reward offered by the county, she sought a meeting with defendant at which he agreed to sell and deliver to her at her house a bottle of whisky at 2 o'clock in the afternoon of May 29, 1917. Mrs. Sisson arranged to have her sister-in-law, Mrs. Campbell, and Lily Ferraris, a house servant, so concealed as to witness, unknown to defendant, and hear what took place when defendant came to the Sisson house. These three women testified that defendant came to Mrs. Sisson's house on the day and at the hour agreed upon, was admitted, and stated to Mrs. Sisson he had brought her the bottle of whisky as he had promised to do, and told her the price was $1.50; that he took the bottle from his coat pocket and delivered it to Mrs. Sisson; that she found she had but $1.40, which she gave him, saying she would pay him the remaining 10 cents when she next saw him; that he took the money and went away. The conversation between Mrs. Sisson and defendant was testified to, and there was substantial agreement in the testimony of these three witnesses as to what was there said and done, and it agreed substantially with the testimony of the defendant, except that he testified he did not know what was in the bottle. As soon as defendant departed, Mrs. Campbell and Miss Ferraris came out from their place of concealment, examined the bottle carefully, and were able to and did identify it when produced in court. Mrs. Sisson immediately notified Deputy Sheriff Estes, who came to her house in the evening of that day, uncorked the bottle, and drank of its contents. His testimony was that it was "good whisky." The bottle was delivered to him at that time. He sealed it, and thereafter it was cared for by him until it was brought into court in the same condition as when he received it. In the presence of the court and jury he removed the cork and again sampled the contents and pronounced it whisky. Dr. John Style, a practicing physician, was called as a witness. He testified that he had drank whisky and could distinguish the difference between whisky and nonalcoholic liquids "by taste and smell—by taste practically." He sampled the contents of this bottle, and pronounced it whisky.

It is not claimed that Dr. Gibson could or would testify, if present, further than that at defendant's request and for the purpose defendant explained to him he filled and gave to defendant a bottle resembling the one in evidence, but containing less than 1 per cent. of alcohol. And the witnesses who saw the druggist in the act of making up the compound, whatever it was, testified that they saw the bottle delivered to defendant by Dr. Gibson and saw defendant immediately thereafter drive in his automobile to and enter Mrs. Sisson's house. What defendant did after entering the house they knew not. The most that can be claimed from what Dr. Gibson could testify to and what the witnesses who testified saw done by him and by defendant is that the mixture prepared by Dr. Gibson contained less than the inhibited per cent. of alcohol, and that these facts tended to show an innocent intent on defendant's part. If Dr. Gibson gave defendant a bottle whose contents were innocuous, the evidence conclusively shows that it was not the one delivered to Mrs. Sisson by defendant, and as it is not pretended that this change of bottles could have happened through any agency other than defendant's, it entirely overthrows any inference of innocent intent to be drawn from anything Dr. Gibson could have testified to. But the law upon this question of intent, in this class of cases, treats the element of intent as immaterial. The rule is stated as follows in the case of the People v. Pera, 171 Pac. 1091:

"The decisions appear to be quite uniform upon the proposition that where, in invoking and applying the police power, the Legislature has prohibited certain acts and denounced them as criminal, the mere commission of such acts, regardless of the intent with which they were committed, is sufficient to constitute the crime so denounced. There are, perhaps, certain exceptions to this rule, as, for instance, where the statute itself uses language in describing or defining the crime indicating that scienter or a specific intent to do the act was essential to constitute it a crime. But, particularly in cases interdicting the traffic in intoxicating liquors, the rule generally is that the mere commission of the act is sufficient to consummate the offense, and in the present case the law authorizing the establishment of 'no-license territories' uses no language indicating an intention in the Legislature to make the intent with which the act of keeping a resort for the purpose of selling intoxicating liquors is committed an ingredient of the offense."

The case of Commonwealth v. Holstine, 132 Pa. 357, 19 Atl. 273, is cited, where the court said:

"It is not necessary to sustain a conviction for selling intoxicating liquors under the act of

1887 for the commonwealth to prove a criminal intent. It is enough to show the sale, when the defendant may, if he can, shield himself behind a license. If the sale is contrary to law, the intent has nothing to do with it. A contrary ruling would fritter away the act of 1887, and conviction under it would be rare."

Section 13 of the act of April 4, 1911 (Stats. 1911, p. 599), provides as follows:

"It shall be unlawful for any person * * * within the boundaries of any no-license territory to sell, furnish, distribute or give away any alcoholic liquors except as provided in section 16 hereof." (Nothing in said section 16 has reference to the facts in this case.)

Plainly the rule applies in cases arising under this section, as it did in People v. Pera, which arose under the same statute though for a different offense.

[2, 3] This rule of law furnishes sufficient answer to defendant's points above designated as 1, 3, and 5. Dr. Gibson's testimony, as we have seen, would have been addressed to the question of intent, as would testimony that defendant had knowledge, prior to the 29th day of May, 1917, that Mrs. Sisson was a spy, for the purpose of that testimony was to bolster up defendant's claim that he was playing a joke upon her, and hence had no intention to violate the law.

[4] As to instructions 1 and 5, they both in effect charged the jury that the intent to violate the law is implied upon proof beyond a reasonable doubt that the defendant sold to Mrs. Sisson at the time named, within the limits of the town of Alturas (admittedly no-license territory), alcoholic liquor, to wit, whisky containing more than 1 per cent. of alcohol. A similar instruction in People v. Pera, supra, was given and was held to be a correct statement of the law.

The testimony that the bottle, with its contents, as it was sold and delivered to the prosecuting witness, was the same bottle, with the same contents, which was brought into court, is not controverted; nor is there any evidence that the liquid in this bottle was other than whisky, and there was evidence that it contained 15 per cent. alcohol. The bottle was passed to the jury, who were, without objection, "permitted to smell the contents and taste it if they desire." The jury examined the bottle, but it does not appear that they drank any of the contents. Defendant offered no evidence that the contents were not whisky.

As to defendant's second point, he says in his brief that "the only point in dispute between prosecution and defendant was: What was the character of the liquid delivered to Mrs. Sisson?" The contention is that under paragraph 9, § 1870, Code of Civil Procedure, only one who "is skilled therein" can give "his opinion on a question of science, art, or trade." Witness Estes concededly did not testify as an expert. He testified, however, that he was familiar with the taste of whisky and had drank of different brands, that he could distinguish between the taste of whisky and brandy, and his opinion was quite emphatically given that the bottle in question contained whisky.

[5] In the case of People v. Monteith, 73 Cal. 9, 14 Pac. 373, a nonexpert witness was permitted to testify that a person at a given time was intoxicated, the court saying:

"Drunkenness is, unfortunately, of such common occurrence that it does not require an expert to pronounce upon it. We think the case falls within the principle of People v. Sanford, 43 Cal. 32, 33."

Likewise we may safely say that the drinking of whisky is, unfortunately, of such common occurrence that it does not require an expert to pronounce upon it. We do not think it was necessary for the people to have caused a chemical analysis of this liquid to be made, but that it was competent to establish prima facie that the liquid in question was whisky by the opinion of persons who were accustomed to the use of whisky. The way was open to defendant to rebut this evidence either by causing an analysis to be made of the liquid or by having other witnesses familiar with the taste of whisky to test it and give their opinion. He did neither, but rests wholly on the incompetency of the witness Estes to testify. We do not think the court erred in its ruling.

[6, 7] Appellant claims that the court erred in permitting Lulu Sisson and Mrs. Campbell to be corroborated by their notes taken of what occurred when defendant was at Mrs. Sisson's house. It appeared that after he had gone they entered in a memorandum book what they remembered of the occurrence. After they had testified to the facts without consulting their memoranda or finding it necessary to do so, the district attorney, over objection, was allowed to introduce this book showing what these witnesses had written down therein. Substantially it agreed with their testimony. We think this was error. Under section 2047, Code of Civil Procedure, a witness may "refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing." But, where the witness can and does testify fully as to the facts without resort to his memorandum, we do not think he can be corroborated by the introduction of his memorandum. We think, however, that the ruling was without prejudice. Section 4½ of article 6 of the Constitution would seem to apply here.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

37 Cal. App. 370

## MOORE v. INDIAN SPRING CHANNEL GOLD MINING CO. et al. (Civ. 1837.)

(District Court of Appeal, Third District, California. May 28, 1918.)

1. EVIDENCE ⟸20(1) — JUDICIAL NOTICE — MATTER OF COMMON KNOWLEDGE.

It is common knowledge that a refusal by an employer, hiring many men, some being discharged and others taken on the job daily, to pay discharged men, would tend to create breaches of the peace and disturb public tranquility.

2. STATUTES ⟸74(1)—UNIFORM OPERATION—DUTY TO PAY WAGES UNDER PENALTY.

St. 1911, p. 1268, as amended by St. 1915, p. 299, providing that whenever an employer discharges an employé, wages due and unpaid shall become payable immediately, etc., imposing a penalty recoverable by the employé, is not violative of Const. art. 1, § 11, providing all general laws shall have uniform operation.

3. STATUTES ⟸76(1) — LOCAL OR SPECIAL LAWS—APPLICABILITY OF GENERAL LAW.

St. 1911, p. 1268, as amended by St. 1915, p. 299, providing that, whenever an employer discharges an employé, wages due and unpaid shall become payable immediately, etc., imposing a penalty recoverable by the employé, is not violative of Const. art. 4, § 25, subd. 33, providing Legislature shall not pass local or special laws, where general law can be made applicable.

4. CONSTITUTIONAL LAW ⟸275(2)—MASTER AND SERVANT ⟸69—DUTY TO PAY WAGES UNDER PENALTY—DUE PROCESS—STATUTE.

St. 1911, p. 1268, as amended by St. 1915, p. 299, providing that, whenever an employer discharges an employé, wages due and unpaid shall become payable immediately, etc., imposing a penalty recoverable by the employé, is not violative of Const. U. S. Amend. 14, providing no state shall deprive any person of life, liberty, or property without due process, etc.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Oscar Moore against the Indian Spring Channel Gold Mining Company, a corporation, Charles Mushrush, and others. From judgment for plaintiff against defendant Mushrush, the latter appeals. Affirmed.

Carleton Gray, of Oroville, for appellant. W. K. Hays, of Chico, and Jones & Jones, of Oroville, for respondent.

CHIPMAN, P. J. This is an action brought by plaintiff upon his own claim and certain claims assigned to him by his fellow laborers, for work performed by them as miners. The court found in favor of the plaintiff on his own and the assigned claims, and "that defendant Charles Mushrush promised to pay each of said above-named persons at the rate of three and 50/100 dollars a day wages for eight hours work," no part of which has "ever been paid to either or any of said named persons."

The action was to recover, not only the wages of the men, but also the penalty as provided by the act entitled "An act providing for the payment of wages," approved May 1, 1911 (Stats. 1911, p. 1268), and the amendment thereof, approved April 28, 1915, in effect August 8, 1915 (Stats. 1915, p. 299). The court found, in addition to the sums found due as wages, that there was due each of the several claimants a sum specifically found "as a penalty for nonpayment of wages." Judgment was accordingly entered in favor of plaintiff and against defendant Mushrush for the sum of $1,010.55 as wages and the further sum of $1,184.15 as a penalty. The findings were in favor of the other defendants. The appeal is from the judgment by defendant Mushrush.

There was no controversy as to the amount due to these several claimants. The only question of fact being tried was whether all of the defendants were liable, and, if not all, which of them. The court found as to each claim that the "service was rendered to the defendant Charles Mushrush at his special instance and request." We have examined the testimony and documentary evidence in the case, and are entirely satisfied that the court was justified in finding that defendant Mushrush is liable for the amount of these several claims. The only question open for discussion is the constitutionality of the act of 1911, as amended in 1915, imposing a penalty for nonpayment of the wages, the subject of the action.

Appellant contends that the act of 1911, as it was enacted and as amended, is in violation of section 11, article 1, and subdivision 33 of section 25, article 4, of the Constitution of this state, and also of the Fourteenth Amendment to the federal Constitution. Section 11, article 1, declares that:

"All laws of a general nature shall have a uniform operation."

Section 25, article 4, provides that:

"The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * Thirty-Third: In all other cases where a general law can be made applicable."

Article 14 of the federal Constitution provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1 of the act of 1911 is as follows:

"Whenever an employer discharges an employé, the wages earned and unpaid at the time of such discharge shall become due and payable immediately. When any such employé not having a contract for a definite period quits or resigns his employment the wages earned and unpaid at the time of such quitting or resignation shall become due and payable five days thereafter."

Section 2:

"All wages other than those mentioned in section 1 of this act earned by any person during any one month shall become due and payable at least once in each month and no person, firm or corporation for whom such labor has been performed, shall withhold from any such employé any wages so earned or unpaid for a

longer period than fifteen days after such wages become due and payable: Provided, however, that nothing herein shall in any way limit or interfere with the right of any such employé to accept from any such person, firm or corporation wages earned and unpaid for a shorter period than one month."

Section 3:

"Any person, firm or corporation who shall violate any of the provisions of this act shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not to exceed five hundred dollars."

Section 4:

"None of the provisions of this act shall apply to any county, city and county, incorporated city or town, or other municipal corporation."

The act of 1911 was before the District Court of Appeal for the First District in the Matter of Crane, 26 Cal. App. 22, 145 Pac. 733, and section 3 was held to be violative of section 15 of article 1 of the Constitution, which provides that:

"No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of * * *."

The constitutionality of the act otherwise was not considered. Since that decision, and possibly by reason of it, the Legislature amended section 3 (Stats. 1915, p. 299) to read in part as follows:

"In the event that any employer shall fail to pay, without abatement or deduction, within five days after the same shall become due under the provisions of section 1 of this act, any wages of any employé who is discharged or who resigns or quits, as in said section 1 provided, then as a penalty for such nonpayment the wages of such servant or employé shall continue from the due date thereof at the same rate until paid; or until an action therefor shall be commenced: Provided, that in no case shall such wages continue for more than thirty days. * * *"

Appellant expresses "difficulty in discovering any material distinction between the two acts. In the act of 1911," continues the brief, "the penalty is nothing more nor less than a fine not exceeding five hundred dollars; while in the amendment of 1915 the penalty is in effect a fine not exceeding thirty times the servant's daily wage." It seems to us that the distinction is obvious in this: The act of 1911 declares that a violation of its provisions is a crime for which the violator is answerable to the state, while by the amendment he must compensate the wage-earner by way of penalty.

In the present case there was no dispute as to the facts. These laborers had been working for appellant several months at a daily wage, receiving their pay at the end of the month regularly at a time and at a wage agreed upon. The mine shut down at the end of August, 1915, and filled up with water, and the laborers were discharged. Appellant, who had theretofore paid them their wages, failed and refused to pay for the month of August, and on September 29, 1915, the action was commenced, thus bringing the case within the terms of the act. No question arises as to the correctness of the amounts due each claimant as to wages earned and the penalty imposed.

The provisions of our Constitution, relied upon by appellant, have many times, and under many different legislative enactments, been before the courts of review in this state, as, also, has the Fourteenth Amendment of the national Constitution. That in certain cases special laws are permissible was shown in City of Sacramento v. Swanston, 29 Cal. App. 212, 155 Pac. 101, where the subject was given a somewhat extended treatment, and it was there held that under certain circumstances attorney's fees were allowable in condemnation proceedings, although in that regard the statute is clearly special legislation. It is doubtless true, as was said in Bruch v. Colombet, 104 Cal. 347, 38 Pac. 45, that:

"No absolute, inflexible rule has ever been formulated, and probably never will be, by which to determine what departure from uniformity is permissible, and what will be fatal. The courts must determine each case as it arises, presuming in favor of the rightful exercise of the legislative power. Yet the inhibition should be enforced unless there is discoverable some reasonable ground for a distinction."

The courts have, however, announced certain governing principles which are more or less applicable to all legislation of this class. Perhaps as concise a statement of the rule as may be found, is given in the Matter of the Application of Miller, 162 Cal. 687, 698, 124 Pac. 427, 430, as follows:

"A law is general and uniform in its operation when it applies equally to all persons embraced within the class to which it is addressed, provided such class is made upon some natural, intrinsic, or constitutional distinction between the persons composing it and others not embraced in it. It is not general or uniform, and it makes an improper discrimination if it confers particular privileges or imposes peculiar restrictions or disabilities upon a class of persons arbitrarily selected from a larger number of persons, all of whom stand in the same relation to the privileges granted or burdens imposed, and between whom and the persons not so favored or burdened no reasonable distinction or substantial difference can be found justifying the inclusion of one and the exclusion of the other from such privileges or burdens. The difference on which the classification is based must be such as, in some reasonable degree, will account for or justify the peculiar legislation."

The act in question, in imposing a penalty where the facts are as therein mentioned, is not unlike, in its operation, the sections of the Code of Civil Procedure—sections 732, 733, 735—which authorize the court to impose treble damages where a tenant commits waste, cuts down trees, and in cases of forcible entry and detainer. The constitutionality of these sections is not questioned. They are held not to be penal, but remedial. Jahns v. Nolting, 29 Cal. 508, 513. Such laws relate to matters of procedure as to which the court said, in Cohen v. Alameda, 168 Cal. 265, 267, 142 Pac. 885, 886:

"The legislative discretion as to the different modes of procedure or rules of practice to be prescribed for the numerous and various actions and proceedings allowed in courts of justice is very wide, and that its judgment on the question

whether or not a particular provision shall be made for any class of cases, and as to the classification thereof, is not to be interfered with except for very grave causes and where it is clear beyond reasonable doubt that no sound reason for the legislative classification, and for the different provisions regarding the same, exists."

The legislative authority in this class of laws is, however, usually referable to the police power, and if the act in question may be regarded as deriving its validity from such source, it is not without its restrictions and limitations. But here, too, as was said in Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 694, 151 Pac. 398, 401:

"The broad and all-pervading scope of this power makes a satisfactory definition of it impossible."

For the purposes of the discussion in that case, Mr. Justice Sloss said:

"The police power is, we think, adequately and well described by the Supreme Court of Washington in these words: 'By means of it, the Legislature exercises a supervision over matters affecting the common weal and enforces the observance by each individual member of society of duties which he owes to others and the community at large. The possession and enjoyment of all rights are subject to this power. Under it, the state may "prescribe regulations promoting the health, peace, morals, education, and good order of the people, and legislate so as to increase the industries of the state, develop its resources, and add to its welfare and prosperity." In fine, when reduced to its ultimate and final analysis, the police power is the power to govern.'" State v. Clausen, 65 Wash. 156, 177, 117 Pac. 1101, 37 L. R. A. (N. S.) 466.

But, as was further said by Mr. Justice Sloss:

"The arbitrary taking of life, liberty, or property cannot, of course, be justified by referring the act to the police power. But, if a given piece of legislation may fairly be regarded as necessary or proper for the protection or furthering of a legitimate public interest, the mere fact that it hampers private action in a matter which had theretofore been free from interference is not a sufficient ground for nullifying the act."

Examples are pointed out where vital legislative changes are of everyday occurrence.

"The same may be said of employer and employés. The employment creates a status involving relative rights and obligations, and it is proper for the Legislature, acting within the bounds of fairness and reason, to determine the nature, extent, and application of those rights and obligations."

Referring to the Workmen's Compensation Act (St. 1913, p. 279), the constitutionality of which was under discussion, it was further said:

"If the law-making body determines that one of the incidents of that relation shall be that the employer must compensate his employé for an accidental injury received in the service, an enactment to that end is neither arbitrary nor outside the scope of legislative authority."

Acts similar to our Employers' Liability Act are in force in several states, and in all of them the law has been upheld against all attack on constitutional grounds. In effect this act makes certain employers liable to pay a stated sum of money to every employé, who is injured while in their employ, whether or not the injury arose through the employers' fault. This compensation is based in part upon the wage of the employé and is paid during a period of the employé's idleness and inability to serve the employer. It would be difficult to find a reason which would justify this law which may not be urged in support of the act in question. There is between the two laws this striking difference: The Employers' Liability Act penalizes the employer, though he has committed no fault or wrong. The Payment of Wages Act fixes a penalty for the nonperformance of a duty the employer owes to his employé. It simply says to the employer: You shall not have the services of your employé without making provision for the payment of his wages within a reasonable time after they are due, and if you default you shall compensate him for your wrong.

In the case of International Text-Book Co. v. Weissinger, 160 Ind. 349, 65 N. E. 521, 65 L. R. A. 599, 98 Am. St. Rep. 334, an act of the Legislature of Indiana was before the court, which provided that:

"Every person * * * employing any person, to labor, * * * shall make weekly payments for the full amount due for such labor or service in lawful money of the United States to within six days or less of the time of such payment" (Acts 1899, c. 124).

And the act also prohibits the assignment of future wages to become due to employés from persons affected by the act. Weissinger assigned to plaintiff his wages to become due. The action was against Weissinger and his assignee, who had accepted the order. It was contended that the act was in violation of the Constitution of Indiana and of the Fourteenth Amendment of the federal Constitution. The court said that the act unquestionably restricted the liberty of the citizen to enter into contracts which, in the absence of the statute, he would have the right to make. "Such a prohibition," said the court, "can be sustained only on the ground that some public interest is involved, and that it is of such a character as to render it a legitimate subject of legislative regulation or control. The wages of laborers have been the subject of legislative solicitude and action in this state for many years, and in a great variety of forms." The court instances a number of statutes to support its statement and points out the peculiar circumstances surrounding the day laborer which justify legislation specially designed for his protection. "If," said the court, "the Legislature, in the exercise of its general police power, to secure the safety and welfare of the state may deprive the laborer and his employer of the right to contract for the payment of wages in anything else than legal tender notes or other lawful money" (referring to decisions of the United States Supreme Court), "we do not perceive why it may not, also, in the exercise of that power, prohibit the assignment of wages before they are earned. * * * The purpose of the legislation in each is to protect a large and important class of citizens from imposi-

tion, unfair dealing, and the consequences of their own improvidence. The act * * * is not subject to the objection of a partial or improper classification."

A Kentucky statute (Ky. St. 1903, § 2739a, subsec. 1) required that all persons, corporations, etc., employing one or more persons in mining work, should within a stated number of days pay in lawful money the full amount of wages due such person or persons, "unless prevented by an unusual casualty." The act declared a violation of its provisions to be a misdemeanor punishable by fine. In Commonwealth v. Reinecke Coal Mining Co., 117 Ky. 885, 79 S. W. 287, 25 Ky. Law. Rep 2027, defendant was indicted for violation of the act. Among other grounds of demurrer it was contended that the statute "is class legislation, also, special legislation, and not a just exercise of the police power," and hence unconstitutional. The court held "that the statute in all its parts is valid."

In volume 9, Federal Statutes Annotated, at page 462, are cited certain cases bearing upon the question here. In St. Louis, etc., R. R. Co. v. Paul, 173 U. S. 409, 19 Sup. Ct. 421 (43 L. Ed. 746), affirming 64 Ark. 83, 40 S. W. 705, 37 L. R. A. 504, 62 Am. St. Rep. 154, it was held that:

"A statute entitled 'An act to provide for the protection of servants and employés of railroads' [Acts Ark. 1889, p. 76], relating to the payment of unpaid wages without abatement or deduction on discharge of an employé, does not amount to deprivation of property, as the act is purely prospective in its operation. It does not interfere with vested rights, or existing contracts, or destroy, or sensibly encroach upon, the right to contract, although it imposes a duty in reference to the payment of wages actually earned, which restricts future contracts in the particular named."

A Rhode Island statute (Laws 1891, c. 918, § 1) providing that "every corporation, other than religious, literary, or charitable corporations, * * * shall pay weekly the employés engaged in its business the wages earned by them to within nine days of the date of such payment, unless prevented by inevitable casualty," was held valid. State v. Brown, etc., Mfg. Co., 18 R. I. 16, 25 Atl. 246, 17 L. R. A. 856. See the question considered in Ex parte Stephan, 170 Cal. 48, 148 Pac. 196, Ann. Cas. 1916E, 617; Ex parte Lichtenstein, 67 Cal. 359, 7 Pac. 728, 56 Am. Rep. 713.

There has been a pronounced tendency in state and national legislation for many years, not only to ameliorate the working conditions of the wage-earner, but to safeguard him in his relations to his employer in respect of hours of labor and the compensation to be paid for his labor. In the controversies that have arisen between capital and labor, the public conscience has become awakened to the fact that the public safety and welfare demand more enlightened laws governing the relation of employer and employé—laws which are designed to secure to the latter a reasonable wage, to provide, where practicable, for the enforcement of payment by way of liens on the product of his labor, to exempt from execution a part of his earnings, to give him sanitary and otherwise safe surroundings while employed, and the like. Does the act in question apply equally to all persons embraced within the class to which it is addressed, and is such class made upon some natural, intrinsic, or constitutional distinction? If an affirmative answer may be given, the law is general and uniform in its operation and valid. Application of Miller, supra. The act refers to all wage-earners, designated as employés, as the class referred to, and it unquestionably applies equally to all of the class.

[1] Respondent quotes from an editorial in a responsible journal of January 22, 1916, the Saturday Evening Post, a statement which we think not far from the truth:

"Probably two-thirds of the inhabitants of the United States live out of a pay envelope—that is, on wages or on salaries that are only wages under a polite name. The yearly wage bill of the country has been estimated at fourteen billion dollars, which we take to be conservative."

A very large per cent. of those persons are day laborers, the greater part of whose earnings are necessarily paid out to them from day to day or week to week in the support of themselves and their families; their requirements are often obtained on credit, and must be promptly met, or the wage-earner loses his credit and sometimes his job; in many cases, he is denied credit, and must pay cash. Delay of payment or loss of wages results in deprivation of the necessities of life, suffering inability to meet just obligations to others, and in many cases may make the wage-earner a charge upon the public. It cannot be disputed that the multitudinous and important enterprises which constitute a characteristic feature of the industrial activities around us are absolutely dependent for their successful operation upon the day labor of the wage-earner. Many of these enterprises directly contribute to the welfare of the public and are necessary to the public convenience and safety. It is not to be expected that the laborer upon whose service these industries depend will give his service without assurance of receiving the reward promised for such service, and any law whose object is to give to the laborer some further assurance that he will be promptly paid for his labor, in addition to the employer's promise, would seem to be reasonable, especially as the object is to induce, if not to compel, the employer to keep faith with his employé, and imposes a penalty only when he commits a wrong which not only injures the employé, but is an injury to the public in its tendency to deprive the public of an incidental benefit which comes from the employé's labor. The law imposes no unreasonable burden upon the employer, for, operating as it does in the future, and disturbing no vested right, he must, and it is but fair that he should, make provision to

pay his employé before hiring him, failing in which he should pay the penalty. Many enterprises require the services of large numbers of men—the numbers shifting from day to day—some being discharged and others taken on the job. It is common knowledge that a refusal to pay discharged men under such circumstances would tend to create breaches of the peace and disturb the public tranquility. The intention of the penalty imposed by the act in question is to make it to the interest of the employer to keep faith with his employés and thus avoid injury to them and possible injury to the public at large.

The act very properly provides that, when an employé is discharged by his employer, his wages earned and unpaid shall become immediately due. If the employment is not for a definite period, and he quits his employment, the act gives the employer five days to pay the wages earned and unpaid. We see nothing unreasonable in this provision, for the right of the employé to quit work, where there is no contract for a definite period, is as undeniable as the right of the employer to discharge his employé. Respondent cites a very ancient authority not inappropriate:

"Thou shalt not oppress an hired servant that is poor and needy, whether he be of thy brethren, or of thy strangers that are in thy land within thy gates.

"At his day shalt thou give him his hire, neither shall the sun go down upon it; for he is poor, and setteth his heart upon it; lest he cry against thee unto the Lord and it be sin unto thee." Deuteronomy xxiv, 14, 15.

[2-4] We can discover no ground for holding the act to be violative of any provision of our Constitution, or that it violated the Fourteenth Amendment of the national Constitution.

The judgment is therefore affirmed.

We concur: HART, J.; BURNETT, J.

---

(37 Cal. App. 147)

## VENTURA MFG. & IMPLEMENT CO. v. WARFIELD. (Civ. 1808.)

(District Court of Appeal, Third District, California. May 3, 1918. Rehearing Denied by Supreme Court July 2, 1918.)

1. SALES ⟹441(3)—BREACH OF WARRANTY—SUFFICIENCY OF EVIDENCE.

In action on note given for part of price of gasoline tractor, evidence *held* to show tractor delivered to defendant failed to do work for which such a machine is intended.

2. APPEAL AND ERROR ⟹999(1)—REVIEW—CONCLUSIVENESS OF RECORD.

Credibility of witnesses, or weight to be attached to testimony, being entirely for the jury, the appellate court may accept the bare record as conclusive on all questions of fact on which there is testimony in the record not inherently untruthful or improbable.

3. SALES ⟹181(13) — ACTION OF AGENT TO CONSUMMATE SALE — SUFFICIENCY OF EVIDENCE.

In action on note for price of gasoline tractor, evidence *held* to justify finding that everything agent who induced sale did and said with respect to transaction, from time he procured order until defendant finally notified seller of rescission and returned machine, was done to consummate uncompleted sale.

4. PRINCIPAL AND AGENT ⟹123(7)—AUTHORITY—SUFFICIENCY OF EVIDENCE.

In action on note for balance of price of tractor, evidence *held* to show that agent who negotiated sale was general sales agent of seller, and had authority to make any arrangements his judgment might dictate, as to waive conditions of original contract and written notice of unsatisfactory operation.

5. SALES ⟹181(11)—BREACH OF WARRANTY—ACCEPTANCE—SUFFICIENCY OF EVIDENCE.

In action on note for balance of price of tractor, evidence *held* to sustain finding engine never measured up to warranted test, that defendant never unconditionally accepted it, and that whole transaction was subject of controversy founded on repeated complaints.

6. SALES ⟹284(1, 2)—BREACH OF WARRANTY—GASOLINE TRACTOR.

Where gasoline tractor sold failed to come up to standard for efficiency and durability represented and warranted by seller, there was breach of warranty.

7. SALES ⟹441(1)—WAIVER OF CONDITION—SUFFICIENCY OF EVIDENCE.

In action on note for balance of price of gasoline tractor, evidence *held* to warrant finding that agent who negotiated sale, authorized to do so, waived condition specified in written order as to time within which defendant was to be restricted in trying out or testing.

8. SALES ⟹168(2)—TIME FOR TESTING.

Where written order for tractor did not involve unconditional sale, and engine differed in material particulars from that ordered, and was delivered when satisfactory test was impracticable, buyer was entitled to a reasonable time beyond that prescribed in order to test the engine.

9. SALES ⟹445(4)—BREACH OF WARRANTY—QUESTION FOR JURY.

In action on note for balance of price of tractor, question of breach of warranty, on conflicting evidence, is for the jury.

10. SALES ⟹285(4) — REQUIREMENT OF NOTICE—WAIVER.

Where there is requirement, in contract for sale of gasoline tractor, that notice of failure to work properly must be given within specified time, notice is waived by continued efforts of seller's agents, including one who made sale, to make machine work, after expiration of time limited.

11. PRINCIPAL AND AGENT ⟹103(1) — AUTHORITY OF SELLER'S AGENT.

Authority of general agent who negotiates sale of gasoline tractor extends to all such acts as are properly connected with sale and delivery, and does not stop when buyer first takes machine on trial, but continues until sale is completed or machine returned.

12. SALES ⟹285(4)—REQUIREMENT OF NOTICE—WAIVER.

Though contract for sale of tractor stipulates purchaser shall give written notice of defects, and provides that failure shall constitute waiver of breach of warranty, if agent who negotiates sale is present at trial of machine, and has knowledge of failure of performance, provision as to notice is waived.

13. EVIDENCE ⟹460(11)—ACTION ON NOTE.

Where order for tractor did not contain detailed description, in action on note for balance of price, it was proper to show defendant was induced, by representations contained in seller's catalogue and a photograph of the machine to enter into the agreement.

14. SALES ⊂255—ASSUMPTION OF WARRANTY BY AGENT.

Company acting as general distributing agent of company manufacturing gasoline tractors necessarily assumed all burdens and conditions of manufacturing company's warranty; the contract, as to the particular tractor in litigation, being between distributing company and buyer.

15. SALES ⊂437(4) — ACTION FOR PRICE — PLEADING—THEORY OF CASE.

In action on note for balance of price of tractor, though defendant did not plead waiver of condition in warranty as to time of trying machine, case was not tried erroneously on theory of such waiver, where all facts of transaction, as set out in answer and cross-complaint, pointed to waiver.

Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Action by the Ventura Manufacturing & Implement Company against G. A. Warfield. From judgment for defendant, plaintiff appeals. Affirmed.

George R. Freeman, of Willow, and W. H. Barnes and Orr & Gardner, all of Ventura, for appellant. Duard F. Geis, of Willow, and B. A. Herrington, of San Jose, for respondent.

HART, J. Plaintiff commenced the action to recover the sum of $1,967.50, and interest thereon, due on a promissory note, dated September 24, 1912, in favor of plaintiff and signed by defendant. In this note it was set forth that it was given in consideration of the sale by plaintiff to defendant of a "30 H. P. Pioneer Engine." The case was tried before a jury, and judgment was entered in accordance with their verdict, as follows: That defendant was entitled to recover from the plaintiff the sum of $1,500, paid by him on account of the purchase of the engine, together with interest thereon; that defendant was entitled to have said promissory note surrendered and canceled as though fully paid; and that plaintiff is entitled to the possession of said tractor. From said judgment plaintiff appeals.

The defendant interposed an answer to the complaint and also filed a cross-complaint and set up a counterclaim. The defendant by answer denies the vital averments of the complaint and sets up an affirmative defense, based upon alleged false representations by the plaintiff with respect to the character of the engine for capacity and durability, and relies upon the alleged violation by plaintiff of the terms of the written warranty attached to and a part of the contract of sale. The cross-complaint repeats the allegations of the answer respecting the alleged false representations by the plaintiff and charges that solely by the representations so made the defendant was induced to enter into the contract for the purchase of the tractor; charges that the engine which was delivered to the defendant by the plaintiff was not the engine which he agreed to buy and which the plaintiff agreed to deliver to him; alleges that the plaintiff violated the terms of its warranty, and that, upon learning of the difference in the engine delivered and the engine which he purchased and the plaintiff promised to provide him with, and of the defects of the engine delivered, the defendant immediately notified plaintiff thereof and rescinded the contract and demanded of the plaintiff a return of the cash money paid on account of the sale and the cancellation of the note given by him to the plaintiff for the balance of the purchase price.

The foregoing, while only a brief statement of the allegations of the pleadings filed by the defendant, is sufficient for present purposes and to show the general issues upon which the cause was tried and upon which it is submitted here by this appeal.

The facts are, briefly, these: Some time in the month of May, 1912, one C. W. Horstman, a salesman for plaintiff, solicited defendant to purchase a tractor and exhibited to him certain pamphlets and catalogues describing gas engines and also photographs thereof. The negotiations led to an agreement by the defendant, on the 22d day of June, 1912, to purchase a certain engine, a description and a photograph of which were contained in the pamphlets and catalogues referred to. Thereupon, and on the day named, the following order or agreement was signed by the defendant and delivered to plaintiff through its salesman, Horstman:

"Order for Gas and Gasoline Engine:

"To Ventura Mfg. & Imp. Co. Town Ventura, State Calif.

"The undersigned of Princeton Post Office, county of Colusa, state of Calif. Rural Route No. ———, hereby purchases of you, subject to all conditions of agreement and warranty printed on back of this order and made a part hereof, to be shipped to G. A. Warfield Ranch, Marysville, Calif.—'One 30 H. P. Pioneer'—Pioneer Tractor gas or gasoline engine (reg. size of pulley), complete including necessary fixtures, and to settle for said engine by payment of (3,467.50) thirty-four hundred sixty-seven $^{50}/_{100}$ dollars as follows: Fifteen hundred cash on delivery of engine, nineteen hundred sixty-seven $^{50}/_{100}$ note due Nov. 15, 1912. It is expressly agreed that this order shall not be countermanded, and that said engine shall remain and be held by the undersigned as your exclusive property until purchase money shall have been paid in full. It is expressly agreed that the engine shall be and remain personal property in what so ever manner it may be annexed to realty.

"Dated the 22d day of June, 1912. Sold by C. W. Horstman. [Signed] G. A. Warfield."

At one end of said order is written:

"Note to bear interest at seven per cent. after maturity. Tractor to have 60 gal. radiator and extension and swinging hitch."

The warranty is in the following language:

"Pioneer Tractor Co. (Incorporated) warrants the within described engine to do good work, to be well made, of good materials, and durable if used with the proper care. If upon trial, with proper care, the engine fails to work well, the purchaser shall immediately give writ-

ten notice to Pioneer Tractor Co., Winona, and to the agent from whom it was purchased, stating wherein the engine fails, shall allow a reasonable time for a competent man to be sent to put it in order, and render friendly assistance to operate it. If the engine cannot then be made to work well, the purchaser shall immediately return it to said agent, and the price paid shall be refunded which shall constitute a settlement in full of the transaction.

"Use of the engine after three days, or failure to give written notice to said company and its agent, or failure to return the engine as above specified, shall operate as an acceptance of it and a fulfillment of this warranty. No agent has power to change the contract of warranty in any respect and the within order can be canceled only in writing from said company's Winona office.

"This express warranty excludes all implied warranties and said company shall in no event be liable for breach of warranty in an amount exceeding the purchase price of the engine. If within ninety days' time any part proves defective, a new part will be furnished on receipt of part showing defect."

On the 2d day of September, 1912, a tractor was delivered to the defendant at his ranch by Horstman. This, as the defendant testified, was after the harvesting season had ended, and when there was practically no opportunity for testing out the tractor as fully as was desirable and necessary.

There is, in point of fact, no dispute as to the proposition that there were material differences in mechanical construction between the engine purchased by the defendant and which the plaintiff agreed to furnish him with and the engine actually delivered. But, for the purpose not only of showing the differences referred to but that from the time, approximately, that the engine was received by the defendant, he was dissatisfied therewith and protested, as he continued thereafter to protest, against accepting the tractor upon the ground that it was not the machine he had bargained for, we will here present a brief statement of his testimony with regard to the transaction, as follows: He stated:

That the engine delivered was not the character of engine ordered by him as represented by the diagram and catalogue exhibited to him by Horstman. That the radiator held 24½ gallons of water instead of 60. That the engine delivered had no muffler over the exhaust pipes, there being nothing "to protect ripe grain from being burned from the cinders from the exhaust. The sparks shot from the exhaust free and clear. The main oiling system in the main pump was supposed to be in the cab, in front of the operator of the engine, in plain sight at all times, and upon examination I found this oiler was down under the hood, alongside of the cylinders and in grease where it was impossible to see it without stopping the engine, raising up the hood, and wiping off the grease, and using some artificial light to see if the oil was running. In the engine ordered this particular oil was to be in the cab in sight of the operator at all times, so that he could know that the main bearings were getting oil at all times. * * * The gears were supposed to be entirely inclosed in a case to exclude all dust from getting in the oil and among the gears, and upon examination I found there was an opening alongside of the gears on both sides, under the hood, where the dust from the fan, driving past the cylinders, would finally end up in this case where these gears revolved, and did not give any protection to speak of from any dust flying at all; the fan drove the dust back to the gears. * * * This was represented not to be the case in the engine ordered—that they were to be inclosed, all incased, and to be protected entirely from the dust. * * * The engine was to have a Kingston carburetor, and on examination we found there was a Bennett carburetor. * * * The fan for cooling air was to be a gear-driven fan, was not to have any belts at all, but to connect direct with the engine and drive with gears. It was described in the catalogue as a direct, gear-driven fan, and when the engine arrived it was found to have a belt drive with spring tightener. * * * There was an apparent defect in the wheels. The spokes were loose in the rim."

Accompanying Horstman, when the engine was delivered to defendant, was a Mr. Muir, an expert sent by the Pioneer Tractor Company, to demonstrate it. On the next day, Muir, driving the tractor, took it out into a field with some plows and operated it for two hours or more, and it was then placed in a shed on defendant's premises. At the time of the delivery to defendant, he called the attention of Horstman to the differences between the engine he received and the one he expected to receive. As to the radiator, Horstman stated that he was confident it would keep the engine cool, but that "if it didn't they would put on a larger radiator. * * * He said the only way to find out was to try it out in harvest." The witness stated:

"I told him I didn't want it the way it was. It was not the engine I had picked out on the catalogue, and I didn't think it would work at all, and I wouldn't take it under those conditions. * * * They put it in the shed on the ranch and left it there."

There is evidence that Horstman and the plaintiff attempted to reason with defendant and show him that by proper handling the tractor would do the work and so come up to the warranted test as to capacity and durability, and that thus the defendant was persuaded to give it a further trial. Accordingly, on the 24th day of September, 1912, defendant made a cash payment of $1,500 and executed and delivered to Horstman the note sued upon; it being made payable on August 1, 1913, which would be after the harvest season of 1913. After the trial made by Muir in the early part of September, no attempt was made to use the tractor until November, when defendant took it out for the purpose of plowing. He testified:

"After I got the engine started, I had difficulty in keeping it running. The ignition did not seem to work well, and the fan gave me considerable trouble. * * * The shift gears would not work well. I worked with it several days, plowing, or trying to plow, and finally parts of it began to go to pieces. The fans broke. I had to go down and get a fan belt in town, and the magneto went out of commission entirely from no cause that I could see, and I took the magneto down to San Francisco and got another one. Then I got an engineer to help me on the engine, and the two of us worked with it and fought it, and we got the engine finally to go a little piece. * * * Then the engine broke down. * * * It took me a week to plow a piece that should have been plowed in two days. The fan belt proposition

went to pieces, the fan belt and the bearings that run this shaft. * * * We took those to Colusa and had them rebabbitted. * * * Then the wheels began to develop defective. The spokes were loose, and that caused a crystallization in the rim, and each spoke in the rim split out clear from the spoke to the outside of the rim, and when we brought the engine in it had something like 24 or 25 cracks across the rim. * * * We took it back to the shed, and on the way home the fan belt and gears went all to pieces."

Some rims were shipped to him by plaintiff and were put on the tractor by a man representing plaintiff, who also rebabbitted the bearings on the fan shaft.

In November, 1913, defendant attempted to harrow with the tractor, but there was a recurrence of the troubles he had theretofore had; the spokes getting loose, making it necessary to get new ones, the connecting rods not staying tight, the fan belt breaking, the shift gears giving trouble, the engine heating, and the magneto giving trouble so that he ran on the battery. He finished his harrowing with mules and put the tractor back in the shed. On the 14th of May, 1914, he started to do some grading, and on the way to the field with the tractor the clutch broke. He sent to plaintiff for a new disc, which came on May 25th. He still had trouble with the engine, and, after doing about one-third of the grading, he discontinued the work. In June he hired an engineer, and they worked 10 or 15 days on the engine, and he then hired another engineer to inspect it. They commenced harvesting, and, on the third day, "everything went to pieces, and we opened it up, and the crank shaft and connecting rods and everything were in a pile." He telegraphed plaintiff for another crank shaft, which came to him after a long delay and after he had tried to have the old one welded in Sacramento. He hired an expert mechanic to set the crank shaft, and the engine was put back "in practically as good condition as it could be put." The next day the engine commenced to heat, and sometimes two-thirds of the day was lost waiting for the engine to get cool. The harvesting, which lasted from June 9th to July 23d, was not successful; the witness stating that he probably lost half of each day on account of the engine. Then defendant tried to use the engine for pumping water for irrigating an orchard, but could not keep it cool, and after two or three days he took it back to the shed. On the way there, while running on a county road, the front axle broke. He had this repaired and then placed the tractor in the same place in the shed where it had been left by Horstman at the time of its delivery to defendant.

Expert testimony introduced by defendant tended to show that the construction of the engine was not proper in certain specified particulars, and the engineer sent by plaintiff to work on the tractor stated, on cross-examination, that "it was essential that the fan construction should be improved and changed to make it of any practical value," and that the mechanical construction of the engine should be changed.

Certain correspondence was introduced in evidence. The first letter in the record is dated Ventura, November 20, 1912, written by plaintiff to defendant, and refers to a letter theretofore received from defendant in regard to "spikes for wheels."

On December 26, 1912, defendant wrote plaintiff as follows:

"The engine (Pioneer 30) which I purchased from you by contract has proved to be far from satisfactory, and along with that your company, through Mr. Charles Horstman, have misrepresented things to me. The engine is not built for the work intended or for any durability. It is now out of commission. I have asked you people to send your mechanic, but no answer; have asked you to send extras from your shops at Ventura, instead I am compelled to pay express on extras from Ind., not getting what I asked for, have to have the extras made here at the foundry or any other place at a great expense. Therefore, according to our agreement the engine is yours. I hereby cancel the payment of the note given you in payment of the engine. I ask you to send your representative here and inspect the engine, and you will find what I tell you is the truth. The engine is at your disposal. I am stuck with a contract which your engine should do but is unable to finish."

Plaintiff replied to the above letter, stating:

"We feel confident your trouble lies in the fact that you do not know how to take care of the engine properly. If you had the right kind of an engineer on the machine, there would be nothing wrong with it."

It was further stated that Mr. Horstman would call upon defendant.

On January 8, 1913, Horstman wrote to defendant:

"Have sent off several wires yesterday to get some definite line-up from the Pioneer people with regard to their decision in the broken engine wheels."

The following letter, dated January 10, 1913, was sent to defendant by plaintiff:

"We are in receipt of a letter from our Mr. Horstman stating that the wheels on the engine we sold you have cracked in several places. We at once took this matter up with the factory, advising them of the condition of the wheels, etc., and informed them that they would have to make these wheels good. The reply we received from them was that the breaking of the wheels was due to the carelessness of the engineer in not keeping the turn buckles or spokes tight, they also stated that they would furnish some extra heavy rims for this engine free of charge. * * * Mr. Horstman also reports that the other troubles you had on the engine did not amount to anything, as on all gasoline engines you may expect more or less minor troubles. * * *"

The defendant, on March 8, 1913, wrote to plaintiff a long letter, calling attention to alleged representations by Horstman regarding the engine, recapitulating particulars in which it had proven defective and demanding the return of the $1,500 paid by him and the cancellation of the note.

On March 27th, the plaintiff replied to the above letter, stating, among other things:

"When you signed the note, this was an acceptance of the engine. As for the note, it is out of our possession. You will take particular notice of the warranty on the back of the contract, which stated that 'no agent has the power to change the contract of warranty in any respect.' * * * We are well satisfied it is no fault of the engine that it was in the condition it was in."

Other correspondence followed, showing that defendant had gone to Ventura to endeavor to effect some sort of settlement, and, on September 9, 1913, defendant wrote to plaintiff again demanding the return of the money paid by him and the note, "or deliver to me an engine of equal value that will do the work fully guaranteed to my satisfaction."

The defendant explained, and the written correspondence above referred to corroborated him in that particular, that he made repeated trials of the tractor upon the solicitation and persuasion of Horstman, after in the first instance, and the several times thereafter, he notified Horstman and the plaintiff that the machine was not the one which the latter agreed to deliver to him and that the one delivered had failed, after the several trials, to meet the warranted test.

Appellant relies upon the terms of the written warranty, denies that Horstman agreed that defendant might make a trial of the engine, but insists that if he did do so his agency was not proven, and that the contract itself expressly provides that no agent shall modify its terms.

First, it is proper to observe that the transaction out of which this controversy arises was wholly between the plaintiff and the defendant, and that the assumption by the plaintiff, in its argument of the points submitted in support of this appeal, that the transaction was one between the Pioneer Tractor Company, the manufacturer of the tractor in question, and defendant, cannot be maintained. By this statement we mean to say that the verdict, which is amply supported, is conclusive upon that question. The order or agreement is addressed to the plaintiff, and the initial language thereof is:

"The undersigned (defendant) * * * hereby purchases of you, subject to all conditions of agreement and warranty printed on back of this order and made a part hereof, * * * 'one 30 H. P. Pioneer Tractor gas or gasoline engine.'"

The agreement or order further provides that:

"Said engine shall remain and be held by the undersigned (defendant) as your (plaintiff's) exclusive property until the purchase money shall have been paid."

The evidence further shows that the transaction, so far as the seller was concerned, was from its beginning to and including the time at which this action was instituted, wholly and solely, and without any interposition whatever by the Pioneer Tractor Company, conducted by the plaintiff. Moreover, the promissory note executed by the defendant for the balance of the purchase price after a cash payment by the defendant of $1,500 had been made was made to and in favor of and in the name of the plaintiff. Furthermore, the note declared upon itself states that the consideration therefor is:

"That the said Ventura Manufacturing & Implement Company has agreed and promised that upon payment of said note, principal and interest, at maturity, * * * they will sell and transfer to the undersigned (defendant), at the price of said principal and interest, the thirty H. P. Pioneer Tractor which the said Ventura Manufacturing & Implement Company has this day entrusted to the care of the undersigned."

Again, the note reads:

"It is admitted and agreed that the said property so intrusted is the property of the said Ventura Manufacturing & Implement Company, and shall remain in them until they shall make the aforesaid sale and transfer," etc.

But the contention is vigorously pressed that, assuming that the transaction was between the plaintiff and the defendant, there is no evidence showing that Horstman gave the defendant the right of any further trial of the engine for the purpose of testing its efficiency for the purposes for which it was intended and bought by the defendant than was expressly provided for in the warranty. It is further contended that, even if it had been made to appear that Horstman did allow the defendant such further trial of the engine, there is no evidence showing that he had authority to do so, and that therefore in doing so he exceeded his authority as agent and violated the provision of the warranty that:

"No agent has the power to change the contract of warranty in any respect, and the written order can be canceled only in writing from said company's Winona office."

The theory upon which the defendant sought to present the case at the trial in the court below was that, the tractor delivered not being the one which the plaintiff agreed to deliver to the defendant, the negotiations between Horstman and the defendant as to the tractor delivered constituted a new contract, and that oral testimony disclosing the terms and conditions of such contract was necessary and proper. The trial court held that the defendant's pleadings failed to set up a new contract, but relied upon the original order and warranty and therefore excluded testimony of a new contract. But we do not regard this as important in this case. The testimony, we think, very clearly shows: (1) That Horstman had the authority, as the plaintiff's sales agent, to give the defendant further opportunity to try out the engine; (2) that he did do so; (3) that the tractor delivered to the defendant failed to do the work for which such a machine is intended; (4) that it must be held that, under all the circumstances of the case the defendant duly notified the plaintiff that the tractor was a failure and would not satisfac-

torily perform the work for which it was intended.

[1] The third proposition above stated is, we think, abundantly supported by the evidence to some of which we have specially referred above. We need not, therefore, reproduce herein upon that question further or other testimony of which there is an abundance.

[2, 3] That Horstman was a sales agent of the plaintiff, and as such authorized to negotiate a sale of the tractor to the defendant, is not disputed, but in fact, admitted; and, under the state of this record, the verdict of the jury is conclusive upon the question of the extent of his authority in the negotiation of the transaction involved herein. In other words, the credibility of witnesses or the weight to be attached to the testimony being entirely a question for jury, we may therefore accept the bare record as conclusive upon all questions of fact upon which there is therein testimony not inherently untruthful or improbable; and, so viewing the record before us, we have found no reason for saying that the jury were not amply justified in finding, as from the verdict we must presume that they did find, that everything that Horstman did and said with respect to this transaction, from the time he procured from the defendant the order of June 22, 1912, for the tractor, until the defendant finally notified the plaintiff of his rescission of the contract and returned the machine to the place where the plaintiff delivered it, was done for the purpose of consummating an uncompleted sale of the tractor.

[4, 5] We may, however, refer to some of the testimony which tends strongly to show that Horstman had authority to make any arrangements with defendant that his judgment might dictate. Although the written order for the tractor was executed by the defendant and delivered by him to the plaintiff on June 22, 1912, the tractor was not delivered until the month of September of that year, which was after the end of the harvest season and at a time, when a proper test of the engine could not well be made. The cash payment was made and the note for the balance of the purchase price given at the time of the delivery of the engine; and, although the written order of June 22d expressly provided that the note should be made payable on November 15, 1912, the said note, upon the consent of Horstman, was made payable August 1, 1913, which, as is obvious, was at a time of the year when the harvesting season was well near an end. The plaintiff accepted the cash payment and the note. The extension of the time of payment of the note beyond the harvesting season of 1913 and the acceptance by the plaintiff of the new arrangement so made by Horstman are circumstances which tend in some degree to show that Horstman had general authority as a sales agent of the plaintiff, and to show further that he not only did extend the time for a trial of the tractor by the defendant, but that, as the plaintiff's agent, he had full authority to do so. But there is other testimony warranting the conclusion that Horstman, although only an agent for a special purpose, had general authority as such agent and was authorized to do all that was in his judgment required to consummate a sale of the machine to the defendant. We need not present herein an extended statement of said testimony. It is enough to say that, as seen, it was shown: That, because the engine was not the one which the plaintiff agreed to deliver—that is, it was in many important particulars different in mechanical construction from the one agreed to be delivered—the defendant objected to accepting it. That Horstman, after some reasoning with the defendant, persuaded the latter to give it a trial to see if it would not do the work which it was represented the engine bargained for would do. That prior to the month of December, 1912, the defendant did give it a trial, and that it failed to meet the test or the representations as to the engine the plaintiff agreed to deliver. That defendant, on the 26th day of December, 1912, addressed a letter to the plaintiff, stating that the engine had "proved to be far from satisfactory. * * * The engine is not built for the work intended or for any durability. It is now out of commission. I have asked you people to send your mechanic, but no answer." And in said letter asked for a cancellation of his note and return of the money paid down when he received the tractor. That Horstman, after some further reasoning with the defendant, induced the latter to give it a further trial. That from the very beginning of the repeated trials by defendant, parts of the engine broke or proved to be defective or incapable of the performance of their respective mechanical functions. That, from time to time, as the breakages occurred, or as the machine in certain particulars was upon repeated tests shown to be so defectively constructed as to render it inefficient for the purpose for which it was intended, the defendant notified the plaintiff thereof, insisted that the engine was a failure, and refused to accept it. That the plaintiff and (on one occasion) the manufacturer supplied the broken parts of the engine with new parts. That the plaintiff sent an expert to the ranch of the defendant to assist in giving the engine a proper test. That Horstman on numerous occasions urged defendant to give the machine a fair and further trial before refusing to accept the engine. In brief, the jury were well within the testimony adduced in finding, as their verdict implies that they did find, that the engine never at any time measured up to the warranted test; that the defendant never at any time

unconditionally accepted it; that the whole transaction was at all times, after the engine was delivered to defendant, the subject of controversy between the latter on the one side and Horstman and the plaintiff on the other, founded upon repeated complaints by the defendant of the unsatisfactory work of the engine and his refusal to accept the machine.

[6-8] It will not, of course, be disputed that the failure of the engine to come up to the standard for efficiency and durability represented and warranted by the plaintiff constituted a breach of the warranty. That it did wholly fail to come up to that standard, the evidence strongly tends to show. Nor will it be doubted that there is evidence warranting the implied finding that Horstman was a general sales agent of the plaintiff, vested with full authority to do whatever was reasonably requisite to effect a sale of the machine to the defendant; that, as such agent, he was authorized to waive any of the conditions of the original contract and waive written notice by the defendant of the defective and unsatisfactory operation of the tractor; and that he did, if, indeed, the plaintiff itself did not, waive the condition specified in the written order as to the time within which the defendant was to be restricted in trying out or testing the efficiency of the engine. In fact, as before suggested, the written order did not involve an unconditional agreement of sale, and the fact that the engine delivered was in material particulars different in mechanical construction from the one which the plaintiff agreed to deliver, and the further fact that it was delivered, through no fault of the defendant, at a season of the year when a satisfactory test of the tractor was impracticable, themselves necessarily operated to entitle the defendant to a reasonable time beyond that prescribed in the order, and under conditions more favorable for that purpose than existed at the time of delivery, to put the engine to a proper test.

A case in its facts substantially like this is that of Springfield Engine & Thresher Co. v. Kennedy, 7 Ind. App. 502, 34 N. E. 856. It was there contended that the findings did not show that the agent of the plaintiff who sold a steam separator to the defendant was the general agent of the plaintiff, and therefore was without authority to waive conditions in the contract of warranty. The court, replying to that contention, said:

"Mitchner was the agent of the plaintiff to make sales of its machinery, and at the time he received the notice of the defects in the separator, and made the attempt to remedy the same, the findings show that he was the authorized agent of the plaintiff. *All that he did, and caused to be done, in relation to remedying the defects, and the promises made by him, were in the line of perfecting and completing the sale.* (Italics ours.) The contract made, in the first instance, was not an unconditional contract for the sale of the machine. The defendants had the right to return it if unsatisfactory. It is a familiar rule that notice to an agent is notice to the principal of any matter that is within the scope of the agency. In Railway v. Ruby, 38 Ind. 294 [10 Am. Rep. 111], it was held that 'notice to an agent of a corporation, relating to any matter of which he has the management and control, is notice to the corporation.' This rule is peculiarly applicable to foreign corporations doing business in this state. Insurance Co. v. Hinesley, 75 Ind. 1; Insurance Co. v. Crutchfield, 108 Ind. 518, 9 N. E. 458. The terms 'general agent' and 'special agent' are relative. An agent may have power to act for his principal in all matters. He is then strictly a general agent. He may have power to act for him in particular matters. He is then a special agent. But within the scope of such particular matters his powers may be general and with reference thereto he is a general agent. Mitchner was authorized to make sales of plaintiff's machinery in certain localities. His powers for that purpose were general, and with reference thereto he was a general agent. As such, he received notice of the defects in said machinery, and notice to him was notice to the principal. His subsequent acts and promises were in the line of perfecting the sale. We think he had the right to waive the written notice required by the contract and of the other stipulations therein contained which were for the benefit of appellant. * * * We find no reversible error in the record. Judgment affirmed, at costs of appellant."

See, also, Peterson v. Walter A. Wood Mowing & Reaping Machine Co., 97 Iowa, 148, 66 N. W. 96, 59 Am. St. Rep. 399; D. M. Osborne & Co. v. Backer, 81 Iowa, 375, 47 N. W. 70; Hull v. Prairie Queen Mfg. Co., 92 Kan. 538, 141 Pac. 592; Pitsinowsky v. Beardsley, 37 Iowa, 9; First Nat. Bank v. Dutcher, 128 Iowa, 413, 104 N. W. 497, 1 L. R. A. (N. S.) 142; Harrison v. Russell, 12 Idaho, 624, 87 Pac. 784; Sandwich Mfg. Co. v. Feary, 22 Neb. 53, 33 N. W. 485; McCormick Harvesting Machine Co. v. Dodkins, 73 S. W. 1129, 24 Ky. Law Rep. 2306; Luitweiler P. E. Co. v. Ukiah W. & I. Co., 16 Cal. App. 198, 116 Pac. 707, 712.

[9-12] Summarizing the conclusions announced in the above cases, whose facts are quite similar to those of the case at bar, they are: (1) That the question of a breach of warranty such as the one involved in this case is, upon conflicting evidence, one for the jury. (2) That where, in such case, there is a requirement in the contract that notice of the failure of the machine to work properly must be given within a specified time after its receipt, such notice is waived by the continued and persistent efforts of the seller's agents, including the one who made the sale, to make the machine work after the expiration of the time limited. (3) That, under such facts as are present here, a sales agent's authority extends to all such acts as are properly connected with the sale and delivery of the machine; hence his authority does not stop when the proposed vendee first takes the machine on trial, but continues until the sale should either be completed or the machine returned without any sale being made. (4) That, although the contract of sale stipulates that the purchaser shall give written notice to the seller of any defects in the machinery purchased, and in effect

provides that the failure to give such notice shall constitute a waiver of any breach of warranty, if the agent of the seller is present at the trial of the machine, and in this manner has knowledge that the machine is not performing according to warranty, the provision as to notice is waived.

As above stated, the facts of this case bring it well within the doctrines above enunciated. There is therefore no ground for the contention of the plaintiff that the acts of Horstman with reference to the transaction after the execution of the order by defendant had the effect of modifying or altering the terms of said order or of introducing a new term therein.

[13] It is claimed that the ruling allowing in evidence the catalogues and photographs, published by the plaintiff, showing the character and mechanism of the tractor referred to in the written order and which were exhibited to the defendant by Horstman when he first opened negotiations for a sale of the engine to defendant, was erroneous and prejudicial. The point is devoid of merit. The written order does not contain a detailed description of the machine bargained for in the first instance, and it was proper to show that the defendant was induced by the representations contained in the plaintiff's catalogue and photograph of the machine to enter into the agreement. Luitweiler, etc., Co. v. Ukiah, etc., Co., 16 Cal. App. 198, 210, 116 Pac. 707, 712.

There are other rulings as to evidence admitted against objection by the plaintiff which it is claimed involved error and seriously affected plaintiff's rights. We will not give these special notice herein. It is sufficient to say that we have carefully considered them and are convinced that they could not have had the effect of damaging the plaintiff's rights, even if it be true that some were without legal justification.

It is further complained that the court committed serious error in some of the instructions submitted for the jury's guidance in considering the evidence. The instructions referred to, it is insisted, erroneously stated and assumed: (1) That the plaintiff warranted the engine, whereas, so it is contended, the warranty is the warranty of the Pioneer Tractor Company, the maker of the engine. (2) That the written warranty could be waived by the plaintiff. (3) That the jury were authorized to consider any evidence tending to show that after difficulties arose in the operation of the engine the agent of plaintiff induced the defendant to make further trial thereof after the time limited by the warranty.

[14] All the above propositions have already been considered and disposed of herein. It may be added, however, referring to the first of the stated objections under this head, that the warranty of the Pioneer Company is, in the very nature of the situation as disclosed by the record, the warranty of the plaintiff. The latter, as the general distributing agent in California of the former, has necessarily assumed as such agent all the burdens and conditions of the warranty; this being shown by the undisputed fact that the contract as to the particular tractor in question is between the plaintiff and the defendant and not between the Pioneer Company and the defendant.

[15] As to the point that the defendant does not plead a waiver, and hence the case was tried upon an erroneous theory, the reply is that, while neither in the answer nor cross-complaint is there a waiver specifically pleaded, all the facts of the transaction, from its inception to its finish, are set out in both those pleadings of the defendant, and from them the implication irresistibly follows that there was a waiver by the plaintiff of the condition in the warranty as to the time for trying out the machine.

We have found no reason for disturbing the result arrived at in the court below, and the judgment is, accordingly, affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

---

37 Cal. App. 449

## DOTY v. CALIFORNIA RICE MILLING CO. et al. (Civ. 1840.)

(District Court of Appeal, Third District, California. June 5, 1918. Rehearing Denied by Supreme Court Aug. 1, 1918.)

1. VENDOR AND PURCHASER ⟸13 — CONTRACT—CONSIDERATION.

Sale of land on agreement to convey an interest in a corporation to the value of $5,000, in its fully paid-up stock, to be 100 shares, with a par value $100 per share, based on an incorporation of $100,000, is not for $5,000 to be paid in money.

2. VENDOR AND PURCHASER ⟸267—VENDOR'S LIEN—PAYMENT OF PRICE.

Civ. Code, § 3046, giving a vendor's lien for so much of price as remains unpaid, does not avail a vendor, where the price is shares of stock, and a certificate therefor, issued in his name and under the agreement, was put in escrow as security for his paying off the incumbrance on land; he thereby being paid the price.

3. VENDOR AND PURCHASER ⟸267 — VENDOR'S LIEN—RIGHT TO LIEN.

Where sale of land is for shares of stock in corporation, certificate for which is issued to vendor and put in escrow as security for his discharging incumbrances, no right to vendor's lien inures to him because of corporation selling its property to another corporation for some of its stock, certificates for part of which are likewise issued to him and placed in escrow, all with his consent.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by W. M. Doty against the California Rice Milling Company and others. Judgment for plaintiff, and defendant California Rice Mills, Incorporated, appeals. Reversed.

See, also, 174 Pac. 396.

---

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Norman A. Eisner and Cushing & Cushing, all of San Francisco, and George F. Jones, of Oroville, for appellant. W. H. Carlin, of Marysville, for respondent.

CHIPMAN, P. J. This is an action to enforce a vendor's lien upon certain real estate situated in the town of Biggs, Butte county. It is alleged in the complaint: That on November 27, 1912, plaintiff executed and delivered to California Fruit Canners' Association, a corporation, a mortgage upon said real property to secure the payment by plaintiff to said canners' association of the sum of $2,500, payable as follows: $500 on January 1, 1913; $500 December 1, 1913; $500 December 1, 1914; $500 December 1, 1915; and the remaining $500 December 1, 1916, with interest at the rate of 6 per cent. per annum, which said mortgage was duly recorded May 15, 1913. That on December 1, 1913, "plaintiff did for the price or consideration of $5,000 to be paid to him by said defendant California Rice Milling Company, grant, sell, and transfer to wit the above-described real property"; that said Rice Milling Company was incorporated on September 11, 1913, with a capital stock of $100,000, divided into 1,000 shares and that at the time of the execution and delivery of said deed the said capital stock of said defendant California Rice Milling Company was reasonably worth $50 per share; "and it was then and there agreed by and between plaintiff and said defendant California Rice Milling Company that plaintiff should be paid the selling price of said lands in said sum of $5,000 by said defendant California Rice Milling Company, by the issuance by it to plaintiff of 100 shares of its said capital stock aforesaid." That at the time of the execution of said deed there was still due and unpaid on said mortgage to said canners' association the sum of $2,000; "and it was understood and agreed by and between plaintiff and said defendant California Rice Milling Company that a certificate of the capital stock of the corporation should be issued in the name of plaintiff for 100 shares as aforesaid, and deposited with Sacramento Valley Bank at Biggs, Butte county, Cal., to be by said bank retained and held until the final payment by plaintiff of all moneys secured by said mortgage aforesaid, whereupon said stock was to be delivered over to plaintiff; and said defendant California Rice Milling Company did forthwith, on or about said 1st day of December, 1913, cause to be issued in the name of plaintiff its certificate No. 7 for 100 shares of its said capital stock, and did place the same in and with said Sacramento Valley Bank, which received the same, all in accordance with said agreement aforesaid." That thereafter and until the 12th day of November, 1914, plaintiff duly performed all acts and conditions on his part to be performed and paid installments upon said mortgage required by him to be paid up to and including said 12th day of November, 1914, and "that up to said 12th day of November, 1914, the capital stock of said defendant California Rice Milling Company was and continued to be of the same reasonable value of $50 per share." That on said last-named date the said Rice Milling Company transferred all of said real property, together with all of its property of every kind and nature, to the defendant California Rice Mills, Incorporated, "and thereby said defendant California Rice Mills, Incorporated, received, absorbed, gobbled up, and gathered to itself all of the property of said defendant California Rice Milling Company, and thereby rendered the capital stock of said California Rice Milling Company, including that issued to plaintiff as aforesaid, and still in said Sacramento Valley Bank, utterly worthless and of no value whatsoever, and all of said stock has ever since continued to be, and still is, wholly worthless and valueless." That at the time of said transfer to said defendant California Rice Mills, Incorporated, defendant "had full knowledge of plaintiff's rights in and to said real property, and of all the matters and things in the first eight paragraphs in this complaint set forth" referring to the foregoing averments.

It is then alleged that defendant California Rice Mills, Incorporated, was incorporated on November 6, 1914, with a capital stock at and since its incorporation of $250,000, divided into 2,500 shares, and, after receiving said transfer of said property on November 16, 1914, defendant issued its certificate No. 6 for 100 shares of its capital stock to plaintiff, "and sent the same to said Sacramento Valley Bank for the purpose, as plaintiff is informed, believes, and therefore alleges, of having the same substituted in the place and stead of said 100 shares of stock of said California Rice Milling Company, placed there as aforesaid for this plaintiff under the terms and conditions heretofore in this complaint set forth." That plaintiff has at all times declined to accept the said substitution of said 100 shares of said Rice Mills, Incorporated, in lieu of said 100 shares of said defendant Rice Milling Company, "and never consented in any way to or approved of said transfer of property from said California Rice Milling Company, to said California Rice Mills, Incorporated." That both of said certificates still "remain in charge of said bank, and plaintiff has never received any thereof." That since the execution of said deed by plaintiff on December 1, 1913, plaintiff has performed all covenants and agreements undertaken by him to be performed in connection with all the matters in said complaint set forth, and he has made all payments to said California Fruit Canners' Association which have thus far become due, "excepting only the payment falling due on the 1st day of December, 1914,

and as to that payment he has, by arrangement with said California Fruit Canners' Association, obtained forbearance and extension until such reasonable time as he can adjust his affairs, and meet and pay the same, and he is now ready, willing, and able to pay all moneys now due and unpaid upon said mortgage indebtedness, as well as all future payments required to be paid upon the same up to and including the last payment becoming due and payable as aforesaid, on the 1st day of December, 1916." (The complaint was filed April 15, 1915.)

It is further alleged, on information and belief, that since November 12, 1914, defendant Rice Mills, Incorporated, "has become and now is insolvent, its business and affairs in process of liquidation, and all of its capital stock, including that placed as aforesaid in and with said Sacramento Valley Bank utterly worthless and of no value whatsoever." It is further alleged that plaintiff has at no time ever been a stockholder of, owned any stock in, or had anything to do with the management of either of said corporations, and that "plaintiff has received nothing whatsoever for his said transfer of said lands and premises in this complaint described, and the whole consideration therefor in the said sum of $5,000 still remains unpaid, and at all times since said transfer has remained, and still remains, unsecured, and the whole thereof will become due and payable to plaintiff at and upon the full and final payment of said mortgage indebtedness to said California Fruit Canners' Association aforesaid."

The prayer is for a vendor's lien upon all the lands and premises in the complaint described, "together with their improvements and appurtenances as security for the payment to him of the said selling price of said lands and premises in said sum of $5,000, together with interest thereon at the rate of 7 per cent. per annum since the 1st day of December, 1913, and for costs of suit," and that after said lien has been decreed, the same may be enforced by foreclosure and sale of said premises, "and the proceeds of said sale be applied towards the payment of the amount found due and unpaid to plaintiff and secured by said lien, together with interest, expenses of sale, and costs of suit; that said certificates of stock in said Sacramento Valley Bank, as aforesaid, be ordered returned to the respective defendants, causing the issuance of same; and for such other and further relief as to the court may seem meet and agreeable to equity."

A general demurrer to the complaint by the Rice Mills, Incorporated, was overruled, and it answered generally and specifically, and also by cross-complaint. Briefly stated, it denied that plaintiff conveyed the property upon any consideration other than 100 shares of the capital stock of the California Rice Milling Company, which was duly issued to respondent, and alleges that the transfer of the property of that company to appellant was upon valuable and adequate consideration, and that the value of the stock of that company was not in any way diminished by reason of the transfer to the Rice Mills, Incorporated. As separate defenses, alleged that it is the purchaser of the property for value and without notice of any claim of plaintiff; that plaintiff executed to appellant a quitclaim deed for the property, and that plaintiff agreed in writing to accept stock of this defendant in lieu of the stock of the California Rice Milling Company, which stock was duly issued by this defendant.

In an amended and supplemental cross-complaint, this defendant alleged that plaintiff agreed to convey the property free of incumbrances, and that, notwithstanding plaintiff had mortgaged the property and by reason of plaintiff's failure to pay the same and in order to prevent a foreclosure, this defendant was required to pay plaintiff's mortgage. The prayer is that plaintiff take nothing by this complaint, and that defendant recover the mortgage payments made by it.

The lower court granted judgment for plaintiff, fixing a vendor's lien upon the property to the amount of $4,795, being the principal, $5,000, and interest from date of conveyance, less the mortgage payment, $1,103.29, made by this defendant. The judgment also ran against "the defendants W. J. Matson, George F. Braun, and Charles E. Hale, as trustees for the stockholders of California Rice Milling Company, a dissolved corporation." These defendants have also appealed from the judgment, and their appeal is brought up upon another record, Civil No. 1854. The California Rice Mills, Incorporated, is the sole appellant herein. The cause was tried by the court without a jury, and the court made findings of fact substantially as alleged in the complaint.

It is found that plaintiff did not waive his right of a vendor's lien upon said property, but that on September 2, 1913, he executed and delivered to defendant Rice Milling Company on that day that certain agreement annexed to the answer as Exhibit A. (This is an agreement of lease by plaintiff to Charles E. Hale Company of the premises, including an agreement to sell the property to lessees or assigns at a price agreed upon, but not stated in the agreement, "free and clear from all incumbrances.") It is also found that plaintiff and said Hale Company entered into certain other agreements referred to in defendant's answer as Exhibits B and C. Exhibit B is dated September 5, 1913, and is an agreement of plaintiff, first

party, to sell said premises to said Hale Company, second party, and contains the following provision:

"And the party of the second part, * * * agrees to and with the party of the first part that the party of the second part will convey without further compensation to the party of the first part, or his assigns, an interest in the Rice Milling Company owned and controlled by the party of the second part, or its assigns, to the value of five thousand ($5,000.00) dollars, in full paid-up stock in the said Rice Milling Company of the party of the second part. Said fully paid-up stock to be one hundred (100) shares, with a par value of one hundred ($100.-00) dollars per share, based on an incorporation of one hundred thousand dollars."

Exhibit C is dated September 5, 1913, and acknowledges the receipt by plaintiff from Chas. E. Hale Company, Incorporated, of $10 "as part payment for the following described real property," the premises in question, and further states:

"The entire price to be paid for said above described real property is $5,000.00 (five thousand 00/100 dollars), and to be paid as follows: As written and stated in document called 'Agreement' and signed by Wm. M. Doty, Esq., of Biggs, California, known as party of the first part, and the Charles E. Hale Co., Inc., of San Francisco, Cal., known as the party of the second part, and which document called 'Agreement' is hereby made part of this 'Contract.' Ex. B. Title to be perfect; search of the same to be made; deed to be executed and delivered by the said Wm. M. Doty, Esq., to the Charles E. Hale Company, Inc., or its assigns on or before the second (2d) day of September, A. D. 1915, together with an abstract showing a merchantable title. Said above-described parcel of real property at time of execution of deed to be free and clear of all incumbrances of every name and kind, whatsoever. Provided, however, that the payment of amount as stated in document (called 'Agreement') is paid at said date, but if not paid on or before the said second (2d) day of September, A D. 1915, then this contract to be of no effect, and in that event the said $10.00 ten dollars to be retained by Wm. M. Doty, Esq., as liquidated damages. Time is of the essence of this contract."

It is further found that on November 12, 1914, when the Rice Milling Company conveyed said property to defendant Rice Mills, Incorporated, "the latter paid to the former a valuable consideration for the lands, premises and property conveyed." It is found that:

"Chas. E. Hale Company was in fact the predecessor and promoter of the defendant California Rice Milling Company, and on or about the 29th day of September, 1913, said Charles E. Hale Company did transfer all of said agreements referred to as Exhibits A, B, and C, respectively, to the defendant California Rice Milling Company, and the said deed executed by plaintiff on the 1st (2d) day of September, 1913, as aforesaid, followed and was in accordance with the provisions of said Exhibit B." That defendants Matson, Hale, and Braun, trustees of said dissolved corporation, defendant Rice Milling Company, assigned and transferred to the Rice Mills, Incorporated, said agreements A, B, and C, and to prevent foreclosure, said Rice Mills, Incorporated, on October 12, 1915, paid to the mortgagee, California Fruit Canners' Association, upon the debt secured by said mortgage, $500 principal and $94.79 interest, being the installment due December 1, 1914, and interest on whole amount unpaid, and on December 6, 1916, it paid another installment of $500 and interest falling due December 1, 1915, leaving the remaining installment of $500 payable December 1, 1916.

As conclusions of law the court found that plaintiff is entitled to judgment against defendants for the sum of $5,000 and interest from December 1, 1913, at 7 per cent. per annum, less the payments made by defendant Rice Mills, Incorporated, leaving the amount of the judgment at $4,795, provided if defendants, or any of them, should pay the balance due on said mortgage in the sum of $500 and interest falling due December 1, 1915, such amount shall be deducted from said sum of $4,795; that plaintiff is entitled to a vendor's lien upon said lands and premises, and that the same be foreclosed and the property sold to pay said sums, but no deficiency judgment to be docketed. Judgment followed accordingly.

Plaintiff was engaged in merchandizing in the town of Biggs, and purchased the property in question from the California Fruit Canners' Association November 30, 1912, the consideration being $2,500, of which $500 was paid about the time of purchase and the balance was to be paid in installments for which promissory notes were given of $500 each, payable as shown in the mortgage mentioned in the pleadings and findings. At the time there was an old building on the land, very much dilapidated and of little value in its then condition.

Chas. E. Hale Company, a corporation, was carrying on a wholesale grocery and bakers' supply business in San Francisco, and conceived the plan of establishing a rice milling establishment at the town of Biggs. To this end this company entered into negotiations with plaintiff to lease with the privilege of purchasing from him the said premises. These negotiations took written form in the three instruments above referred to, the first dated September 2, 1913, which was a lease with an option to purchase; the second and third were instruments dated September 5, 1913, by which plaintiff agreed to convey the property to the Charles E. Hale Company, the lease being made part of the agreements by reference. It appeared that the original proposition to plaintiff was that the Rice Milling Company should be incorporated for $50,000, on which, as a basis, plaintiff was to have stock of the par value of $5,000. It was later decided to capitalize the company at $100,000, and plaintiff was given stock of the par value of $10,-000. On September 24, 1913, pending negotiations, plaintiff wrote the Hale Company, requesting it to make the sale a cash transaction, the letter reading:

"In looking over the papers and before returning them to you, we would ask if the Chas. E. Hale Co. has passed a resolution authorizing their secretary to sign the various papers that have been submitted to us. We are not attempting to stall you at all, but it is better to get this right than to attempt to correct it later.

Also, would it be agreeable to you to make a cash price on the building should anything happen that would make it practically impossible for us to continue as we now expect to? I am suggesting this as many things may happen in twenty-four months, and submit it to you for your approval or disapproval, as the case may be."

On September 29, 1913, Hale Company replied as follows:

"Referring to your letter of the 24th inst. in which you asked if it would be agreeable to come to some agreement as to a cash price on the building, it will be quite impossible to take up a subject of this kind by correspondence."

On September 30, 1913, plaintiff wrote the Hale Company, again, stating:

"Before returning you the papers asked for by Mr. Barnard this morning, I would like to insert the following: ('or W. M. Doty is to receive cash for the above-mentioned cannery building and grounds, to the amount of $5,000.00; he to have the right of accepting either proposition'). Will you kindly instruct me to have the above inserted in the agreement over our signatures, and oblige yours very truly."

On October 1, 1913, the Hale Company replied, repeating the request made by plaintiff:

"Beg to say we cannot see our way clear to allow you this privilege at this time and consequently your request is respectfully declined. Please deliver the three documents you have in your possession to our Mr. W. E. Barnard on demand, and by so doing very much oblige, yours truly."

And on September 22, 1913, a certificate for 100 shares of the Rice Milling Company stock was issued, signed by Chas. E. Hale, president, and Geo. F. Braun, secretary, which recited that "W. M. Doty is the owner of 100 shares of the capital stock," etc. This certificate was placed in escrow in the Sacramento Valley Bank at Biggs, on or about September 25, 1913, with instructions reading as follows:

"To be indorsed by Mr. W. M. Doty, opened, to be held in escrow by bank until mortgage is paid off by W. M. Doty on cannery property, then stock to be turned over to W. M. Doty. [Signed] California Rice Milling Co., by George F. Braun, Secretary."

Plaintiff went to the bank and indorsed the certificate, leaving it there with the escrow memorandum, and, to conclude the transaction, plaintiff, on December 1, 1913, executed and delivered his deed to the Rice Milling Company of the said premises, and the milling company went into possession, and at once commenced preparing the building for its contemplated uses and the installation of the necessary rice milling machinery. The improvements of the building cost $7,551 and the testimony of Mr. Hale was that the Chas. E. Hale Company had "put in $26,000 actual money," and were responsible for the machinery purchased, making in all about $42,000 contributed by the Hale Company in establishing the plant. The Rice Milling Company operated the plant about 11 months and until about the middle of November, 1914, and, as stated in respondent's brief, "had built up and established in the vicinity a fairly thriving rice milling business."

[1] Before advancing to the second phase of plaintiff's investment, it is perhaps best that we should at this point determine whether or not the finding that respondent conveyed the property for the price of $5,000 to be paid him by the Rice Milling Company is supported by the evidence. It is challenged by appellant, whose contention is that the sole consideration for the conveyance was the shares of the Rice Milling Company's stock. It is not claimed by respondent that any false or misleading representations were made to respondent by any of the promoters of the enterprise, or that there was any fraud in any form practiced upon him, or that any advantage was taken of his ignorance of the promoters' intentions. There was no agreement or representation that the stock of the proposed company should have or continue to have any specified value. Plaintiff seems to have been informed of the object they had in view from the beginning of the negotiations. There is nothing in the language of the instruments, nor in the circumstances surrounding the transaction, nor in the conduct of the parties to warrant the conclusion that a cash payment was contemplated. Had such been the intention of the parties, the natural thing to have done would have been to so express it in some unmistakable written form. They were all men of experience in business affairs, and presumably capable of expressing their intention in simple and plain English in a matter such as this—simple and plain as it was. The enterprise was a legitimate and promising one, and was to be inaugurated and built up at respondent's place of residence and in what was known to be a rice producing neighborhood. The testimony of plaintiff and Mr. Hale was that at its inception the only property or assets the Milling Company had was the land conveyed by respondent to the Milling Company, which respondent valued at $5,000. At that time the value of the company's shares, beyond the value of the land, was purely prospective, and depended on the installation of a plant of sufficient capacity, which the Hale Company was to erect and did erect, and its successful operation. It represented, when completed, an investment, including the land, of about $50,000, and according to respondent's contention his shares represented a value of about $5,000. The value of these shares is, perhaps, not material if the transaction was as respondent contends, and as the court seems to have found, that the sale of the land was for $5,000, to be paid in money, and that the shares issued were but evidences of the company's indebtedness for that amount.

We must look to the written agreements to ascertain what the transaction was, for the negotiations ultimately found expression

in them. The provision relied upon is found in the agreement of September 5, 1913, mentioned above as Defendant's Exhibit B, which is that plaintiff will convey to Charles E. Hale Company, or assigns, the property in question, "to the value of five thousand ($5,000) dollars, in full paid-up stock in the said Rice Milling Company of the party of the second part; said fully paid-up stock to be one hundred shares with a par value of one hundred ($100) dollars per share based on incorporation of one hundred thousand dollars." We find ourselves unable to give these agreements a construction that would justify a finding that the Chas. E. Hale Company or the Rice Milling Company, as its assigns, agreed to pay plaintiff $5,000 in money for the property. Plaintiff sought by his letters of September 24th and 29th, noticed above, to have this very provision placed in the agreements as optional with him, but it was expressly refused, and he allowed the shares which had been issued in his name, pursuant to the agreement and with his indorsement of the certificate, to remain in escrow as security for his payment of the mortgage debt resting on the property, the escrow agreement being that the certificate was to remain until the "mortgage was paid off by W. M. Doty on cannery property, then stock to be turned over to W. M. Doty."

[2] Respondent's right to a vendor's lien is to be derived, if at all, from section 3046 of the Civil Code, to wit: "One who sells real property has a vendor's lien independent of possession for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer." Obviously, if the price for the property was paid by the issuance to respondent of said shares, the statute does not apply. Respondent contends that he never was a stockholder in either company; that he never was permitted to have any stock. Appellant contends that under the agreement by which respondent became entitled to 100 shares of stock for his property, he became a fully paid vendor. Authorities are cited to the effect that the agreement to issue stock for the property constituted the respondent a stockholder. For example, in Cook on Corporations, § 52, it is said:

"Any agreement by which a person shows an intention to become a stockholder is sufficient."

Again at page 28:

"Issuance of the certificates of stock is not necessary to constitute one a stockholder or owner of shares in a corporation."

In Garretson v. Pacific Crude Oil Co., 146 Cal. 184, 188, 79 Pac. 838, 840, the court said:

"The fact that the Corbin shares were not issued until after other shares had been issued is immaterial, for the Corbin stock passed upon the completion of the agreement by which the consideration was conveyed to the corporation. Nothing remained to be done but the formal issuance of the certificate, upon which the ownership of the stock did not depend."

See, also, Mitchell v. Beckman, 64 Cal. 117, 121, 28 Pac. 110.

Here, however, the stock was in fact issued. Respondent says:

"Such is the law, but that law has no bearing upon the case at bar. Here we are dealing with this corporation which so far as it was concerned, never permitted respondent to have any stock. In fact it was contemplated that he wouldn't have such stock until December 1, 1916, when the last installment of the mortgage indebtedness must be paid."

The escrow agreement was part of the transaction. Respondent was to convey the property free from incumbrance. There was a mortgage indebtedness resting upon it, and by agreement his shares were placed in escrow as security for his performance and to be delivered to him upon performance. He could at any moment have demanded and would have received the certificate upon payment of the mortgage debt. Respondent interposed no objection to this disposition of the stock, nor could he, since the use made of it was for no other purpose than to secure the performance of his obligation, and was apparently with his consent.

What was said in the case of Greenberg v. California Bituminous Rock Co., 107 Cal. 667, 40 Pac. 1053, would seem appropriate in this case:

"The corporation did not guarantee that the stock should always have a value equal to the then actual or estimated value of the land, or that, if the stock should decline in value, they should be paid in money, or have a vendor's lien as for a money consideration. It certainly could not have been the intention that these parties should sell their land to the corporation for a definite number of shares of its capital stock, and that they might leave their stock unissued in the hands of the corporation, so that if the corporation was prosperous and its stock valuable, that they would then take it, but if the corporation became involved, they might possibly escape liability as stockholders by refusing to take it upon the ground that the stock was not of the value they contracted for, but hold the land as security for its alleged value by a proceeding to foreclose a vendor's lien."

[3] We come now to the second phase of the transaction. In the early part of November, 1914, the Rice Mills, Incorporated, or second company, as it is sometimes called, was incorporated. Its articles were filed with the county clerk of the city and county of San Francisco, on November 5th, and on the 6th were filed with the secretary of state. This corporation was organized with a capital stock of $250,000 in shares of $100 each. Its objects were the same as those of the old company, and it was organized to take over its property. The corporators, with the exception of Chas. E. Hale were different persons from those who organized the old company, and the president and secretary were not the same. The old company conveyed its property and assets to the new company, the consideration being that the new company

assumed the liabilities of the old company, and in addition transferred to it 420 shares of the par value of $42,000 of the new company. On this subject Mr. Hale testified as follows, and it was not disputed:

"I explained to Mr. Doty that I thought, the new corporation being one of more financial strength, the stock in that would be much more desirable than the one in the old company, which was not so strong financially, and that the exchange looked to be an advantageous one for the stockholders in San Francisco of the old company. We wanted to present the matter to him. I had brought Mr. Glass and Mr. Lilly with me to explain the matter to him, to ask him if he looked at it in the same light, and, if he did, to enter into the agreements we had done in San Francisco, to carry out the project of having the new company, which had already bought the Pacific Rice Milling Company of San Francisco, also buy the mill at Biggs. If he felt that was a good thing to do we would like to have him join us, and we were waiting his decision of the matter, as he was stockholder in the old company, and after going over the subject several hours, and, as I recollect it, asking all the questions relating to it, he thought that it would be a good thing to do, and consented, and signed the contract, and also gave me the proxy to take back with me to San Francisco to vote in favor of it at a called meeting of the directors of the old company."

While the negotiations were pending, plaintiff executed and delivered the following agreement, referred to by Mr. Hale in his testimony:

"California Rice Milling Co., Biggs, Cal. Nov. 2d, 1914. To Whom it may Concern: Agreement in duplicate. I, W. M. Doty, of Biggs, California, agree on demand to the transfer of my one hundred shares (par value $10,000) of the California Rice Milling Company (Inc.) stock, now held in escrow by the Sacramento Valley Bank of Biggs, Cal., for an equal amount of the paid-up stock in the company of the prospective purchasers of said California Rice Milling Company. W. M. Doty. In consideration of the above transfer, the California Rice Milling Company agrees to waive all assessments and/or other liabilities prior to the transfer of stock from the old into the new company. California Rice Milling Company (Inc.) per Chas. E. Hale, Prest."

On the same day, plaintiff delivered to Mr. Hale the following proxy:

"Know all men by this writing: That I, W. M. Doty, hereby appoint Chas. E. Hale my proxy to vote in my place at a called meeting of the stockholders of the California Rice Milling Company to be held on the ——— day of November, 1914, at San Francisco, California, and at any adjourned meeting thereof according to the number of votes I would be entitled to if I were personally present, without power of substitution or revocation. This proxy shall continue in force until December 1, 1914. Witness my hand this second day of November, 1914. W. M. Doty."

By quitclaim deed of date November 13, 1914, plaintiff conveyed the said premises to California Rice Mills, Incorporated. On November 16, 1914, the new company issued, as a part of the 420 shares it had agreed to issue to the old company, certificate No. 6 to plaintiff, and as the said mortgage indebtedness of plaintiff was still unpaid in part this certificate was placed in escrow with the other certificate, and plaintiff indorsed it as he had indorsed the first certificate. The Rice Milling Company conveyed the said premises and appurtenances to the Rice Mills, Incorporated, on November 12, 1914. The new company operated the plant for 6 or 8 months, when it failed and shut down. The evidence was that the Johnson-Locke Mercantile Company, the owners of a majority of the stock of the new company, had undertaken to finance the new company, failed, and carried the Rice Mills, Incorporated, or new company, with it. It would seem unnecessary to trace the misfortunes of the new company. This company took over the property under the agreements entered into by plaintiff with the old company and its deed. The old company proceeded to wind up its affairs preparatory to dissolution, and was finally dissolved by decree of court, and presumably its obligations to creditors were satisfied; otherwise it could not have secured the decree. Admittedly, however, there was nothing left for the stockholders, and it is conceded that the stockholders in the new company are in like situation. The court found that at the time appellant acquired the property, it had full knowledge of all plaintiff's rights therein. Plaintiff never at any time, before bringing the action, claimed a vendor's lien. Defendants endeavored to show by the officers of both the old and new company that they had no knowledge or notice that such a claim was made by plaintiff. The court sustained objections to this line of inquiry erroneously, we think, for the pleadings raised the issue whether appellant was a purchaser for value without notice. The finding, however, is that appellant purchased with knowledge "of all plaintiff's rights," but does not specify what those rights were. So far as the existence of a right to a vendor's lien is concerned, the only right respondent had must be traced to the agreements already disposed of. If the finding refers to respondent's right arising out of these agreements, and means that appellant had notice of these agreements and of such rights as they carried, the finding is supported. But we have seen that no vendor's lien arose out of these agreements with the Rice Milling Company, and it seems to us equally clear that no vendor's lien arose by reason of the transfer of the Rice Mills, Incorporated, or from respondent's relation to the latter. Plaintiff gave his written consent to the transfer of his shares in the old company for an equivalent in the new company; he appointed Mr. Hale as his proxy to vote these shares in the new company; he indorsed the certificate and left it in the bank to take the place of the share he held in the old company; and he conveyed by deed to the new company his interest in the premises he now seeks to have charged with a vendor's lien. The negotiations and their culmination in making plaintiff a stockholder in the new company appear to have been free from

fraud, misrepresentation, or mistake; indeed, nothing of this sort is alleged or claimed.

Appellant contends that, if it can be said that a vendor's lien ever existed, "it has been waived time and again," and especially "by the execution of a deed by the vendor to a subpurchaser." We do not think it necessary to consider the question of waiver. We feel quite satisfied that, for the reasons above given, no vendor's lien arose out of the transaction, and that the findings of facts from which the learned trial court reached the conclusion that such a lien did arise in plaintiff's favor are without support in the evidence. We are further satisfied that the evidence does not support the finding that plaintiff sold and transferred the property to the Rice Milling Company "for the price or consideration of five thousand dollars to be paid to him by said defendant California Rice Milling Co.," and that the judgment for said sum is without support.

The judgment is therefore reversed.

We concur: HART, J.; BURNETT, J.

---

37 Cal. App. 817

## DOTY v. MATSON et al. (Civ. 1854.)

(District Court of Appeal, Third District, California. June 5, 1918.)

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by W. M. Doty against W. J. Matson and others, trustees for the stockholders and creditors of the California Rice Milling Company, a dissolved corporation, and others. Judgment for plaintiff and defendant trustees appeal. Reversed.

See, also, 174 Pac. 389.

Norman A. Eisner, of San Francisco, for appellants. W. H. Carlin, of Marysville, for respondent.

CHIPMAN, P. J. This is an appeal by defendants Matson, Braun, and Hale from the judgment made and entered in the cause, entitled W. M. Doty v. California Rice Milling Company et al., 174 Pac. 389, No. 1840, which latter case was this day decided, and the judgment therein reversed. Referring to that case, respondent says in his brief: "If our vendor's lien is sustained we satisfy it out of the property and that alone. If it is not sustained we get nothing." In considering the case No. 1840 we were constrained to hold that the plaintiff's alleged vendor's lien was not sustained, and that plaintiff was not entitled to the relief prayed for.

We see no reason for appellants taking this separate appeal upon a separate record.

The judgment is reversed, each party to pay his own costs of the appeal.

We concur: HART, J.; BURNETT, J.

---

37 Cal. App. 204

## TURMAN et al. v. ELLISON et al. (Civ. 1831.)

(District Court of Appeal, Third District, California. May 11, 1918.)

1. TRUSTS ⟨⊃44(1) — ESTABLISHMENT — EVIDENCE—REQUISITES AND SUFFICIENCY.

Since direct evidence of one witness entitled to full credit is full proof of any fact except perjury or treason, plaintiffs, seeking to establish trust, need not corroborate their own testimony.

2. TRUSTS ⟨⊃44(3) — EVIDENCE — REQUISITES AND SUFFICIENCY.

Evidence to show that, notwithstanding absolute terms of deed, the grantee holds subject to parol trust, should be clear, satisfactory, and convincing.

3. APPEAL AND ERROR ⟨⊃1009(2) — SCOPE—FINDINGS OF FACT.

The trial court's determination whether evidence to establish parol trust notwithstanding deed is absolute in terms is clear, satisfactory, and convincing will be accepted by the appellate court as conclusive when there is substantial evidence to support the trust.

4. TRUSTS ⟨⊃44(2) — PAROL TRUSTS — EVIDENCE—SUFFICIENCY.

The trial judge need not adopt as true testimony of witnesses who testified positively that an absolute deed was in fact a trust.

5. TRUSTS ⟨⊃44(2) — PAROL TRUSTS — QUESTIONS FOR JURY—SUFFICIENCY OF EVIDENCE.

Persons testifying nine years after the transaction and after all parties are dead that an absolute deed was intended to raise a trust are not necessarily unworthy of belief, but the trial judge will regard their testimony with serious misgivings.

6. TRUSTS ⟨⊃44(2) — PAROL TRUSTS — QUESTIONS FOR JURY—SUFFICIENCY OF EVIDENCE.

That a grantee devised property so as to repudiate alleged parol trust from her grantor was some evidence that no trust was raised; the presumption under Code Civ. Proc. § 1903, being that the grantee was innocent of such a wrong.

Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Suit by Meta Stephens Turman and another against John F. Ellison, as administrator with the will annexed of the estate of Martha L. Tooley, deceased, and others. From the decree rendered, plaintiffs appeal. Affirmed.

See, also, 170 Cal. 164, 149 Pac. 574, Ann. Cas. 1917B, 516.

Chas. L. Donohoe, of Willow, and Glenn West, of Lodi, for appellants. Frank Freeman and George R. Freeman, both of Willow, for respondents. W. T. Belieu, of Willow, for defendant Klemmer.

BURNETT, J. The case has been exhaustively argued, although no novel proposition of law is involved. Indeed, the legal principles so ably discussed by counsel have been frequently considered by eminent jurists throughout the country, and it would be idle to attempt in this opinion to add to the learning upon the subject. It is doubtful even if any specific statement of the facts can be of any value to the profession, and we might content ourselves with the declaration that the findings of the court are supported, and therefore the judgment must be affirmed.

However, it may not be amiss to call attention to some of the circumstances that justify the conclusion of the learned trial judge. In April, 1907, Dr. L. P. Tooley was living with his wife, Martha L. Tooley, in Willows, the county seat of Glenn county. Being ill, and believing that he would not

recover, he determined to dispose of his property. He sent for his attorney, Judge Frank Moody, and after a conference with him he decided to make a transfer of all his property, real and personal, to his said wife. Thereupon a deed absolute in form was made to her of the real estate, and a bill of sale of the personal property. In May, 1907, the doctor died, leaving as his heirs his widow, Logan M. Tooley, the daughter of himself and said Martha L. Tooley, and the two plaintiffs in this action, daughters of a former marriage. The deed and bill of sale were placed on record by said widow, who continued in the use and possession of said property until her death on the 12th day of February, 1913. She left a holographic will as follows:

"I give all my property at my death to my daughter, Logan Mattie Tooley, if at her death she has neither husband or children. I desire any property that may be left divided equally among my sisters and brother."

This will was admitted to probate, and on request of said Logan Mattie Tooley John F. Ellison was appointed administrator with the will annexed and proceeded with the administration of said estate. Prior to the distribution of said estate Logan M. Tooley died, leaving a will in which she devised all her property, except a small bequest, to one Lemus L. Klemmer. At the request of the latter the plaintiff Meta Stephens Turman had said will admitted to probate and herself appointed administratrix with the will annexed.

In February, 1914, the said John F. Ellison filed his final account as such administrator and petitioned for the distribution of the residue of the estate of said Martha L. Tooley to the brother and sisters of said deceased, alleging that said Logan M. Tooley had died unmarried and without any surviving child. Said Meta Stephens Turman filed a verified written objection to this petition, claiming that the second clause of said will of Martha L. Tooley was void, that said property had passed absolutely to the daughter, Logan M. Tooley, and asked that it be distributed to her estate. In this opposition Klemmer joined. The lower court construed the will in accordance with the contention of said contestants, but the Supreme Court reversed said decision, holding that said second clause of the will was operative, and that the residue of the property should be distributed to said brother and sisters of Martha Tooley. Estate of Tooley, 170 Cal. 164, 149 Pac. 574, Ann. Cas. 1917B, 516.

It is under this will that the defendants claim the property. Said decision of the Supreme Court was filed in the superior court of Glenn county on June 12, 1915, and four days thereafter this suit was brought by plaintiffs to have it declared that said defendants are holding said property in trust for the two plaintiffs and for the defendant Klemmer, as devisee of said Logan M. Tooley.

This claim is based upon the allegations of the complaint that there was an oral agreement on the part of Dr. Tooley, his wife, and the two plaintiffs providing that he should deed all his property to his wife, and that plaintiffs would cause her no trouble during her lifetime; that at her death she would convey the residue of said property to the plaintiffs and said Logan M. Tooley; that by reason of this agreement he executed the said conveyance to his wife, and after his death she repudiated and violated said agreement and made said will as aforesaid. Certain questions of fact were submitted to a jury, and they found in favor of the position of plaintiffs, but the trial court did not adopt the jury's view, but concluded that:

"Said L. P. Tooley did transfer all his property, both real and personal, to his wife unconditionally, in fee simple to have and to hold to her and her heirs and assigns forever and without any condition or limitation."

We may concede that the complaint states a cause of action, that it sets up a trust that could be legally enforced by a court of equity, and, what is more to the point of controversy, that there is evidence in the record which would support a finding and judgment in favor of plaintiffs.

To make manifest the latter statement we may refer to and quote from the testimony of Meta Stephens Turman. She said:

That shortly before her father died—probably two weeks—a conversation took place at her father's house in his bedroom; that the persons present were the father, her sister, Cliffie I. Clarke, her half-sister, Logan Tooley Clark, and her stepmother, Martha L. Tooley. "When we went into the room I stepped up to the bed and asked my father how he was. I knew he was very low, and he said he was glad we had come to see him, because he wanted to talk to us, and he turned to my stepmother and says, 'Mattie I wish you would tell Logan to come in the room.' And when Logan came in the room he said, 'I wish to tell you girls how I am going to leave the property' and we told him not to talk, because he was very low and could only say one word at a time, and my stepmother told him not to talk, and he said he must. He says, 'I want to explain how I am going to leave the property.' He says, 'One time I wanted to leave $1,000 to each of you girls of the insurance,' * * * a life insurance policy for $1,000 apiece for the girls, and he was going to change that and put it in Mrs. Tooley's name as well as all the other property, and that he had told Judge Moody to fix up the papers to that effect, because she promised him if he did put all the property in her name and she used it all her life that at her death she would divide what was left, between us three girls, and he says, 'Didn't you promise me that?' and she says, 'Yes; I did;' and he says, 'You have heard the promise, and I don't want you to bring any lawsuit, or create any trouble;' and I gave my promise, and my sister didn't say anything, and I did for her because she promised to divide at her death, and I promised we wouldn't bring any suit against it. And then Papa went on to say that she was old and after he died she wouldn't have any one to provide for her, and we were married and had husbands, and he told her to give us girls $100 apiece and Logan $25 after his death; that that was a gift to us girls. And that was all that was said right there. We were all crying, and my father—it was with the greatest effort that he explained anything at all to us."

[1] Nor was it necessary for plaintiffs to corroborate the testimony in order to warrant a finding in their favor. The Legislature has provided that:

"The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact except perjury and treason."

The present case is not within the exceptions; therefore respondents are in error in contending that the burden was upon plaintiffs to introduce more than their own testimony in order to legally entitle them to prevail in the action. There are some decisions from other jurisdictions that seem to hold to such view but such is not the law in this state.

[2] It is true, though, that the evidence to show that a deed is not what it purports to be, that notwithstanding its absolute terms the grantee holds subject to a parol trust, should be clear, satisfactory, and convincing. Bollinger v. Bollinger, 154 Cal. 695, 99 Pac. 196.

[3] But it is also true, as held in the Bollinger Case and many others that might be cited, in fact, it follows from the scheme of our judicial procedure, that the proper application of this rule, when there is substantial evidence to support the existence of a trust, must be left to the trial court, and its determination that such evidence is clear, satisfactory, and convincing will be accepted by the appellate court as conclusive.

[4] It is likewise the law that, although one witness, or more, may testify positively to facts constituting a trust and directly supporting the theory that the deed was not intended to be absolute as it purports to be, the trial judge is under no legal compulsion to find in accordance with such testimony. He must be convinced by it in order to warrant a judgment attaching any such condition to the solemn instrument executed by the parties. To his mind the evidence must be clear, satisfactory, and convincing in order to find a trust, but if he does not believe the witness is telling the truth, or if he is convinced that he is materially in error as to the terms of the declared trust, it is not only the privilege of said judge, but it is his duty, to reject such testimony and base his finding upon the presumption that follows from the execution of a deed absolute in form, that the grantor intended to vest the estate in the grantee unembarrassed by any secret trust or incumbrance.

The foregoing are mere truisms of the law, and we need not cite authorities therefor. Nor is the proposition complicated by the fact that a jury may have found in accordance with the position of the one questioning the integrity of the deed. It is the chancellor who must be satisfied, and it is to his judgment and conscience that the matter must be submitted. In simple phrase, if A. conveys to B. an estate in absolute terms, and C. testifies that it was a trust, in an action to so charge the land, if the witness does not convince the trial judge that such trust was created, and the finding is in accordance with the presumption that arises from the instrument itself, it would be a reflection upon the honesty or capacity of the court below and an invasion of its province for an appellate court to set aside the judgment simply for the reason that the insensate record on appeal contains no affirmative evidence of the improbability of the testimony of the witness.

Besides, the record before us discloses certain considerations that confirm us in the belief that the learned trial judge did not decide arbitrarily against the claim of appellants, and that their story was justly regarded with suspicion and distrust.

Indeed, it is true that actions to enforce oral agreements claimed to have been made with persons who are dead involve a dangerous assault upon property rights, and they are often supported by false testimony, and they naturally and reasonably excite suspicion. And while they may be genuine and worthy of confirmation, they require the closest and most careful scrutiny to prevent injustice being done. Wall's Appeal, 111 Pa. 460, 5 Atl. 220, 56 Am. Rep. 288. They afford and carry opportunity for fraud against the estates of deceased persons and a great temptation to perjury on the part of disappointed or avaricious relatives. Hinkle v. Sage, 67 Ohio St. 256, 65 N. E. 999. Such considerations could not be laid out of view by the trial judge.

[5] He could not fail to observe, also, that the testimony of the plaintiffs was given nearly nine years after the transaction is said to have occurred. It is quite probable—even more than probable—that after the lapse of such a period the memory would be inaccurate as to the facts and conditions of the affair. It requires a good deal of courage and assurance for a witness to undertake under such circumstances to state definitely just what was said and done. If he does confidently make such attempt without ever having reduced the details to writing or having kept them vivid in his memory by frequent expression or recital of what took place, it is difficult to give full credit to his story. The distrust is naturally augmented by the circumstance that the testimony is not presented in any court until all the parties who could have any interest in contradicting it are dead. While we cannot say that under such circumstances it must necessarily be rejected as unworthy of belief, yet it must inevitably occur that the trial judge will regard it with serious misgivings. Mattingly v. Pennie, 105 Cal. 514, 39 Pac. 200. In fact, it is proper to say that evidence given under such circumstances should not only be received with the greatest caution, but it has been declared to be evidence of the weak-

est and most unsatisfactory nature. Austin v. Wilcoxson, 149 Cal. 24, 84 Pac. 417.

[6] Moreover, there are other substantial reasons disclosed by the record which appear amply sufficient to justify the action of the court in rejecting the testimony of the plaintiffs, some of which we will briefly state. The conduct of the plaintiffs in not asserting their claims and their attitude toward the will of Martha L. Tooley and of her daughter, Logan, are circumstances of moment. The fact that said Martha L. Tooley in 1911 made a will devising all her property to her daughter Logan with the remainder over to the defendants, thus repudiating and violating an alleged solemn promise made to her husband in his dying hour, is at least some evidence that no such promise was made. The presumption is that she was innocent of any such grievous wrong. Section 1903 of the Code of Civil Procedure. The will of the said daughter also is entirely inconsistent with her knowledge and recognition of any such trust.

Judge Moody's testimony, it may be added, is strongly opposed to plaintiffs' theory. He was the adviser of Dr. Tooley, and drew the deed and bill of sale. He testified:

"Dr. Tooley sent for me to come up to his house on business. I didn't know what he wanted until I reached there, and he told me at that time in the presence of Mrs. Tooley that he wanted to dispose of his property, and he wanted to give it to his wife. There was a good deal of conversation at that time which all culminated in my advice to Dr. Tooley to make a deed and bill of sale to his wife to carry out the purpose which he stated to me at that time. * * * There were no conditions as to the making and delivery of the deed. Dr. Tooley requested Mrs. Tooley to give each of his two daughters, Mrs. Turman and Mrs. Clarke, $100 out of the insurance money when it should be collected."

He testified further:

That they had another meeting a day or two afterward when the deed was signed and acknowledged and "there were no conditions upon which the deed was to be made. Dr. Tooley stated to me the reason he was doing that was that his two daughters had husbands who were capable of making them homes, and all his wife had would be what he would leave her. All he had was made by Mrs. Tooley and himself, that they had practically nothing when they were married, and that she had made as much of the money they had saved as he had. Mrs. Tooley in answer to the doctor that he wanted his daughters to have $100 apiece said she certainly would see that they got it, or words to that effect."

We must assume that the lower court gave full credit to the testimony of Judge Moody, and that he was entitled to that consideration. Under the circumstances, it would seem quite improbable that, if Dr. Tooley desired to charge the conveyance with the burden of a trust, he would not consult his legal adviser in relation to it. It would occupy a large part of the conversation, as it involved a complicated question concerning which a layman would need information. It will not do to say that it was a private family affair which the doctor hesitated to discuss with his attorney. Why it should be considered more personal or sacred than the matters which he did mention it is difficult to understand.

There is also the testimony of Mrs. Lizette Leddy relating to what the trial court was justified in believing was the same conversation by and through which plaintiffs claim the trust was created. She testified:

"I walked into the bedroom, and Dr. Tooley said, 'Well, here comes Liz' (that was a little nickname he had for me), and Mrs. Turman was on the bed, on her knees, imploring his forgiveness for something she had done, and she said, 'Oh, Papa, Papa, forgive me; Papa, forgive me.' And he turned and said, 'I give all my property real and personal to my wife, Martha;' and she said, 'Oh Papa, we know.' And he said, 'Let me call the name, Martha L. Tooley.' He said 'To Meta I give $100, to Cliffie $100, and to Logan $25, and forgive the debt.' And I stayed in the room quite a while, and walked out and took my seat in the adjoining room, which was the dining room, and you could have heard a pin drop. I never heard a sound."

She further testified that the plaintiffs soon went home. The foregoing is, of course, inconsistent with the position that a secret trust was created as claimed by appellant. It may be further stated that as to certain important matters which plaintiffs testified occurred within the knowledge and recollection of other eyewitnesses the plaintiffs were contradicted by the other witnesses. This is pointed out in the brief of respondents and the testimony of Judge Ellison and Mrs. Ellison and Mrs. Leddy recited, but we need not repeat it.

It is contended that the trial judge adopted an erroneous theory, in that he assumed that the conveyance of the property had already been executed when the promise in relation to the trust was made, and therefore he mistakenly concluded that said promise was not the inducement for the conveyance. However this may be, it is true that he found that there was no agreement whatever in relation to the property between Dr. Tooley and the plaintiffs, and this, of course, is sufficient to support the judgment.

The deed seems not to have been delivered to the grantee immediately on the day it was signed, and the conversation to which plaintiffs referred may have occurred after the deed was signed and before it was delivered. Thus it may be that the conveyance was not entirely completed until after said conversation. However, it is of no importance, as the learned trial judge was considering the case upon the assumption that the trust was attempted to be created; and whether he was right or wrong in his hypothetical view of the legal aspect of that situation does not affect the finding upon the other material question, nor does it militate against the soundness of the judgment rendered.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

37 Cal. App. 715

## MAUCHLE v. PANAMA-PACIFIC INTERNATIONAL EXPOSITION CO. et al.

(Civ. 2425.)

(District Court of Appeal, First District, California. July 2, 1918.)

1. MASTER AND SERVANT ⟸302(2)—MASTER'S LIABILITY FOR SERVANT'S NEGLIGENCE—SCOPE OF EMPLOYMENT—AUTOMOBILE ACCIDENT.

Where ground superintendent of exposition company struck pedestrian while driving home from work at night in an automobile used by him in performance of his duties but which belonged to the company and was ordinarily kept on the exposition grounds, the company was not responsible for the accident; the automobile not having been used at the time within scope of superintendent's employment.

2. MUNICIPAL CORPORATIONS ⟸703(1)—USE OF STREETS—SLOWLY MOVING VEHICLES.

In determining distance slowly moving vehicle must be kept from the curb under St. 1913, p. 648, § 20, par. "i," and San Francisco City and County Ordinance No. 1857, § 6, providing that such vehicles must be kept as closely as practicable to the right-hand boundary of highway, convenience, condition of street, and the number of vehicles on the street must all be considered.

3. MUNICIPAL CORPORATIONS ⟸705(10)—USE OF STREETS—AUTOMOBILE ACCIDENT—CONTRIBUTORY NEGLIGENCE.

Failure of pedestrian pushing a hand cart on foggy night to stay close to right-hand curb, where to avoid jolting of his load and seeing no approaching car or vehicle he moved away from curb to space between rails, does not as matter of law constitute contributory negligence under St. 1913, p. 648, § 20, par. "i," and San Francisco City and County Ordinance No. 1857, § 6, requiring slowly moving vehicles to be kept as far as practicable to the right of highway.

4. MUNICIPAL CORPORATIONS ⟸706(5)—USE OF STREETS—AUTOMOBILE ACCIDENT.

In action for injuries sustained in being struck by automobile, evidence *held* sufficient to show driver of automobile was negligent.

5. MUNICIPAL CORPORATIONS ⟸706(6)—AUTOMOBILE ACCIDENT—JURY QUESTION.

In automobile accident action, whether automobile lights were out at time of accident, as testified to by plaintiff's witnesses, or were extinguished by the accident, as attempted to be shown by a mechanical demonstration, was for the jury.

6. APPEAL AND ERROR ⟸995—REVIEW—JURY FINDING.

The appellate court will not pass on question of whether jury was justified in accepting positive testimony that automobile lights were out at time of accident, in preference to mechanical demonstration that lights were extinguished by the accident.

7. TRIAL ⟸255(15)—INSTRUCTIONS—NECESSITY OF REQUEST.

Code Civ. Proc. § 2061, subd. 3, providing that court shall on proper occasion instruct jury that a witness false in one part of his testimony is to be distrusted in others, does not require court to give such instruction unless requested.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Fritz Mauchle against the Panama-Pacific International Exposition Company (a corporation) and L. I. Fulcher. Judgment for plaintiff, and defendants appeal. Reversed as to first-named defendant, and affirmed as to last-named defendant.

Brittain & Kuhl, for appellant Panama-Pacific International Exposition Co. Everett A. Ingalls, of San Francisco, for appellant L. I. Fulcher. Chas. F. O'Callaghan, of San Francisco (Edmund Nelson, of San Francisco, of counsel), for respondent.

PER CURIAM. Plaintiff sued the defendant for damages claimed to have been caused to him by being run down by an automobile owned by the defendant Panama-Pacific International Exposition Company, and driven by L. I. Fulcher, the other defendant. He prevailed.

The plaintiff, while on his way home from work on the evening of October 6, 1915, was proceeding westerly on Geary street pushing a hand cart of the type used about railroad stations, warehouses, and stores to move heavy boxes and parcels. Upon this truck the plaintiff had loaded some empty boxes. Proceeding westerly from Fillmore street, he kept near the curb line until he crossed Divisadero street. From that point westerly the street, except between the car tracks, is paved with blocks of stone. Observing no approaching car or other vehicle, and thinking to avoid the jolting of his load by the rough street, he moved over on the west-bound car track where the space between the rails was smooth. He had proceeded but a short distance westerly from Divisadero street when he suddenly heard the purring of an automobile engine behind him, and almost at the same instant he was struck in the back and pushed over onto the hand cart. The grade at this point is uphill, and the car which struck him stopped within a very short space. There was some conflict of evidence as to his injuries, but it may be said that the finding that he was injured is supported by the evidence.

It is contended in behalf of the appellant corporation that there was no showing that the defendant Fulcher at the time of the accident was performing any duty which he owed to the exposition company, or was using the automobile with its consent or knowledge. The respondent, answering this contention, quotes the following testimony to show liability on the part of the exposition company:

"Mr. Nelson: Q. Mr. Fulcher, * * * on the 6th of October, 1915, by whom were you employed? A. The Panama-Pacific Exposition. Q. How long had you been employed by that company? A. I should say approximately 2½ years or 3 at that time. Q. From the beginning of their work? A. Practically. Q. Are you still employed by that company? A. Yes, sir. Q. What was your particular duty in that service? A. I was superintendent of grounds. Q. The automobile that has been under discussion here, was that owned by you or by the company? A. By the exposition company. Q. Was that used by you in the service of the com-

pany? A. Yes, sir. Q. On this particular day at the time of this occurrence you had come from the grounds, had you, of the exposition company? A. Yes, sir. Q. And where were you going? A. I was on my way home at that time when the accident occurred. Q. Where did you keep this automobile overnight, say, when you went home? A. Why, it usually worked all night, and stayed out at my house until 10 o'clock and then down to the grounds. Q. You were bringing it to your house on this particular night? Where were you taking this automobile? A. I was going home with it. Q. Did you have a garage at your house to keep it in? A. No, sir. Q. After you got home with it, what would become of it? What would be done with it? A. It stood in front of my house. Q. And then later what would you do? A. My night foreman came and got it or I took it to the grounds along about 10. Q. That automobile was ordinarily kept on the grounds of the exposition company? A. Yes, sir. Mr. Nelson: That is all."

The ownership of the automobile by the exposition company is admitted, and the employment of Fulcher in the capacity of superintendent of grounds, as shown in the above testimony, is not disputed; but it is claimed that Fulcher, at the time of the accident, was not using the automobile within the scope of his employment nor upon any business or affair of the exposition company.

[1] The foregoing testimony, being the only evidence quoted in the attempt to show responsibility on the part of the exposition company, seems to us to fall far short of so doing. Respondent relies upon the case of Chamberlain v. California Edison Co., 167 Cal. 500, 140 Pac. 25; but the employé in that case had been ordered by another employé of the company, who had the right to give him instructions, to do the thing which he was doing at the time that his negligence caused the injury to the plaintiff in that case, and the defendant corporation in that case reaped the financial benefit of the work which he was performing at that time, the facts being briefly, as stated in the opinion in the case, as follows:

"Sterling, the storekeeper, ordered Rosso, the chauffeur, to go to the residence of Lighthipe with the company's truck, of which Rosso was the driver, and to bring Lighthipe's motorcar to the shop which the corporation maintained for the repair of its own motor vehicles. This order was obeyed, and, while Rosso was towing Lighthipe's automobile, Caleb Chamberlain was injured through the carelessness and negligence of Rosso. It was shown that Lighthipe's automobile was repaired at the company's shop; that a bill was rendered by the corporation [therefor] and paid by Lighthipe."

This plainly showed that Rosso was acting within the scope of his employment at the time of the accident in that case.

The respondent relies further upon the case of Jessen v. Peterson, Nelson & Co., 18 Cal. App. 350, 123 Pac. 219. In that case the injury was due to the negligence of one Nelson. The defendant was engaged in general contracting and construction work in the city and county of San Francisco. Nelson was an officer, namely, the vice president of the defendant company, and had the right to operate the buggy. In so operating it "he had no regular hours whatsoever. He had to go around all over the city sometimes; he had to go out to the park and Richmond, where the corporation was working at times. He had to go everywhere and see that the work was all right. From this it appears that in addition to being vice president of the company Nelson was also general superintendent of its work, and in the performance of his duties he had a roving commission which permitted him to look after the business of the defendant at the times and in the manner which best suited his own convenience." This presents a far different case from the relation sustained by Fulcher to the exposition company. The evidence above quoted does not show that Fulcher was in any way serving the exposition company at the time of the accident in this case; nor does it present any evidence tending to so show.

It is contended that Fulcher's use of the automobile was a convenience which enabled him to perform his duties more expeditiously in moving about from place to place where he was needed. But while this may be true, the above-quoted evidence—which we assume from respondent's brief is the only evidence showing that Fulcher was performing duties for the exposition company at the time of the accident—fails completely to show that he was about the business of the exposition company at the time of the accident. We think the verdict not supported by the evidence so far as the exposition company is concerned, and as to that defendant the judgment will be reversed.

[2-6] Unless it must be said that the respondent was guilty of contributory negligence in not staying closer to the right-hand curb in his journey, this judgment may not be reversed as to Fulcher. Paragraph "1" of section 20 of chapter 326 of the Statutes of 1913 (Stats. 1913, p. 648) has this provision:

"The person in control of any vehicle moving slowly along and upon any public highway shall keep such vehicle as closely as practicable to the right-hand boundary of the highway, allowing more swiftly moving vehicles reasonably free passage to the left."

There is a similar provision in section 6 of Ordinance No. 1857 of the city and county of San Francisco. These provisions of the law are elastic. They do not attempt to lay down a definite and rigid rule as to the distance which the slowly moving vehicle must keep from the curb. Convenience, condition of the street, freedom of the street from other vehicles, or, on the other hand, its more or less crowded condition, must all be taken into consideration in determining the position upon the street which the slowly moving vehicle must occupy in order that the person propelling it or driving it shall be free from negligence. In this case the evidence was of such a character that we are not prepared to say that Mr. Mauchle was guilty of contributory negligence in moving along the

west-bound car track instead of keeping close up to the curb. It does not appear that there was not plenty of room for free passage by Fulcher to the left of Mauchle. Some discretion must be left to juries and trial courts in such cases; and we think in this case that we cannot hold as a matter of law that Mauchle was guilty of contributory negligence. There are other elements, such as that the night was foggy, which are urged by appellant to show contributory negligence on the part of Mauchle; but we cannot say, as a matter of law, that they do so. It is also urged that there is no evidence that Fulcher was guilty of any negligence; but the testimony of the plaintiff and other witnesses is sufficient to support the plaintiff's contention that the lights on Fulcher's machine were not lit, and that he blew no horn nor made any other sound when approaching Mauchle. An attempt is made to demonstrate that from the mechanism of Fulcher's machine his lights went out when he stopped it, and that thus Mauchle was deceived into supposing that it had no lights, whereas its lights had been burning up to the time it stopped; but the jurors were the judges as to whether this mechanical demonstration or the positive testimony of the plaintiff was true, and they accepted the positive testimony of the plaintiff that the lights were not lighted on the machine. They accepted the evidence of the witness as against the mechanical argument, and we are not in a position to determine that they were wrong.

[7] The appellant contends that the trial court should have instructed the jury that a witness false in one part of his testimony is to be distrusted in others, as provided in subdivision 3, § 2061, Code of Civil Procedure. The reply is that the instruction was not asked. Counsel, however, contend that the defendants had the right to rely upon the court to give those instructions which, under the Code, the court is bound to give. That section of the Code, however, provides only that the court shall give this instruction as it provides that others of a similar nature shall be given—on proper occasions. We are not inclined to lay down a rule that would place upon trial judges the burden of determining that such instruction shall be given unless the request therefor is made by the party desiring it.

As to Fulcher the judgment will be affirmed.

---

37 Cal. App. 495

## McCARTHY v. BOARD OF FIRE COM'RS OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 2016.)

(District Court of Appeal, First District, California. June 11, 1918.)

1. MUNICIPAL CORPORATIONS ⇐216(1)—SECRETARY—FIRE DEPARTMENT—CIVIL SERVICE.
Since, under San Francisco Charter, art. 8, c. 1, § 1, the police department includes policemen, the police commissioner, a chief, and such other clerks as are necessary, while under article 9, c. 1, § 1, the fire department is merely declared to be under the management of the board of fire commissioners, such board is not a part of the department, and the secretary of such board is not subject to civil service rules.

2. STATUTES ⇐209 — CONSTRUCTION — PRESUMPTIONS.
A word or phrase repeatedly used in a statute will be presumed to bear the same meaning throughout, in the absence of other intent indicated.

3. MUNICIPAL CORPORATIONS ⇐216(1)—SECRETARY—FIRE DEPARTMENT—CIVIL SERVICE.
Since, under San Francisco Charter, art. 9, c. 1, § 6, no person over 35 years of age was eligible under the civil service law for appointment to the fire department, conceding that secretary of board of fire commissioners was subject to the civil service, the commissioners could discharge him at pleasure, if he were first appointed after reaching the age of 35 years.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Mandamus by John W. McCarthy against the Board of Fire Commissioners of the City and County of San Francisco and others. From a judgment denying the writ, petitioner appeals. Affirmed.

Paul A. McCarthy, of San Francisco, for appellant. George Lull, City Atty., and Maurice T. Dooling, Jr., Asst. City Atty., both of San Francisco, for respondents.

BEASLY, Judge pro tem. The plaintiff, John W. McCarthy, petitioned the superior court for a writ of mandate to compel the board of fire commissioners of the city and county of San Francisco to reinstate him as their secretary. On February 3, 1910, he was such secretary, and on that day the board passed a resolution removing him. The superior court denied the writ, and he appeals.

In supporting his claim for a reversal of the judgment, McCarthy contends that the secretary of the board of fire commissioners is within the classified civil service provisions of the charter of the city and county of San Francisco, and consequently comes under the protection of section 12 of article 13 thereof (Stats. 1899, p. 241), providing that no person employed in the classified civil service shall be removed or discharged, except for cause, upon written charges, and after an opportunity to be heard in his own defense. The board, in appointing McCarthy, went through the form of complying with the civil service rules, and undoubtedly at the time of his appointment considered their secretary to be within the classified list. No charges were made against him when he was dismissed, and he had no trial.

The respondents argue that the office of secretary in question is not within the classified list, and that, even if it were, McCarthy was not eligible to the position when appointed, as he was then over 35 years of age,

which is the limit age prescribed by section 6, chapter 1, article 9, of the charter, as it stood at the time of McCarthy's appointment, for all persons appointed to positions in the department. We are inclined to think both these positions of respondents to be well taken.

[1] Without enumerating all the city functionaries to whom the civil service provisions of the charter apply, it may be said that at the time McCarthy was discharged, and until March 28, 1913, section 11 of article 13 provided that the civil service provisions should apply to the fire department and numerous other positions and officials. What officers should be included within the meaning of the term "fire department" was not specified in that section, and we are left to a critical examination of the language of the charter to ascertain what is meant thereby, and specifically whether the secretary of the board of fire commissioners is to be considered as included within the term, and so whether the secretary is a member of the fire department within the meaning of the civil service provisions of the charter.

Perhaps this question can be best understood by a comparison between the provisions of the charter in relation to the police department and the fire department. While the police department is specified to consist of a board of police commissioners, a chief of police, a police force, and such other clerks and employés as shall be necessary to carry into effect the provisions of the article providing for the policing of the city (Charter, § 1, c. 1, art. 8), the fire department is not specified to consist of all corresponding persons engaged in the protection of the city from fire, but rather to be under the management of the board of fire commissioners (section 1, c. 1, art. 9).

When different language is used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning and effect. Black, Interpretation of Laws (2d Ed.) p. 145. As it is clear that under the language above quoted in relation to the police department the secretary of the department would be a member of the police department, so, if we apply this cardinal rule of statutory construction to the different language employed by the charter framers in dealing with the two departments, it must be held that while the commissioners, for instance, of the police department are members of that department, the board of fire commissioners are not members of the fire department. The Legislature must be presumed to know the meaning of language; and when one set of words is used in one section, and another in another section, the presumption is that the Legislature intended to convey a different meaning if the two sets of words ordinarily have different meanings. Lehman, Durr & Co. v. Robinson, 59 Ala. 219. And it has similarly been held that a change of legislative purpose is to be presumed from a material change in the wording of a statute. Hasely v. Ensley, 40 Ind. App. 598, 82 N. E. 809; Rich v. Keyser, 54 Pa. 86, 89; Thomas v. Joplin, 14 Cal. App. 662, 112 Pac. 729. This rule is applicable likewise to material changes between the language used in different sections of the same statute.

It would seem plain from this that the words "fire department," as employed in the civil service section of the charter, are not intended to embrace the board of fire commissioners nor the secretary thereof. Again, the officers and members of the fire department are enumerated in section 1, chapter 8, article 9, of the charter for the purpose of fixing salaries; and the secretary is not enumerated among them.

It is further provided by section 2 of chapter 3 of article 9 that the chief engineer may suspend any subordinate officer, member or employé of the department. It is plain that this does not refer to the secretary. And in section 2 of chapter 8 of the same article is a provision for vacations of officers and members of the fire department, in which it is provided that during each year of his service a vacation of not less than 15 days' duration, and also leaves of absence of not less than 24 hours' duration not less times than once in each week, shall be due each officer and member of the fire department without loss of pay. Certainly it will not be contended that the words "officers and members of the fire department," as used in the last section referred to, were intended to include the secretary.

[2] It is a familiar principle of the construction of statutes that a word or phrase repeatedly used in the statute will be presumed to bear the same meaning throughout the statute, unless there is something to show that another meaning is intended. McClain v. Hutton, 131 Cal. 143, 61 Pac. 273, 63 Pac. 182, 622; Robbins v. O. R. R., 32 Cal. 472, 474; Ransome-Crummey Co. v. Woodhams, 29 Cal. App. 356, 361, 156 Pac. 62. There is nothing here to show that a different meaning was intended by the use of the words "the fire department," or "officers and members of the fire department," in the section referring to salaries and vacations, than the meaning intended to be affixed to this language in section 11 of article 13 providing for the civil service.

The proposition that the secretary is not a member of the fire department is further supported by the decision of the Supreme Court in the case of Maxwell v. Fire Commissioners, 139 Cal. 229, 72 Pac. 996, in which the former clerk of the board sought to be retained as secretary of the new board of fire commissioners as organized under the present charter. The court there said:

"The position of clerk as prescribed in the law of 1878 is not, in terms at least, contained in the new chapter. By the old law, as shown, the clerk was required to be one of 'the members and employés of said fire department.' No such qualification is required by the new charter in regard to the secretary. It simply declares that the board 'may appoint a secretary, who shall perform such duties as the board may prescribe.' It cannot be said, therefore, that the secretary of the board under the new charter is the same office or place as the clerk mentioned under the old law. Chapter 8 of article 9 of the charter provides that 'the officers and members of the fire department shall receive annual salaries as follows,' and then enumerates the different classes of officers and members, but does not mention the secretary of the board, nor any 'clerk' of the fire department. It is a fair inference that the direction in chapter 2, that in reorganizing the force the department shall make its appointments of 'officers and members' from the force in service when the charter took effect, applies only to the 'officers and members' whose salaries are fixed in chapter 8, and, as the secretary is not one of those enumerated, it would follow that the board is not required to select him from the members of the old fire department. From the foregoing, and from the nature of the office and the necessity of the greatest degree of confidence between the incumbent and the board, it would seem that it was the intention of the framers of the charter that the appointment of the secretary should be left to the discretion of the board."

[3] Aside from this, as stated by counsel for the respondents in their brief, if the foregoing construction of the charter provision is incorrect, and if it should be conceded that McCarthy was, as secretary, an officer and member of the fire department, and therefore within the civil service provisions of the charter, he still must fail to establish his position here, because of the fact, found by the trial court, that at the time of his appointment to the position of secretary of the board of fire commissioners he was above the age of 35 years, and therefore not eligible to a position in the department. Section 6, chapter 1, article 9, provides that all persons appointed to positions in the fire department must be not less than 21 nor more than 35 years of age. That provision of the charter is plain and unambiguous. It formed a part of the present charter of the city and county of San Francisco when that instrument was first adopted, was in full force at the time of McCarthy's election to the position of secretary to the board and at the time he was discharged therefrom, and remained in that form until it was changed by an amendment adopted by the people on November 15, 1910, approved by the Legislature on the 17th of February, 1911. Stats. 1911, p. 1661. So that, taking either view of the plaintiff's case, whether McCarthy be considered as a member of the fire department, and so subject to the civil service sections of the charter, or whether he be considered as not within the meaning of those sections, he was still in a position where the board of fire commissioners had a right to discharge him, and he cannot be reinstated by the courts.

The judgment is affirmed.

We concur: KERRIGAN, J.; ZOOK, Judge pro tem.

---

37 Cal. App. 663

## CRAIG v. STANSBURY.

## STANSBURY v. SUPERIOR COURT OF CALIFORNIA et al.

(Civ. 2703, 2712.)

(District Court of Appeal, Second District, California. June 26, 1918. Rehearing Denied by Supreme Court Aug. 22, 1918.)

1. SUPERSEDEAS ⊂=1—INJUNCTIVE CHARACTER OF REMEDY.

The remedy by supersedeas is usually regarded as injunctive or prohibitive in character, and not corrective.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Supersedeas.]

2. APPEAL AND ERROR ⊂=492—EXECUTION SALE—VACATION—POWER OF COURT.

The appellate court has inherent power by writ of supersedeas to vacate execution sale made after appeal was perfected and stay of execution had become operative.

3. APPEAL AND ERROR ⊂=485(4)—STAY OF EXECUTION—VIOLATION OF RIGHT OF STAY.

Where notice of appeal and bond were filed after issuance of the sheriff's certificate of sale on execution the sale worked no violation of any right of stay of execution as the conclusion of execution sale, under Code Civ. Proc. § 700a, is at least as early as the time of the issuance of the sheriff's certificate of sale.

4. APPEAL AND ERROR ⊂=458(1)—EXECUTION SALE.

In view of Code Civ. Proc. § 946, the appellate court has no power to set aside by supersedeas an execution sale completed before the court acquired jurisdiction of any appeal from the judgment; any right of the judgment debtor to have the sale set aside must be enforced in the trial court.

5. EXECUTION ⊂=247—SALE—MOTION TO SET ASIDE—CONSPIRACY.

On motion to set aside execution sale, allegations of a conspiracy to commit a fraud on the rights of the judgment debtor cannot be considered.

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Writ of Mandate to the Superior Court of Los Angeles County; John M. York, Judge.

Action by J. C. Craig, executor of the last will and testament of Valentine Kratz, against Charles Stansbury, resulting in judgment for plaintiff, defendant appealing with application for writ of supersedeas. From an order dismissing motion to set aside execution sale, defendant petitions for writ of mandate against the Superior Court of the State of California in and for the County of Los Angeles, and Hon. John M. York, judge thereof, an alternative writ being allowed. Motion denied, alternative writ set aside and application for a peremptory writ refused.

Hocker & Austin, W. A. Alderson, Andrews, Toland & Andrews, and Kenton A. Miller, all of Los Angeles, for appellant. George P. Adams, of Los Angeles, for respondent Craig. Andrews, Toland & Andrews, Kenton A. Miller, Hocker & Austin, and W. A. Alderson, all of Los Angeles, for petitioner Stansbury. Haas & Dunnigan, George P. Adams, and Wm. M. Brown, all of Los Angeles, for respondent Superior Court. Haas & Dunnigan, of Los Angeles, for purchaser at execution sale.

WORKS, Judge pro tem. For convenience the action first above entitled, Craig v. Stansbury, will throughout this opinion be referred to as the action; and the second matter, Stansbury v. Superior Court, will be alluded to as the mandate proceeding. The action was commenced for the purpose of recovering on a promissory note, the plaintiff had judgment, and the defendant appeals. The appeal is not yet before us for decision; but the appellant asks for the issuance of a writ of supersedeas, upon his claim that the execution of the judgment had been stayed by the giving of bond, in connection with the appeal, before the making of a certain sale by the sheriff on execution, as well as upon grounds other than the ground that execution had been stayed. The application is made upon notice to the purchaser at the sale, as well as to the respondent in the action. After the appeal was taken, but before the application for a supersedeas was filed in this court, the appellant presented to the trial court, in the action, a motion to set aside the execution sale. That motion was made upon all the grounds now placed before us as a basis for the application for the supersedeas. The trial court entered a dismissal of the motion on the ground that the "court has not jurisdiction to entertain" it "on the facts stated in the notice of motion," Thereupon the appellant instituted the mandate proceeding for the purpose of compelling the trial court to proceed to hear and determine the questions involved in the motion, and an alternative writ was allowed.

[1, 2] Our first labor is to determine whether a supersedeas will issue out of this court, as demanded. It is to be observed, at the outset, that the form of relief now requested has had its most frequent use in those cases in which there has been a stay of the execution of a judgment appealed from, and in which the trial court has threatened to take some step toward an enforcement of the judgment, notwithstanding the operation of the stay (McAneny v. Superior Court, 150 Cal. 6, 9, 87 Pac. 1020; Southern Pac. Co. v. Superior Court, 167 Cal. 250, 252, 139 Pac. 69); in other words the remedy by supersedeas is usually regarded as injunctive or prohibitive in character and not corrective. We are now, however, asked to apply the remedy as a corrective, by ordering vacated a sale which has been consummated by the sheriff pursuant to final process of the court, after the perfecting of an appeal and the giving of a stay bond. Notwithstanding what we have said above as to the purpose for which the remedy by supersedeas usually has been employed, there is direct authority, also, for its use in such a case as this. In Owen v. Pomona L. & W. Co., 124 Cal. 331, 57 Pac. 71, an appeal had been taken and a stay of execution was operative under it. The respondent, pending the appeal, took out an execution or order of sale, and the sheriff sold certain property described in the decree appealed from. The appellant moved to set aside the sale and quash the execution on the ground that they were in violation of the right to a stay, and the court granted the motion, going so far as to say:

"No question is made as to the power and duty of this court to grant the relief sought by the motion if all proceedings on the judgment were stayed by the appeal."

This case is directly in point here, and it has been cited with approval in McAneny v. Superior Court, supra, and in Southern Pacific Co. v. Superior Court, supra. We conclude that this court has the inherent power —for it is to that source that the right to issue the writ of supersedeas is ascribed by the authorities—to vacate the sale now sought to be set aside, if, as claimed by the appellant, the appeal was perfected and a stay of execution became operative before the sale was made.

[3] We are next to inquire whether the appeal had been perfected and the stay of execution imposed before the completion of the sheriff's sale; and, in determining this question, the property sold having been personalty, we consider the conclusion of the sale as being at least as early as the time of the issuance of the sheriff's certificate of sale. Code Civ. Proc. § 700a. The notice of appeal and the stay bond were filed with the trial court together, in point of time, and the execution sale was conducted, including the issuance of the certificate of sale, on the same day. The question of priority, as between the sale and the perfecting of the appeal, is therefore one of hours only. This fact is conceded by the entire record before us, which consists of voluminous affidavits and of some testimony from the witness stand. It would serve no useful purpose to review the evidence on this question. We have examined it carefully, and from our examination we now find and declare that the notice of appeal and bond were filed after the issuance of the sheriff's certificate of sale. The sale, therefore, worked no violation of any right of stay of execution.

[4] We have already remarked that we are asked to set the sale aside on grounds other than the one that a stay of execution was in force at the time the sale was made. We have yet to determine whether we may entertain the motion on those grounds, which, speaking in general terms, are that the sale was conducted in furtherance of a conspir-

acy between all those who were parties to the sale, formed to cause a sacrifice of the property under levy at an inadequate price and for other purposes claimed by the appellant to be illicit and to work a fraud upon his rights. The appellant presents to us no authority and shows us no good reason which point to the power in an appellate court to set aside, by supersedeas, an execution sale completed before the court acquired jurisdiction of any appeal from the judgment for the enforcement of which the sale was made. The general character of the remedy, as that character is above stated, seems to prevent its application in such an instance. It is true, in addition to what we have already said concerning supersedeas, that the Supreme Court has allowed its use to create a stay of execution where none had been imposed by appeal or by bond given pursuant to appeal (Hill v. Finnigan, 54 Cal. 493; Rogers v. Superior Court, 158 Cal. 467, 111 Pac. 357; Reed Orchard Co. v. Superior Court, 19 Cal. App. 648, 667, 128 Pac. 9, 18), instead of merely allowing it for the purpose of protecting a stay already existent; but its use in those instances, as well as in all others, seems to have been predicated upon the ground that an appellate court may concern itself, by supersedeas, with acts either threatened or consummated after appeals have been perfected. Where an execution sale has been completed before an appeal has been taken from the judgment sought to be executed through such sale, any right of the judgment debtor to have the sale set aside must be enforced by appropriate proceeding in the trial court. This view is sustained, in effect, if not in terms, by the provisions of section 946 of the Code of Civil Procedure, which has to do with the effect of appeals upon proceedings in the trial court after judgments have been appealed from and upon the levy of executions outstanding for their enforcement.

We now turn to the mandate proceeding, in order to determine whether a peremptory writ shall issue requiring the trial court to proceed with the hearing of the motion to set aside the execution sale, on grounds other than the ground that a stay of execution was in effect at the time the sale was made, of which latter ground we have already disposed. The Supreme Court early declared that a motion to set aside an execution sale could not be entertained where the purchaser at the sale was a stranger to the judgment under execution (Bryan v. Berry, 8 Cal. 130); and a little later a judgment was affirmed in a case in which the trial court had set aside a sale in an action in equity brought to secure that relief (San Francisco v. Pixley, 21 Cal. 56). The case last cited was one in which a stranger had purchased at the sale, and Bryan v. Berry is cited in the opinion in connection with a query as to when relief, in such cases, may be had on motion and when by bill in equity. The question thus mentioned had not been presented by the parties, and was stated by the court not to be before it. It was said in the opinion that "whether the application for relief should be presented by motion to the court or by bill in equity will depend upon the special circumstances of the particular case"; but further language was used in indicating a view of the court to the effect that, where a third party was the purchaser and the sale had been closed by the execution of a final conveyance by the selling officer, the application for relief should be, or, at least, might be, by bill in equity. The grounds for relief in the case were that the property sold, being realty which lay in parcels, had been sold en masse, and that the price paid was nominal and out of all proportion to real value. The question next came before the Supreme Court in Boles v. Johnston, 23 Cal. 226, 83 Am. Dec. 111. The sale was there sought to be set aside on account of "numerous irregularities in the conduct of the officer in making the levy and sale," of which irregularities the purchaser at the sale was not alleged to have had notice. The court said:

'Whether a court of equity might not grant relief in a proper case showing fraud in the conduct of the sheriff in selling property in violation of the rights of the parties and the requirements of the statute, of which the purchaser and those claiming under him had notice, or in which they may have participated, is a question unnecessary to determine in this case, as it is not founded upon any such state of facts. If the plaintiffs have any remedy at all under the facts stated, it is by motion properly made in the court where the judgment was rendered to set aside the sale, and not in this collateral action. The right of action here is founded solely upon these irregularities, and the court below committed no error in dismissing the action."

These appear to be the only cases, in California, in which there is any mention of the question as to when execution sales may be set aside on motion and when that relief may be had pursuant to bill in equity, although we have a line of cases, beginning with Brown v. Ferrea, 51 Cal. 552, and running at least as late as Anglo-Californian Bank v. Cerf, 142 Cal. 303, 75 Pac. 902, and Bechtel v. Wier, 152 Cal. 443, 93 Pac. 75, 15 L. R. A. (N. S.) 549, in which the sufficiency of various grounds urged toward the setting aside of sales on motion is considered, it being assumed that the form of remedy chosen was an appropriate one. This assumption was doubtless proper, in each case, as each had to do with mere irregularities in sales, principally under the provisions of section 694 of the Code of Civil Procedure, laying down certain rules for the conduct of sales under execution. The Supreme Court in at least two cases, also has considered the sufficiency of grounds upon which, in actions in equity, attempts were made to set aside sales because of fraud and unfair dealing (Odell v. Cox, 151 Cal. 70, 90 Pac. 194; Rauer v. Hert-

week, 165 Pac. 946); but in neither of them was the question of the propriety or exclusiveness of the remedy brought into question. Now, however, we are driven to repeat the query of the earlier cases. We have not to do with a question of irregularity in the conduct of a sale. There is before us a direct and circumstantial charge that a conspiracy was formed to commit a fraud upon the rights of the judgment debtor by making sacrifice of his property. Not only so, but it is charged that the conspiracy was executed by the performance of a series of acts which led to its successful culmination in the sale now sought to be set aside. To this conspiracy the county clerk and the sheriff, or deputies of each of them, are alleged to have been parties, along with the judgment creditor and the purchaser at the sale, and the acts done by each of them in furtherance of the conspiracy are distinctly set forth in the notice of motion and affidavits which were presented to the trial judge, and which he refused to consider.

[5] We are of the opinion that such matters cannot properly be considered on mere motion. Such a case does not seem to come within any decision of the Supreme Court authorizing, either tacitly or by direct decision, the setting aside of execution sales in that summary manner. Such motions are usually based upon affidavit, and the number of persons concerned in the charge here presented, the complexity of the charge, and the fact that it has to do with many matters extraneous to the sale itself—thus, as we have already said, presenting a case entirely different from one of mere irregularity in a sale—all seem to frame a controversy which ought not to be, and which in justice to all concerned could not be, determined upon such an informal presentation. It is said in Freeman on Executions (3d Ed.) § 310:

"Where grounds exist for vacating a sale, which rest not in irregularity of proceeding, but in fraudulent devices practiced upon the complainant, or in accident or mistake for which he has suffered, and from which he is entitled to relief, he may, before conveyance is made to the purchaser, proceed either by motion in the original case or by bill in equity. In this, however, as in other matters within the concurrent jurisdiction of law and equity, the choice and propriety of remedy are governed by considerations of adequacy and expediency; and since the importance of these considerations depends quite usually upon the circumstances of the case in hand, it is impossible to deduce from the cases an inflexible rule, determining the proper choice of remedy, where the end sought is the vacation of an execution sale. The proper criterion for determining this matter is found in the nature of the question, and the character of the issue, which must be weighed and decided before the relief sought can be granted or denied. Fraud, mistake, irregularities, and inadequacy of price may justify the setting aside of an execution sale upon motion; but the nature of the proceeding by motion renders it applicable with propriety only to a minority of the cases where such grounds for vacation are set forth. If a conveyance has been executed, and the purchaser thereby vested with the legal title, it is doubtful whether he can be divested of it by motion. If the charge is that the sale ought to be vacated for matters not apparent from an inspection of the proceedings, such as combination to depress the bidding, or any other species of fraud, or for any misconduct on the part of the officer conducting the sale, the better opinion is that the purchaser's title cannot be divested otherwise than by an independent suit in equity against him."

The motion, addressed to this court in Civil No. 2703, and demanding that the execution sale be set aside, is denied. The alternative writ of mandate, in Civil No. 2712, is set aside and the application for a peremptory writ is refused.

We concur: CONREY, P. J.; JAMES, J.

---

37 Cal. App. 690

## ELLIS v. CENTRAL CALIFORNIA TRACTION CO. (Civ. 1580.)

(District Court of Appeal, Third District, California. May 30, 1918. Rehearing Denied by Supreme Court July 29, 1918.)

1. RAILROADS ⟸350(11) — INJURIES AT CROSSING — NEGLIGENCE — QUESTIONS FOR JURY.
Whether 30 miles per hour was an excessive rate of speed for defendant railroad's freight train when approaching a public crossing *held* for the jury.

2. RAILROADS ⟸350(7)—INJURIES AT CROSSING—SIGNALS—QUESTION FOR JURY.
Whether a freight train, when approaching a crossing, gave warning of its approach, *held* for the jury.

3. RAILROADS ⟸344(5)—INJURIES AT CROSSING—COMPLAINT.
Plaintiff's allegations that as he reached railroad's crossing in auto stage in which he was a passenger, the railroad ran one of its trains across the highway in a negligent manner, and at negligent speed, without giving any signals, so that plaintiff, while traveling with due care, was injured, stated a cause of action.

4. PLEADING ⟸11—EVIDENTIAL FACTS.
A pleading should not set forth evidential facts.

5. NEGLIGENCE ⟸117—CONTRIBUTORY NEGLIGENCE—BURDEN TO PLEAD AND PROVE.
In an action for personal injuries, contributory negligence is a defense which may be set up, and, if set up, must be supported by defendant.

6. NEGLIGENCE ⟸113(6) — IMPUTED NEGLIGENCE—NEGATIVING IN COMPLAINT.
The complaint against a railroad of a passenger in an auto stage for injuries in collision with a freight train at a crossing did not need to show who the owner or driver of the machine was at the time of the collision.

7. PLEADING ⟸8(17)—ALLEGATIONS OF DUE CARE AND NEGLIGENCE — CONCLUSIONS OF LAW.
Allegations of complaint against railroad, of passenger in auto stage injured at crossing collision with freight train, that plaintiff was traveling with due care, and that railroad ran train across crossing in negligent manner and at negligent speed, were not improper as mere conclusions of law.

---

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

8. RAILROADS ⊂⊃348(4)—INJURIES AT CROSSING—FAILURE TO GIVE WARNING—SUFFICIENCY OF EVIDENCE.

In action against railroad for injuries to passenger in auto stage in crossing collision with freight train, evidence *held* to justify finding railroad employés were negligent by failing to give any warning of approach of train.

9. RAILROADS ⊂⊃348(5) — CROSSING ACCIDENT—SPEED—EVIDENCE.

In an action for injuries to a passenger in an auto stage in collision with freight train at crossing, evidence *held* to justify finding that train was traveling at a negligent rate of speed.

10. NEGLIGENCE ⊂⊃92 — IMPUTED NEGLIGENCE—PASSENGER IN STAGE.

Though driver of auto stage was negligent in attempting railroad crossing, and his negligence, concurring with railroad's, brought about a collision with a freight train, a passenger could not be charged with the driver's negligence, not having had the right to control him.

11. RAILROADS ⊂⊃334—INJURIES AT CROSSING — NEGLIGENCE — PASSENGER IN AUTO STAGE.

Where auto stage approached railroad crossing at high speed, a passenger sitting on side door with his feet in the car, because it was crowded, was not negligent, because, on seeing a freight train approach the crossing, he jumped into the middle of the car holding onto the back of the front seat.

12. WITNESSES ⊂⊃318 — IMPEACHMENT — SUPPORT OF TESTIMONY.

Where depositions showed witnesses were in California at time of the accident in suit, and witnessed it, corroborating testimony of other witnesses that deponents were in state at time, and where they had opportunity to see accident would have been admissible only had adverse party attempted to show for impeachment that witnesses were not in state.

13. RAILROADS ⊂⊃347(11) — INJURIES AT CROSSING—ACTS AND CONDUCT OF PERSON OTHER THAN PARTY.

In action by passenger in auto stage for injuries in crossing collision with freight train, court properly refused to strike, on railroad's motion, answer of another passenger in stage that he did not watch or notice other passengers, and that he could see those in front of him glancing up and down the track, as the driver did.

14. RAILROADS ⊂⊃330(3) — INJURIES AT CROSSING—DUTY OF TRAVELER.

Traveler on highway approaching railroad crossing must use ordinary care and should stop to make observations, being under duty to use all of his faculties, and is negligent if he merely looks or listens, believing man in charge of train will ring bell or sound whistle.

15. APPEAL AND ERROR ⊂⊃1064(1)—HARMLESS ERROR — MODIFICATION OF INSTRUCTION.

Modification of railroad's requested instruction, as to traveler's duty on approaching crossing to stop, look, and listen, by eliminating statement that passenger should stop to make observations, and was under duty to use all his faculties, was not prejudicial.

16. NEGLIGENCE ⊂⊃121(5) — BURDEN OF PROOF.

The burden to prove defendant's negligence as the proximate cause of plaintiff's injuries rested on plaintiff.

17. TRIAL ⊂⊃260(8) — INSTRUCTIONS — REPETITION.

An instruction correctly declaring the law that the burden to prove defendant's negligence rested on plaintiff, but covered by a portion of the court's charge, was properly refused defendant.

18. TRIAL ⊂⊃260(8) — INSTRUCTIONS — REPETITION.

The court properly refused defendant railroad the instruction that the duty to take added precautions was not cast upon the motorman by the mere fact that he saw an automobile at a crossing, but had the right to assume that it would stop; principle being covered by another charge.

19. TRIAL ⊂⊃237(1) — FINDINGS — PREPONDERANCE OF EVIDENCE—STATUTE.

Under Code Civ. Proc. § 2061, subd. 5, in civil cases, where the evidence is contradictory, an instruction requiring proof beyond the preponderance of the evidence is erroneous.

20. RAILROADS ⊂⊃324(1) — INJURIES AT CROSSING—DUTY OF PASSENGER ON VEHICLE.

Mere sight of railroad crossing by passenger in vehicle approaching, no danger being apparent, does not make it the passenger's duty to warn the driver of the crossing or of the near approach of the vehicle.

21. APPEAL AND ERROR ⊂⊃1067—HARMLESS ERROR—REJECTION OF INSTRUCTION.

Where court in charge clearly stated and explained rule that plaintiff could not recover if guilty of negligence proximately contributing to his injury, rejection of instruction requested by defendant involving statement of proposition was harmless.

22. TRIAL ⊂⊃260(8) — INSTRUCTIONS — REPETITION.

In action against railroad for injuries in crossing collision, court properly refused defendant's requested instruction that jury were not at liberty to disregard testimony of either motorman or conductor simply because employed by defendant, where court did instruct jury were sole judges of value of evidence, and were not at liberty arbitrarily to reject testimony of any witness.

23. TRIAL ⊂⊃194(20) — INSTRUCTION — DIRECTION TO RETURN VERDICT.

Instruction that, if plaintiff was injured as described, jury should render verdict for him, and against railroad, for full amount of "damages," not exceeding amount prayed in complaint, was not erroneous as an unqualified direction to return verdict for full amount.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by George W. Ellis against the Central California Traction Company, a corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

Arthur L. Levinsky, of Stockton, for appellant. Stuckenbruck & West, of Lodi, for respondent.

HART, J. On the 28th day of September, 1915, plaintiff was a passenger for hire, on an automobile stage owned and driven by one Sam Ebel, traveling from Stockton to Lodi along a public highway known as the "Cherokee lane." At a point about three miles from Stockton, where the highway crosses the railroad track of defendant, the automobile collided with one of defendant's trains which consisted of two cars. Plaintiff received injuries in the collision and brought the action to recover damages therefor. A jury returned a verdict in his favor for $1,700, and judgment was entered against

defendant for that amount, from which judgment defendant prosecutes this appeal.

Briefly stated, the facts are: the crossing where the accident occurred is an exceedingly dangerous one. Going in a northwesterly direction, Cherokee lane crosses defendant's railroad and immediately turns to the north. There are some trees, with dense foliage, immediately adjoining the right of way which prevent a full view of the track. It is a place where it should be imperative that the driver of a vehicle should heed the admonition to "stop, look, and listen." The testimony, as well as a number of photographs introduced in evidence, showed that at the crossing there was the usual sign, reading, "Railroad Crossing," that at a point about 100 feet south there was a sign painted, "Danger. R. R. X.," and at about 30 feet further south there was another sign on which was painted the word, "Railroad."

The owner and driver of the auto stage, Sam Ebel, for more than two months prior to the day of the accident, had been running his automobile between Stockton and Lodi, making six round trips each day. The automobile was a seven-passenger, six-cylinder, Pierce-Arrow. On the day of the accident it contained eight passengers besides the driver. The stage left Stockton at about 8 o'clock in the morning, and the collision occurred about 15 minutes later.

Plaintiff was a stranger to the locality, and the trip was his first one over the road; his destination being Lodi. Owing to the crowded condition of the stage, plaintiff sat on the door on the left-hand side with his feet inside of the machine. At a point about 75 feet south of the crossing, plaintiff saw that they were approaching a railroad track. He testified that he looked up and down the track, but could see no train; that the orchard trees grew within 6 or 7 feet of the track at one point and that a train could not be observed until one was within about 20 feet of the track; that when he was about that distance from the track he saw the approaching train coming from the north; that it was traveling at about 25 miles an hour, and the automobile was proceeding at not to exceed 6 or 7 miles an hour; that the driver, as quickly as possible, put on his brakes and swerved to the left. Plaintiff jumped to the center of the automobile and took hold of the back of the front seat, and when he recovered his senses after the collision occurred he was lying on the roadway. He and the physicians who attended him testified as to the extent of his injuries.

On of the passengers, Henry Squires, called as a witness for the plaintiff, testified that, when the stage was at a point at about 300 yards from the crossing, he for the first time observed a freight train standing on the siding located about 300 yards above the crossing; that after that, owing to an obstruction of the view caused by houses and fruit trees, he was unable to see the freight train until the auto stage had reached a point about from 25 to 40 feet of the track, when he again saw the freight train, and that it was then moving and approaching the crossing; that thereupon he immediately warned the driver of the automobile of the approach of the train; and that he (the driver) then immediately applied the brakes. Neither Squires nor, for that matter, any of the passengers testifying for the plaintiff, heard a whistle blown.

D. McCoy, also a passenger on the auto stage, called as a witness for defendant, testified that he did not know how rapidly the automobile was traveling, but that at one time he said to the driver, "You are going too damn fast"; that when he first saw the train the automobile was going faster than the train was.

The train with which the stage collided had been standing on the siding mentioned waiting for a passenger train to pass. After it passed, the freight train backed out of the siding to the main track and then started toward Stockton. The motorman testified that he blew the crossing signal—two long and two short blasts—twice before reaching the crossing where the accident occurred; the last signal being given when the train was about 100 feet from the crossing, and ending just before he reached it. The train crew testified that the speed of the train was from 10 to 15 miles an hour and that of the automobile about 30. There was evidence that there was some wind blowing from a southerly direction and that the automobile was making considerable noise, which tended to explain why none of the occupants of the stage heard the whistle, if one was blown. There is a signal gong at the crossing, but the testimony was that it did not ring at or immediately before the time of the accident, but that it was covered with a sack to indicate that it was out of order.

[1, 2] There was evidence from which the jury were warranted in finding that the train, when approaching the crossing, was traveling at the rate of at least 30 miles an hour. Whether this was an excessive rate of speed when approaching a public crossing was a question for the jury, as was likewise the question whether the defendant's train sounded or gave any warning of its approach to the crossing.

The appellant complains: (1) That the complaint does not state a cause of action in behalf of the plaintiff and that the order overruling its demurrer thereto was erroneous; (2) that the evidence does not support the verdict; (3) that certain rulings as to the evidence were erroneous; (4) that error was committed in the giving and the refusal to give certain instructions and in the modification of certain instructions proposed by the defendant and given to the jury as modified.

[3-5] 1. The objection to the complaint is without force. That pleading, after alleging that the automobile in which the plaintiff was riding at the time of the accident was a public conveyance, engaged in carrying passengers for hire, and after describing the crossing at which the collision occurred, avers:

"That as plaintiff reached said crossing and while plaintiff and said automobile were at and on said crossing, defendant ran one of its trains, drawn by a car operated by electric power, across said highway at said crossing, in a negligent manner and at a great and negligent rate of speed and without sounding any alarm, bell, or whistle, and without signal or warning of any kind, so that by reason thereof the said train struck plaintiff and said automobile, in which plaintiff was so riding as a passenger, and thereby injured and crushed plaintiff and damaged him in the following manner," etc.

It is further alleged that when the accident occurred the plaintiff was "traveling with due care in said automobile." These allegations state a case of negligence. Learned counsel seems to be of the opinion, however, that all the facts and circumstances of the accident should have been set forth in the complaint for the purpose of showing that the plaintiff himself was not guilty of the negligence, if any there was, which was the immediate or direct cause of the damage sustained by him. But this would have necessitated the pleading of the evidential facts, and no one knows better than the learned attorney for the defendant that thus the very first of the rules of pleading would have been violated. Moreover, contributory negligence in an action to recover for personal injuries is a defense which may be set up and, if so set up, must be supported by the defendant. The burden of establishing it, when relied on as a defense, is always on the defendant.

[6] The contention that the complaint should have shown who the owner or the driver of the machine was at the time of the collision is equally untenable. If the plaintiff was himself the owner or the driver of the automobile when the damage was done, either of those facts could have been shown under the claim that his negligence alone was directly responsible for the accident. The complaint, however, alleges, as we have seen, that the machine was run as a common carrier or public conveyance and that the plaintiff was merely a passenger in said machine. This was sufficient to justify the inference that he was neither the owner nor driver of the automobile, assuming, but by no means deciding, that that fact was important as a matter of pleading or necessary to be shown by the complaint.

[7] Another point is that the allegations that the plaintiff "was traveling with due care," and that defendant "ran one of its trains * * * across said crossing, in a negligent manner and at a great and negligent rate of speed," involve mere conclusions of law. Of course, the rule is elementary that conclusions of law are ordinarily not permissible in pleading. But conclusions of fact drawn from the evidential facts involve the statement only of the ultimate facts. In a measure, it is often true that the statement of an ultimate fact involves the statement of a conclusion of law, as, for illustration, the statement in a complaint that "John Doe is indebted to Richard Roe" in a certain sum. This is, in a sense, the statement of a conclusion of law; but it has also always been held to constitute the statement of an ultimate fact—a fact which has been drawn from the evidential facts. So it is true here. The allegations that the plaintiff exercised "due care" in making the crossing and that the defendant ran its train "in a negligent manner and at a great and negligent rate of speed" are, in the last analysis, conclusions of law; but they are no less conclusions of fact drawn from the facts and circumstances attending the collision, and are therefore the ultimate facts to be proved.

[8, 9] 2. The jury were apparently justified in finding that the defendant's employés were negligent by failing to blow a whistle or give any other warning of the approach of the train towards the crossing and was likewise justified in finding that, at the time the train approached and started over the crossing, it was traveling at a greater rate of speed than ordinary prudence would justify when passing over that part of a railroad track crossed by a public and popularly used highway. The case, therefore, upon the facts, comes clearly within the doctrines of the cases of Drouillard v. S. P. Co., 172 Pac. 405, and Ilardi v. California Traction Co., 172 Pac. 762, both recently decided by this court, and the cases therein cited.

[10] Here, as in those cases, the plaintiff was a passenger in the vehicle which was struck by a railroad train. He was not the driver of the machine, nor the owner, and had no authority or control over the driver. Assuming the driver to have been guilty of negligence, there is no evidence that the plaintiff participated in or was a party to such negligence. There is no evidence that he volunteered advice to the driver as to the course he should follow after the moving freight train hove in sight of the driver and the passengers. In fact, there is no evidence that he did or said anything which contributed in any measure or in any way to any negligence of which the driver might have been guilty.

In the Ilardi case, supra, it is said:

"The cases are quite uniform in the enunciation of the rule that a person riding as a passenger or guest in a vehicle driven by another may not be charged with the negligence of the latter which has caused injury to the former, unless the passenger or guest has the right to exercise control over the driver of the vehicle, or 'in the eyes of the law may be said to possess such power of control.' (Bryant v. Pac. Elec. Ry. Co., 174 Cal. 739 [164 Pac. 385]), or unless it is made to appear that the passenger or guest himself actively participated in the negligence of the driver."

See, in addition to the cases above named, the following: Pyle v. Clark et al. and Wright v. Clark et al. (C. C.) 75 Fed. 644; Thompson v. Los Angeles & S. D. B. Ry. Co., 165 Cal. 748, 134 Pac. 709; Wilson v. Puget Sound Co., 52 Wash. 522, 101 Pac. 50, 132 Am. St. Rep. 1044; Howe v. Minneapolis, etc., R. Co., 62 Minn. 71, 64 N. W. 102, 30 L. R. A. 684, 54 Am. St. Rep. 616; Bresee v. Los Angeles Traction Co., 149 Cal. 131, 85 Pac. 152, 5 L. R. A. (N. S.) 1059; Fujise v. Los Angeles Ry. Co., 12 Cal. App. 207, 107 Pac. 317; Parmenter v. McDougall, 172 Cal. 306, 156 Pac. 460; Clarke v. Conn. Co., 83 Conn. 219, 76 Atl. 723; Lininger v. S. F. Railroad Co., 18 Cal. App. 411, 123 Pac. 235; Chadbourne v. Springfield St. Ry. Co., 199 Mass. 574, 85 N. E. 737.

Assuming, then, that the driver of the machine was negligent, and that his negligence concurring with that of the defendant brought about the collision and its results, the plaintiff cannot be charged with such negligence, but, if not entitled to recover, must have been shown to have himself failed to exercise ordinary care for his own safety. Such a showing the defendant failed to make.

[11] As is to be observed, none of the passengers heard the train whistle or give any other warning indicating that it was moving, and the first notice the passengers had of its approach was after the trees obstructing a view of the train had been passed and the automobile was at a distance of from 25 to 40 feet from the crossing. The plaintiff, who was sitting on the door of the machine, with his feet on the inside thereof, upon observing the train moving towards the crossing, immediately jumped to the center of the machine and took hold of the back of the front seat. What induced him to believe, as evidently he did for the moment believe, that he would be less liable to injury in the event of a collision by taking a position in the center of the machine than he would in the position from which he jumped to the center, the record does not show. The probability is that he himself could now give no rational reason for his change of positions in the machine. But that thus he intended and attempted to shield himself against personal injury, the jury had the right to believe; and in the absence of a showing that, under the circumstances of peril which surrounded him and which came upon him with a suddenness that would very naturally preclude the exercise of his best judgment as to what he ought to have done, he was guilty of some affirmative act of negligence, it was entirely for the jury to determine whether he did or did not exercise the care for his own safety which the law required of him. The verdict implies that he did exercise such care.

It is often true that, in cases of sudden circumstances of danger, a person does the very act that he ought not to do to save himself from being injured; but, in those cases where the party causing those circumstances has done so negligently and the injured person has not himself intentionally or from culpable carelessness contributed thereto, the latter will not be held to have been responsible for any injury he may sustain merely because he has not acted prudently or with good judgment in an effort to escape being hurt or killed. As was said, in Tousley v. Pac. Elec. Ry. Co., 166 Cal. 457, 137 Pac. 31, quoting the syllabus:

"A person in great peril, when immediate action is necessary to avoid it, is not required to exercise all that presence of mind and carefulness which are justly required of a careful and prudent man under ordinary circumstances."

See, also, Shearman & Redfield on Negligence, § 89; Schneider v. Market St. Ry. Co., 134 Cal. 490, 66 Pac. 734; Stapp v. Madera Canal & Irrigation Co., 34 Cal. App. 41, 166 Pac. 823.

But we are unable to perceive what the plaintiff could have done to have saved himself from injury. He might have jumped to the ground, it is true; but the peril attending such a move under the circumstances might have been equally as hazardous and dangerous as the course he did pursue. Indeed, it might have then appeared to him more dangerous to jump from the machine while it was moving at a pretty fair speed than to remain in it, for he had the right to suppose that the driver himself, who was familiar with the crossing, having passed over it many times, would exercise due care for the protection and safety of his passengers. In other words, he had the right at all times to trust to the driver of the automobile to avoid the ordinary dangers of the road, with which the driver was entirely familiar, and that even when so near the crossing as the machine was as the train was approaching he would or might take some action which would prevent what then might have appeared and probably did appear to be an impending collision between the train and the machine.

The cases cited by counsel for the appellant have no application to the facts of this case. They might be pertinent to the case of the driver of the automobile if he were plaintiff here. It should not be necessary to say that in none of them is it held that the negligence of the driver of a vehicle is imputable to a guest or passenger riding in such vehicle where injury has resulted partly from such negligence to the guest or passenger and where the latter has exercised due care for his own safety.

[12] 3. Two of the witnesses to the accident, George Bloodworth and P. S. Titus, were residents of Jacksonville, Fla., and their depositions were taken and introduced in evidence. Before introducing these depositions, counsel for the defendant called a witness, one McCurry, a clerk in the office of the defendant at Stockton, by whom he sought to prove and did prove that said wit-

nesses voluntarily went to the office of defendant shortly after the accident and likewise stated to McCurry that they had witnessed the accident and desired to give testimony as to the circumstances thereof. The object of this testimony, as counsel explained it at the trial, was to negative the insinuation which he claimed was involved in the cross-interrogatories submitted to Titus and Bloodworth that they were not in California on the day of the accident. The object thus sought to be attained by the testimony of McCurry was in fact accomplished, he having been permitted to testify that Titus and Bloodworth voluntarily went to him and stated that they saw the accident and wished to give their testimony then, and that he took them to the law offices of defendant's counsel, to whom they made a statement of the facts and circumstances of the accident as they saw it. Further than this the court refused to allow McCurry to testify regarding that circumstance. Counsel now complains that he was entitled to show all the facts and circumstances of the presence of Titus and Bloodworth in Stockton at the time, including details of their conversations concerning the accident. There is no legal support for the objection here made to the court's ruling excluding further testimony as to the matter. All that counsel stated at the trial that he desired to show by McCurry was testified to by said witness. The fact is the depositions themselves showed that Titus and Bloodworth were in California at the time of the accident and witnessed it, and testimony of other witnesses that they were in this state at the time and were where they had an opportunity to see the accident would be admissible only where the other party had introduced proof by way of impeachment tending to show that said witnesses were not in California on the day the accident happened.

[13] 4. The court refused to strike out on motion of defendant the following answer, given by the witness Stone, a passenger in the automobile when the collision happened, in response to a question by plaintiff's attorney as to whether he (Stone) watched or noticed the other passengers as the train was moving towards the crossing:

"Sure not. I was in the back. I could see those in front of me, but naturally looked up and down the tracks, and their heads bobbing, like glancing up and down the track the driver did."

The ground of the motion, as stated by counsel, was that "what this witness did or saw is incompetent, irrelevant, and immaterial; the witness not being the plaintiff." It is here urged that the ruling on the motion was erroneous and prejudicial. We cannot see it that way. Obviously, the witness or any witness, whether a party to the action or not, is competent to give testimony as to any fact material and relevant to the issue of which he has obtained direct knowledge; that is, any fact which he has observed or acquired knowledge of through his own perception.

There are numerous other exceptions to rulings as to certain evidence which counsel insists constitute well taken grounds for a reversal. These we have carefully examined and considered, and in none have we found prejudicial error.

[14, 15] 5. The following instruction was requested by the defendant:

"It is the duty of a traveler on a highway approaching a railroad crossing to use ordinary care in securing a time and place to stop, look, and listen for coming trains. *He should stop for the purpose of making such observations. It is his duty to use all of his faculties, and it is not enough if he merely looks or listens, believing that the people in charge of any approaching train will ring the bell, or sound the whistle.*"

The court modified said instruction by striking therefrom the portion which we have italicized and as so modified read it to the jury. Counsel contends that the court in so modifying the instruction erred to the serious prejudice of the defendant's rights.

That the instruction as proposed contained a correct statement of the rule in the abstract, there can be no doubt (Griffin v. San Pedro, L. A. & S. L. R. R. Co., 170 Cal. 772, 775, 151 Pac. 282, L. R. A. 1916A, 842); and the portion of the instruction given sufficiently stated the law of this case. But the instruction as a whole is not altogether applicable to a case of this character. While it was no doubt the duty of the plaintiff to look and listen and "to use all his faculties" to the end that he might exercise the required degree of care to protect himself against injury, it is manifest that he could not stop, since he was in the machine and had no authority over the driver, but was wholly subject to the control and actions of the latter. The modification of the instruction as indicated was not prejudicial, although we cannot perceive that any harm would have been done by giving it in its entirety.

[16, 17] 6. Instruction No. 7, proposed by the defendant and disallowed by the court, contained a statement of the rule that the burden of proving the alleged negligence of the defendant as the proximate cause of plaintiff's injuries rested upon the plaintiff. The instruction correctly declared the law, but the rule as stated therein was covered by the court in other portions of its charge. Repeatedly the court told the jury that, to prevail in the trial, the plaintiff was required to prove his allegations of negligence by a preponderance of the evidence and that unless he did so the defendant would be entitled to a verdict.

[18] 7. It is next contended that the action of the court in disallowing the following instruction involved prejudicial error:

"The duty of taking added precautions to prevent a collision was not cast upon the motor-

man * * * by the mere fact that he saw an automobile, but he had the right to assume that the automobile would stop before attempting to cross the track."

The principle stated in said instruction was in effect declared in the following, which was given:

"Those in charge of railway cars are not compelled to stop for an automobile approaching a railway crossing where there is nothing to indicate that the person or persons in charge of such automobile are unable to stop before going on such crossing, and nothing to indicate that they have not, or might not have, seen the approaching train."

Furthermore, the negligence charged against the defendant was in its failure to give a warning signal and in running the train at an excessive speed; and the court explicitly instructed the jury that, in arriving at a verdict, they were to confine themselves to the consideration only of the negligence charged in the complaint, and that if the negligence so charged was not proved by the plaintiff to the required degree they should find for the defendant.

[19] 8. The court refused to allow an instruction, preferred by the defendant, which, if given, would have told the jury that they could not find for the plaintiff unless the evidence satisfied them that he has proved the negligence relied upon by him "beyond a preponderance of the evidence." It is obvious that the italicized language of the proposed instruction does not correctly state the rule, which is, in civil cases, where the evidence is contradictory, that the decision must be made, not *beyond* but *according* to the preponderance of the evidence. Code Civ. Proc. § 2061, subd. 5. It is true that a correct statement of the rule was embraced in the first part of the rejected instruction, but said rule having been elsewhere in the court's charge declared to the jury, it was manifestly unnecessary to repeat it.

[20] 9. Defendant's proposed instruction No. 19 would have told the jury that if the evidence showed that the plaintiff saw the "railroad crossing in ample time to have requested the driver of the automobile to stop before attempting to cross the * * * track, * * * and that plaintiff made no remonstrance or objection, but permitted the driver * * * to attempt to cross the * * * track, without stopping, looking and listening for the approach of a train thereon, then * * * the plaintiff is bound by the act of the driver * * * in not stopping, looking, and listening for an approaching train * * * and cannot recover." The instruction does not state the law applicable to this case. The mere sight of a railroad crossing by a passenger of a vehicle approaching such crossing, where there is then present no apparent danger in making the crossing, does not make it the duty of such passenger to warn the driver of the crossing or of the near approach of the vehicle thereto. As the cases point out, a passenger has the right to assume that the driver will, in such a case, as, indeed, in all cases, exercise due care to avoid the usual or ordinary dangers of the road.

[21] 10. Instruction No. 22, requested by the defendant, but disallowed, in effect involved the statement of the proposition that the plaintiff would not be entitled to recover if it appeared from the evidence that he was guilty of negligence which proximately contributed to the injury. The court in its charge clearly stated and explained that rule to the jury and the rejection of said instruction was therefore not prejudicial.

[22] 11. There was no error in the action of the court in refusing to give defendant's proposed instruction No. 24. The court, had it adopted said instruction, would have declared to the jury the proposition that they were not at liberty to disregard the testimony of either the motorman or conductor of the train "simply because they were in the employ of the defendant," nor should the jury, for like reason, view the testimony of those witnesses with suspicion. The court instructed the jury that they were the sole judges of the effect and value of the evidence, and, further, that they were not at liberty arbitrarily to reject the testimony of any witness, but should attach to it such weight as in their judgment it was entitled to. This instruction was, of course, addressed to the testimony of all the witnesses testifying in the case, including the conductor and motorman of the defendant's train. There was therefore no necessity for or benefit to be derived from an instruction singling out particular witnesses and telling the jury that their testimony should not be arbitrarily or for capricious or unsubstantial reasons rejected or given no weight.

[23] 12. The last point made by the defendant to which special consideration should be given involves an attack upon plaintiff's instruction No. 3, which the court submitted to the jury. It is contended that said instruction involves an unqualified direction by the court to the jury to return a verdict for the full amount of damages asked in the complaint, if they found that the plaintiff had received the injuries complained of directly through the negligence of the defendant. We do not so understand the instruction. It in substance stated that, if the jury found from the evidence that the plaintiff was injured as described in the complaint and directly through the negligence of the defendant, "then it is your duty to render a verdict in favor of plaintiff and against the Central California Traction Company for the full amount of plaintiff's 'damages,' not exceeding, however, the amount prayed for in the complaint." The word "damages" as used in the instruction as the same appears in the record before us was without doubt intended as the word "damage" and to mean "damage" and not "dam-

ages." As so understood, and as undoubtedly the jury must have understood it from the words immediately following the word "damages," to wit, "not exceeding, however, the amount of damages prayed for in the complaint," the instruction simply and plainly means that, in case the jury found that the plaintiff had been injured through the negligence of defendant or its negligence concurring with that of the driver, the plaintiff would be entitled to full compensation for the damage (or injury) so sustained, not exceeding the amount of damages prayed for in the complaint.

We have found no prejudicial error in the record, and the judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

---

37 Cal. App. 624

## POLK v. LAUREL HILL CEMETERY ASS'N. (Civ. 1811.)

(District Court of Appeal, Third District, California. June 24, 1918.)

1. PLEADING ⊜35—SURPLUSAGE.
In action for the drowning of plaintiff's son in a reservoir maintained in defendant's cemetery, where children were allowed to go, allegations as to the rights of lot owners and visitors and as to the public right to use a roadway through the cemetery were surplusage.

2. NEGLIGENCE ⊜108(1)—EXCAVATION NEAR HIGHWAY—ALLEGATIONS.
Complaint, in action for the drowning of plaintiff's son in a reservoir maintained in defendant's cemetery "immediately alongside" a driveway, did not show a case of an excavation "adjoining the highway" into which a traveler rightfully in the highway accidentally fell.

3. NEGLIGENCE ⊜23(1)—TURNTABLE RULE.
The maintenance of dangerous and attractive machinery unguarded and exposed, which naturally allures and tempts small children to go upon or about it, is negligence for which the one maintaining it is liable in damages for an injury to a trespassing child.

4. NEGLIGENCE ⊜23(1)—TURNTABLE RULE—DANGEROUS MACHINERY.
The turntable rule of liability as to dangerous machinery is subject to the qualification that the danger, though novel and attractive to children, can be sufficiently guarded to protect against injury without destroying its usefulness or its intended purpose.

5. NEGLIGENCE ⊜23(1)—TURNTABLE RULE—GROUND.
The doctrine of the turntable cases is grounded in the maxim that one must so use and enjoy his property as to interfere with the safety of others as little as possible consistently with its proper use.

6. NEGLIGENCE ⊜32(4) — INVITATION TO PREMISES—SCOPE.
A permissive general invitation or privilege to visit a cemetery, not abandoned but parked and having driveways, etc., did not allow children to use it as a playground.

7. NEGLIGENCE ⊜32(1)—USE OF PREMISES—"INVITATION"—SCOPE.
An express or implied "invitation" to use premises creates a legal duty when the use is in accordance with the intention or design for which the place was adapted, prepared, or allowed to be used (citing Words and Phrases, Second Series, Invitation).

8. NEGLIGENCE ⊜32(4)—USE OF PREMISES—INJURY—LIABILITY.
Mere knowledge by a cemetery association that children habitually went into the cemetery and played would make the children, at most, licensees to whom the association would owe no duty or obligation.

9. NEGLIGENCE ⊜39 — USE OF PREMISES—RESERVOIR — LIABILITY FOR DROWNING OF CHILD.
A cemetery association maintaining an unguarded reservoir alongside a driveway near an entrance was not liable, under the rule of the turntable cases, for the drowning of a child of eight years allowed in the cemetery.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Imory Smith Polk against the Laurel Hill Cemetery Association, a corporation. Demurrer to complaint sustained, and judgment entered for defendant for costs, and plaintiff appeals. Affirmed.

John L. McNab, of San Francisco, for appellant. Haven & Athearn, of San Francisco, for respondent.

HART, J. Plaintiff brought the action to recover damages for the death of his son by drowning in a reservoir maintained by defendant in its cemetery in the city of San Francisco. A demurrer to the complaint was sustained, plaintiff elected not to amend, and judgment was entered in favor of defendant for costs, from which judgment plaintiff appeals.

The complaint alleges that defendant is a corporation; that, at the time of his death, William Henry Polk was a minor of the age of eight years and was the son of plaintiff; that defendant, for many years, has maintained in San Francisco a public cemetery; the streets surrounding it are named and it is stated that they are public thoroughfares used by the general public and by minor children attending public schools; that, for many years, said cemetery has been abandoned as a burial place owing to an ordinance of the city forbidding burials therein, but that it "has been and is now maintained as a place of adornment and attraction, parked and graded and kept open to the public daily from the hour of 7 a. m. until 5 p. m. of each day. Said cemetery is located in the heart of the residence section of the city and county of San Francisco, is surrounded by dwellings, and is maintained as an open parked ground made attractive not only for the benefit of persons whose relations and friends are buried within said cemetery, but is maintained as a public place of adornment and beauty with driveways, flower gardens," etc., "maintained open for the public view." The gates, entrances, and driveways are then described, and it is alleged that the cemetery is "daily frequented by great numbers of the general public, by visitors, * * * and

particularly by great numbers of minor children who were and are permitted freely and without hindrance to enter said grounds and make a playground thereof, * * * to traverse its paths and byways, play in its driveways, and go and come freely throughout the whole of said cemetery." It is then stated that rules for the government of the public are posted in a prominent place at the entrance, to the effect that visitors should conduct themselves with proper decorum, forbid the plucking of flowers, etc.; that the owners of lots in said cemetery have the right freely to enter and do work in the way of erecting curbs, improving and adorning graves, etc.; that the cemetery contains many hundreds of individual lots, owned by the purchasers thereof, and that all the ground has been sold to individual lot owners; that for many years the general public used a roadway through said cemetery, including children going from what is known as the Richmond district to car lines at Presidio avenue; that there is a turnstile in said roadway in the boundary fence, and over said turnstile are signs reading: "Open from 7 a. m. to 5 p. m." It is next alleged:

"At a prominent place in said cemetery and immediately alongside one of the driveways therein and only a short distance from the Presidio avenue entrance aforesaid, defendant dug, excavated, and constructed a large reservoir for the holding of water. Said reservoir is still maintained on said premises and is of the length of about 130 feet, by a width of 55 feet, and was of a depth of 16 feet. Said reservoir is constructed of concrete and rises only 12 inches above the surface of the ground, which is parked and sloped up to the edge of said concrete." That said reservoir was wholly exposed without covering and without any fence or inclosure. That it was dangerous to all persons passing near the same "because the turf and ground sloped up to the edge thereof, so that any person walking or standing near the edge of said reservoir was without protection and without notice of proximity to a place of danger and was without any warning sign or indication that said place was dangerous. * * * Said reservoir was also likewise a place naturally attractive to children, and the children entering said grounds were naturally attracted on account of the water therein, and were accustomed naturally to play about said reservoir, casting stones into it, and imitating fishermen by casting lines therein and playing on the turf near the edge thereof. Said reservoir was at times filled with water almost to the brim and at other times was almost empty. * * * On the 25th day of April, 1914, William Henry Polk, the son of the plaintiff, a child of eight years of age, in company with other small minor children, entered said grounds at the driveway entrance on Presidio avenue above referred to about 2 p. m. of said day and engaged in playing in said grounds with other children, and in the same way that great numbers of children had been accustomed for years to enter and play in said cemetery with the knowledge of defendant. While engaged in such play near said reservoir, said infant stumbled and was precipitated into said reservoir and drowned, and was dead when removed from said reservoir a few minutes later. Plaintiff alleges that said child came to his death through the negligence of the defendant in constructing and maintaining such reservoir without any protecting barrier," etc., and "without any warning sign or guard to protect against the danger thereof. * * * Defendant at all the times herein mentioned well knew that said reservoir was attractive to children and was dangerous, and was well aware of the fact that any child or other person approaching or being near said reservoir was without protection or notice of danger and was in imminent danger of falling into said reservoir," and it is alleged, on information and belief, that prior to April 25, 1914, defendant, its agents and employés, had been personally notified that said reservoir was a dangerous place and a place attractive to children.

[1] Counsel for the defendant, in their brief, analyze and construe the averments of the complaint as follows:

"The facts (alleged in the complaint) may be classified as follows: (1) Facts relating to lot owners and visitors to graves located in defendants' cemetery. (2) Facts relating to the right of the public to use a certain roadway for the purpose of passing through said cemetery. (3) Facts relating to children playing in said cemetery.

"Under the first class of facts fall the allegations of paragraph 4 that the cemetery was kept open from the hours of 7 a. m. until 5 p. m., and was maintained not only for the benefit of persons whose relatives and friends were buried within said cemetery, but also as a place of public adornment and beauty. To this class of facts likewise belong the allegations concerning the rules of the cemetery which were clearly posted to govern only the conduct of those who were invited to enter the cemetery, and the allegations concerning the rights of lot owners. Under the second class of facts fall the allegations concerning the use by the public of a certain roadway for the purpose of passing through said cemetery between Presidio avenue and the Richmond district."

We are satisfied with the foregoing analysis of the complaint, and agree with the conclusion declared by counsel for the respondent that the facts coming within the first and second classes, as above indicated, are surplusage. We therefore accept and adopt into this opinion the above analysis of the complaint. We do this, not because we believe that the facts embraced within the first and second classes, as above classified, even if properly in the complaint, would add any force or strength to the case as made by the allegations as to the cause of the accidental death of plaintiff's son, but because it will clarify the situation and confine the discussion herein to the single real question submitted by this appeal, viz.: Whether the defendant owed any duty to the deceased with respect to safeguarding, if it could be done, the reservoir into which he fell.

[2] It may, however, be well first to note that, while the complaint alleges that "in a prominent place in said cemetery and immediately alongside one of the driveways therein and only a short distance from the Presidio avenue entrance aforesaid defendant dug, excavated, and constructed" and still maintains "in a prominent place a large reservoir for the holding of water," it is not alleged that said reservoir abutted upon or in any manner affected Presidio avenue or the driveway near which it is maintained. Hence the case as made by the complaint does not fall within that class where an excavation has been dug or maintained "ad-

joining a highway into which a traveler on the highway, where he had the right to be, had accidentally fallen." Peters v. Bowman, 115 Cal. 345, 349, 47 Pac. 113, 598, 56 Am. St. Rep. 106. Nor does it come within the class of cases which constitute exceptions to the general rule as to the liability of an owner of property to a trespasser thereon who has been injured through some trap or hidden or concealed danger maintained by the owner on his land, and as to which the latter has given no warning to the public or others.

But it is vigorously urged that the case here comes within the doctrine of what are known as the turntable cases.

[3-5] The rule of the so-called "turntable cases," generally stated, is this: That, where dangerous and attractive machinery is maintained unguarded and exposed to the observation and temptation of little children, the natural allurements of which will tempt them to go about or upon, and against the danger of which action their immature judgment interposes no warning or defense, the conduct of the party in so maintaining such machinery involves an act of negligence for which he is liable in damages where a child of the above description, having gone upon or played about and with the machinery, is thereby injured, notwithstanding that the child so injured is a trespasser upon the land upon which the machinery is maintained. This rule is, of course, to be understood with the qualification that the dangers of the machinery, although novel and attractive to the immature mind of a child, can be fully or sufficiently guarded to protect against injury without destroying its usefulness for the purpose for which it is maintained. The principle from which the doctrine of the turntable cases is deduced or upon which it is supported is spoken through the maxim of the law that:

"One must so use and enjoy his property as to interfere with the comfort and safety of others as little as possible, consistently with its proper use." Barrett v. Southern Pac. Co., 91 Cal. 296, 303, 27 Pac. 666, 667 (25 Am. St. Rep. 186).

The court, in that case, said:

"If defendant ought reasonably to have anticipated that, leaving this turntable unguarded and exposed, an injury such as plaintiff suffered was likely to occur, then it must be held to have anticipated it, and was guilty of negligence in thus maintaining it in its exposed position. It is no answer to this to say that the child was a trespasser, and if it had not intermeddled with defendant's property it would not have been hurt, and that the law imposes no duty upon the defendant to make its premises a safe playing ground for children.

"In the forum of law, as well as of common sense, a child of immature years is expected to exercise only such care and self-restraint as belongs to childhood, and a reasonable man must be presumed to know this, and required to govern his actions accordingly. It is a matter of common experience that children of tender years are guided in their actions by childish instincts, and are lacking in that discretion which is ordinarily sufficient to enable those of more mature years to appreciate and avoid danger, and in proportion to this lack of judgment on their part, the care which must be observed toward them by others is increased."

[6, 7] We may, however, here pause to inquire whether the plaintiff's son was in the cemetery at the time of his death under the general invitation extended by the defendant to the public to visit the cemetery.

While the complaint declares that the defendant's cemetery, for a number of years prior to the accidental death of plaintiff's son, had been abandoned as a burial place for the dead, and that since that time said cemetery "has been and is now maintained as a place of adornment and attraction, parked and graded and kept open to the public daily from 7 a. m. to 5 p. m." yet it is likewise shown that there are still buried in said cemetery many dead human bodies which had been deposited in graves therein before the cemetery had been abandoned as such, and that said graves are still maintained and cared for by surviving relatives and friends of the deceased. It is therefore quite manifest that the said cemetery is not now, nor has it been since its abandonment as such, any the less a cemetery, notwithstanding that it has been maintained in a manner to give it the appearance of a park. In other words, it has not been converted into a public park, in the sense in which such places of amusement and diversion are commonly known, and much less into a children's playground, merely because further burials therein have been stopped under the mandates of ordinances of the city of San Francisco prohibiting burials therein. The invitation to the public to visit the cemetery must therefore be assumed to be accompanied by the condition that persons accepting or acting upon it will do so with due regard to the fact that a place, such as it is, which is dedicated to the dead, as the resting place of the mortal remains of those who have passed to the beyond, is not one of recreation and pleasure, where the lighter vein of life may with propriety be given full play, but is one which, obediently to the common sentiments of mankind, demands of those who visit it dignity of demeanor and respect and that serious reflection that the one great event, which is inevitably common to all living creatures, and of which a place in which the dead have been buried is a most potent reminder, would naturally inspire. Hence it must be said, on the complaint's description of the place where appellant's son lost his life, that the invitation extended to the public by the owner of the cemetery (the defendant) to visit the same during certain specified hours of each day is limited to those of the public that go or desire to go there for a purpose other than for those lighter pleasures which are intended and calculated to divert the mind from the more serious affairs of life and even for the time from that final inevitable destiny which marks the end of all human life. Of course, it cannot be

doubted that children are within the scope of the invitation, but it certainly cannot reasonably be said that the invitation included the granting of a privilege to children to make a playground of the place. No one would contend that under the invitation children are privileged to play on the graves; and, although it had been the custom of children residing in the neighborhood of the cemetery to go to the cemetery and play therein, there is nothing in the complaint to show that they had been either directly or impliedly given the right to do so. When therefore they were in the cemetery for the purpose of playing only, they were not there for any purpose to which the cemetery is put or designed to be put, nor were they there under the general privilege accorded or general invitation extended to the public to visit the cemetery.

"The invitation which creates a legal duty," says the court, in Mandeville Mills v. Dale, 2 Ga. App. 607, 58 S. E. 1060, "may be express * * * or it may be implied, as when such owner or occupier by acts or conduct leads another to believe the land or something thereon was intended to be used as he uses them, and that such use is not only acquiesced in by the owner or occupier, *but is in accordance with the intention or design for which the way or place or thing was adopted and prepared, or allowed to be used.*" (Italics ours.)

See, also, Words and Phrases, second series, under word, "invitation," and the cases therein cited.

[8] It is true that the complaint discloses that the defendant by its agents and officers had knowledge of the fact that children were accustomed to playing in the cemetery, and that they were permitted by the defendant, its agents, etc., to go in and upon the paths and byways of the cemetery to play therein and thereon. But mere knowledge by the defendant that children habitually went into the cemetery and therein indulged in their childish sports would make them, at the most, mere licensees, to whom the defendant owed no duty or obligation. Means v. Southern Cal. Ry. Co., 144 Cal. 473, 478, 479, 77 Pac. 1001, 1 Ann. Cas. 206; Kennedy v. Chase, 119 Cal. 642, 52 Pac. 33, 63 Am. St. Rep. 153; Grundel v. Union Iron Works, 141 Cal. 564, 75 Pac. 184; Herzog v. Hemphill, 7 Cal. App. 118, 93 Pac. 899; Schmidt v. Bauer, 80 Cal. 567, 22 Pac. 256, 5 L. R. A. 580.

Mr. Thompson, in his treatise on Negligence (section 303), says:

"We have found no support for any rule which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity or motives of private convenience, in no way connected with business or their relations with the occupant."

In the Means Case, supra, the plaintiff was injured while in the freight shed of the defendant by the bursting of a tank of sulphuric acid situated in said shed. The plaintiff had gone into the freight shed to see a party in connection with some matter personal to himself. His action for damages was defeated in the trial court, a motion for a nonsuit having been granted, and the judgment thereupon entered affirmed on appeal. The Supreme Court, referring to the facts, said:

"If the plaintiff was not technically a trespasser in entering the freight house of the defendant, he was at best but a licensee, entering thereon subject to the rule determining the measure of responsibility of the owner of premises to a mere licensee. He was not upon the premises by the invitation, express or implied, of the defendant, nor for any business purpose connected with defendant, nor in relation to any business for which the freight house, in which he was injured, was used. He went there of his own volition, uninvited, concerning a matter which was personal to himself, in which the defendant had no interest."

The foregoing observations have peculiarly pertinent application to the facts of this case. As we have shown, the complaint discloses that the appellant's son went to the cemetery on the day of his unfortunate death for the purpose of gratifying his childish desires and fancies, and was there in connection with a matter in no way germane to the business of the defendant or the purpose for which it maintains the cemetery, or the purpose for which it extends to the public an invitation to visit the cemetery.

[9] It follows from the foregoing considerations that if the appellant is entitled, upon the facts stated in his complaint, to prevail herein, he must show that the said facts bring the case within the rule of the turntable cases. This he has failed to do, as we will now proceed to show.

We have previously stated the principle of law and the reasons supporting the rule applied in cases of injury sustained by trespassing children of immature judgment in playing on and about dangerous machinery to which they have been allured by the peculiar natural attractiveness thereof to childish minds. We may here further say upon that subject that, while the rule is applicable in all cases of attractive machinery in playing with which children have been injured, the leading cases have particularly to do with turntables, which, as is commonly known, are contrivances maintained by railroad companies at certain of their stations for the purpose of turning engines and cars in directions in which the exigencies or requirements of their traffic compel them to go. And those cases, in portraying the natural attractiveness of turntables to infant minds, have described them, as they naturally would appear to the mind of a child, as a sort of "merry-go-round," a contrivance which, as is equally well known, is maintained for the amusement of children and which always, very naturally, arouses to a high pitch their childish predilection for sport and fun. Naturally enough, then, a child would readily be tempted to attempt to play and ride on turntables, machines of lurking and unobservable danger to a child, and hence the rule that the person maintaining them must so safeguard them (as by locking them when not in use so that they cannot be turned) as

will, in a large measure, protect children playing on or about them against injury. The case here, however, presents an entirely different situation. A pond of water, it may be conceded, is always attractive to youngsters; but the dangers connected with and inherent in a lake or pond of water, natural or artificial, are obvious to everybody—even to a child old enough to be permitted by its parents to go about and play unattended upon the streets or in the public parks. It would not conform to the dictates of common reason to say that a child of the age of eight years, or even much younger, does not know and fully realize that a fall into a pond of water or a deep reservoir would result in injury to him, if not in his death. But there is no necessity for abstract reasoning upon the proposition, for we think it thoroughly settled by the decisions that a pond of water, whether natural or artificial, is not to be included in the same class with turntables and other complicated machinery, the inherent dangers of which are not obvious to a child.

In Peters v. Bowman, supra, a pond of water had formed on defendant's land from surface water gathering thereon in certain seasons of the year as the result of the grading of a street upon which the land abutted and so closing a gully through which said surface water had theretofore been accustomed to flow and pass from the land. The plaintiff's son, aged 11 years, while riding a raft on the pond, fell off and into the water and was drowned. Judgment upon the verdict of the jury went for the defendant, and plaintiff appealed from the judgment and the order. Among other things, the court therein said, referring to the turntable doctrine, which the plaintiff in that case undertook to invoke:

"But the rule of the turntable cases is an exception to the general principle that the owner of land is under no legal duty to keep it in a safe condition for others than those whom he invites there, and that trespassers take the risk of injuries from ordinary visible causes; and it should not be carried beyond the class of cases to which it has been applied. And the cases to which the rule has been applied, so far as our attention has been called to them, are nearly all cases where the owner of the land had erected on it dangerous machinery, the consequences of meddling with which are not supposed to be fully comprehended by infant minds. It has also been applied to a few other cases where the owner, by some affirmative act, has caused some artificial danger to exist on his premises, as in the case of Branson v. Labrot, 81 Ky. 638, 50 Am. Rep. 193, cited by appellant, where the defendants had 'stacked a large quantity of lumber in one large and irregular pile, so negligently and badly done that as the deceased, an infant, was playing near it, one of the timbers fell upon and killed him.' It is not contended by appellant that the rule of the turntable cases has ever been applied to facts like those in the case at bar; his contention is that the reasoning and philosophy of the rule *ought* to extend it to a case like the one at bar. But the same reasoning does not apply to both sets of cases. A body of water—either standing, as in ponds and lakes, or running, as in rivers and creeks, or ebbing and flowing, as on the shores of seas and bays—is a natural object incident to all countries which are not deserts. Such a body of water may be found in or close to nearly every city or town in the land; the danger of drowning in it *is an apparent open danger, the knowledge of which is common to all* (italics ours); and there is no just view consistent with recognized rights of property owners which would compel one owning land upon which such water, or part of it, stands and flows, to fill it up, or surround it with an impenetrable wall. * * * No case has been cited where damages have been successfully recovered for the death of a child drowned in a pond on private premises who had gone there without invitation, while it has been repeatedly held that in such a case no damages can be recovered. It was * * * so held in Klix v. Nieman, 68 Wis. 271 [32 N. W. 223], 60 Am. Rep. 854, in Overholt v. Vieths, 93 Mo. 422 [6 S. W. 74], 3 Am. St. Rep. 557, in Hargreaves v. Deacon, 25 Mich. 1, in Gillespie v. McGowan, 100 Pa. 144, 45 Am. Rep. 365, and in the recent case of Richards v. Connell, 45 Neb. 467 [63 N. W. 915]."

In denying a petition for a rehearing of Peters v. Bowman, the late Chief Justice Beatty said, among other things:

"A turntable can be rendered absolutely safe, without destroying or materially impairing its usefulness, by simply locking it. A pond cannot be rendered inaccessible to boys by any ordinary means. Certainly no ordinary fence around the lot upon which a pond is situated would answer the purpose; and therefore, to make it safe, it must either be filled or drained, or, in other words, destroyed. But ponds are always useful, and often necessary, and, where they do not exist naturally, must be created in order to store water for stock and for domestic purposes, irrigation, etc. Are we to hold that every owner of a pond or reservoir is liable in damages for any child that comes uninvited upon his premises and happens to fall in the water and drown? If so, then upon the same principle must the owner of a fruit tree be held liable for the death or injury of a child who, attracted by the fruit, climbs into the branches and falls out. But this, we imagine, is an absurdity, for which no one would contend, and it proves that the rule of the turntable cases does not rest upon a principle so broad, and of such rigid application, as counsel suppose. The owner of a thing dangerous and attractive to children is not always and universally liable for an injury to a child tempted by the attraction. His liability bears a relation to the character of the thing, whether natural and common, or artificial and uncommon, to the comparative ease or difficulty of preventing the danger without destroying or impairing the usefulness of the thing, and, in short, to the reasonableness and propriety of his own conduct, in view of all surrounding circumstances and conditions. As to common dangers existing in the order of nature, it is the duty of parents to guard and warn their children, and, failing to do so, they should not expect to hold others responsible for their own want of care. But, with respect to dangers specially created by the act of the owner, *novel in character, attractive and dangerous to children, easily guarded and rendered safe* (italics ours), the rule is, as it ought to be, different; and such is the rule of the turntable cases, of the lumber pile cases, and others of a similar character. But the owner of a thing dangerous and attractive to children is not always culpable, and therefore is not always liable for an injury to a child drawn into danger by the attraction."

It would seem to be hardly necessary to cite other authorities than the above to show

that the facts of this case do not bring it within the principle of the turntable and other like cases. Special attention is, nevertheless, invited to the cases referred to in Peters v. Bowman, supra, and also to the following cases: Loftus v. Dehail, 133 Cal. 214, 65 Pac. 379; Cooper v. Overton, 102 Tenn. 211, 52 S. W. 183, 45 L. R. A. 591, 594, 73 Am. St. Rep. 864; Arnold v. St. Louis, 152 Mo. 173, 53 S. W. 900, 48 L. R. A. 291, 75 Am. St. Rep. 447; Stendal v. Boyd, 73 Minn. 56, 75 N. W. 735, 42 L. R. A. 288, 72 Am. St. Rep. 599; Sullivan v. Huidekoper, 27 App. D. C. 154, 5 L. R. A. (N. S.) 263, 7 Ann. Cas. 196.

The above-named cases, notably the case of Peters v. Bowman, fully answer every point made by the plaintiff in his attempt to fasten upon the defendant responsibility for the death of his son, and clearly negative the proposition, earnestly pressed by the appellant, that the case at bar is to be differentiated from that of Peters v. Bowman upon the ground that in the latter case the alleged nuisance which caused the damage therein complained of was brought into existence by a natural cause or not by the act of the defendant; whereas, in the case at bar the reservoir which caused the death of plaintiff's son was brought into existence solely by the act of the defendant. The clear and concise exposition of the turntable doctrine by Chief Justice Beatty, above quoted herein, does not support the proposition that the mere fact that the dangers are specially created by the act of the owner or occupier of the land on which they are maintained is itself sufficient to render the owner liable in the case of injuries to a child resulting therefrom or thereby. There are other elements superadded which are essential to fix upon the owner such liability, viz.: That the machinery must not only be novel in character and attractive to children, but "easily guarded and rendered safe." In other words, the machinery or other thing may be attractive and dangerous to children, and yet the owner of the machinery or thing would not be culpable if the dangers of the machinery or thing (which is intended for a useful purpose) cannot be removed without destroying or impairing its usefulness for the purpose it was designed to subserve.

We have found nothing in the cases cited and relied upon by the appellant in conflict with the above views or the conclusion which we have reached upon the facts as stated in the complaint. We are convinced that the complaint fails to state a cause of action for damages against the defendant, and that therefore the demurrer thereto was properly sustained.

Accordingly, the judgment appealed from is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

178 Cal. 604

JENNY v. JENNY. (S. F. 8256.)

(Supreme Court of California. July 31, 1918.)

HUSBAND AND WIFE ⊜283(1)—SUPPORT AND MAINTENANCE—RIGHT OF ACTION.

Where a husband and wife separate by mutual consent, pursuant to a void antenuptial agreement, the wife is not entitled to separate maintenance and support while such separation continues by mutual consent.

Department 2. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action for support and maintenance by Willa Ida Jenny against Rudolph R. Jenny. Judgment for defendant, and plaintiff appeals. Affirmed.

S. C. Wright, of San Francisco, for appellant. James W. Henderson, of Eureka, for respondent.

WILBUR, J. Plaintiff appeals from a judgment rendered against her in an action for support and maintenance against her husband, the defendant. The marriage occurred about 4 or 5 o'clock p. m., and at 5:20 on the same day, September 25, 1915, the parties separated and never thereafter lived together as husband and wife. The defendant alleges and testified and the court found that this separation was by mutual consent. As was said in Mayr v. Mayr, 161 Cal. 134, 140, 118 Pac. 546, 549:

"A wife living separate and apart from her husband cannot, in the absence of special agreement therefor, compel him to support her while living so separate and apart, unless such separation is caused by misconduct on his part."

The testimony of the husband, and indeed the conduct of the parties, support the finding by the court that the separation was by consent. It is claimed, however, by the appellant, that such separation by consent was a result of a prenuptial agreement between the parties, by which it was arranged that they should be married, but should never live together; that the plaintiff should not assume defendant's name; that each should retain their own property and all their future earnings and acquisitions, and that in the future the plaintiff would "grant a divorce to the defendant"; that such an agreement was void and as against public policy, and that therefore the agreement of separation after the marriage, in pursuance of such void agreement before marriage, was also void; and that plaintiff is entitled to support and maintenance. If, as insisted by appellant, *everything* that flowed from the prenuptial agreement to *marry*, separate, and thereafter secure a divorce was void, the marriage would be also void, and yet marriage is the basis of plaintiff's action. The agreement made the evening before the marriage, it is conceded, was void. The marriage which followed was valid, and created all the mutual obligations which the law attaches thereto. Plaintiff was under no obligation to consent to a separation, and might have insisted upon living with her husband, and charged him with desertion upon failure so to do. She did in fact consent to their separation, and that consent deprived her of her right to separate maintenance and support so long as the separation continued by mutual consent.

The judgment is affirmed.

We concur: LORIGAN, J.; MELVIN, J.

178 Cal. 743

SOUTHERN PAC. R. CO. v. INDUSTRIAL DEVELOPMENT LAND CO. et al. (L. A. 4576.)

(Supreme Court of California. Aug. 12, 1918.)

1. JUDGMENT ⊜712—EVIDENCE—DECREE IN PARTITION — LOCATION OF DISPUTED POINT.

In action involving dispute as to point in a boundary line, a decree in partition is competent evidence to aid in fixing the disputed point, although none of the parties to the action were parties in the partition suit.

2. BOUNDARIES ⊜37(1)—DISPUTED POINT IN BOUNDARY LINE — SUFFICIENCY OF EVIDENCE.

In action involving controversy as to point in a boundary line, evidence *held* to sustain court's finding as to location of the disputed point.

Department 2. Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by the Southern Pacific Railroad Company against the Industrial Development Land Company and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Henry T. Gage and W. I. Gilbert, both of Los Angeles, for appellant. Gurney E. Newlin, of Los Angeles (W. W. Hyams, of Los Angeles, of counsel), for respondents.

WILBUR, J. Plaintiff sued to enjoin the defendants from erecting a brick building upon land alleged to belong to the plaintiff and to be necessary for the operation of its railway, the title whereof was claimed by defendant Land Company. The court gave judgment for defendants, and plaintiff appeals.

[1] Plaintiff and defendant Industrial Development Land Company are the owners of adjoining land in Los Angeles, in the block bounded by Macy, Alameda, Aliso, Lyon, Avila, and Ramirez streets. The real controversy between the parties is as to the location of a part of the boundary line between their properties, and this in turn depends upon the location of one of the stations in that boundary line of the lands formerly owned by Mrs. C. A. De Sepulveda. The land thus brought in question is triangular in form, with a base at the disputed point of about 2½ feet and an altitude of about 800 feet. After plaintiff and defendant had introduced in evidence the deeds constituting their respective chains of title, the defend-

ants offered in evidence a decree of partition of lands belonging to the heirs of G. Tononi, to the south and east of the property belonging to the parties. Appellant claims that the introduction of this decree was erroneous, for the reason that neither of the parties to this action, nor their predecessors, were parties to the partition suit. The decree, however, was received in evidence, not for the purpose of binding the parties by its terms, but for the reason that one of the corners referred to in this decree is the disputed point, and is referred to in the mesne conveyances under which plaintiff claims title, which reference is as follows:

"Said point being the northeasterly corner of the lands of Mrs. C. A. De Sepulveda and a common corner with the lands of the heirs of G. Tononi as the same existed prior to the execution of the deed by said Mrs. C. A. De Sepulveda and her husband to the party of the first part herein, * * * to which said deed reference is hereby made; said point of commencement being further described as being on the southerly line of what is known as the Los Angeles Orphan Asylum Tract," etc.

In view of this reference to a common corner of the lands of plaintiff's predecessors and to the heirs of G. Tononi in the decree in partition, it was competent evidence to aid in fixing the disputed point. This corner was thus described in the decree of partition:

"* * * A post 4"x4" marked C. A. and G. T. in the northeasterly corner of the land of C. Apablasa, * * *" who was a predecessor of defendant.

[2] It is claimed that the evidence is insufficient to justify the finding of the trial court, which was to the effect that the corner in dispute was located as claimed by the defendants. The evidence to support this finding is so abundant that it need not be set forth in detail. Suffice it to say, it included evidence of fences and buildings existing along a large portion of the 800 foot line in controversy for more than 20 years, and the location of the 4x4-inch redwood posts at the corner, as claimed by the defendants, with other evidence abundantly sustaining the conclusion of the trial court. It is claimed by the plaintiff that the evidence shows that the property in question has been occupied and was in the possession of the plaintiff for more than 5 years preceding the institution of the suit in question. The evidence is directly to the contrary, and is to the effect that the land in dispute was not actually occupied by plaintiff's tracks. Plaintiff claims that the line as fixed by the defendant was within 8 feet 6 inches of the center line of the plaintiff's railway track nearest the boundary, and thus did not allow the clearance required by the rule of the Railroad Commission of 8 feet and 6 inches. This claim, however, is directly disputed by one of the defendants' witnesses, who thus fixed the line claimed by the defendants with reference to the tracks:

"The distance between the northerly line and the center of the track of the Southern Pacific Railway Company lying to the north is 8 feet 9 inches."

The judgment is affirmed.

We concur: MELVIN, J.; LORIGAN, J.

---

178 Cal. 733

## GEORGE v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 8750.)

(Supreme Court of California. Aug. 12, 1918.)

1. MASTER AND SERVANT ⟸417(3¼)—WORKMEN'S COMPENSATION ACTS—QUESTIONS FOR COMMISSION.

In proceeding to obtain workmen's compensation, whether claimant was engaged in horticultural work, and therefore not subject to the act when injured, was for the commission, whose decision was beyond review by certiorari.

2. MASTER AND SERVANT ⟸363 — WORKMEN'S COMPENSATION ACTS—RIGHT TO COMPENSATION.

Where one seeking workmen's compensation was hired as janitor, whose duty extended to care of the grounds and trimming of the trees, and who was injured when trimming tree left unsightly by a former attempt to trim it so as to admit light to the building, determination that he was engaged in horticulture, and not entitled to compensation, was not unreasonable.

In Bank. Certiorari by Arthur George to review an order of the Industrial Accident Commission and others. Order affirmed.

B. V. Sargent and Vincent Surr, both of San Francisco, for petitioner. McCutchen, Olney & Willard, of San Francisco, for certain respondents. C. M. Bradley, of San Francisco, and J. M. Mannon, Jr., of San Francisco, for other respondents.

SLOSS, J. Certiorari to review an order of the Industrial Accident Commission, dismissing the application of Arthur George for an award of compensation. The commission found that "at the time of the injury the applicant was engaged in horticultural labor, and that this commission is without jurisdiction in this proceeding." Workmen's Compensation Act (St. 1913, p. 284) § 14. The petitioner contends that the finding just quoted is without support in the evidence.

George was employed as janitor and gardener by Miss Mary E. Wilson, who conducted a school for girls at Berkeley. The school buildings stood on a tract of about two acres, much of which was under cultivation. It was George's duty to look after the grounds and to clean the schoolrooms. In August, 1917, Miss Wilson ordered him to trim an acacia tree which interfered with the entry of light to a schoolroom. George cut off portions of two limbs of the tree. The tree was unsightly after the operation, and in October Miss Wilson directed George to remedy this condition. George accordingly cut off the stump of a large limb which projected over the roof of the schoolhouse. By means of a rope he lowered to the roof the limb thus re-

moved. He then, according to his testimony, untied the rope, which slipped out of his hand quite suddenly, whereupon he fell to the ground, sustaining the injuries upon which he bases his claim.

[1, 2] Whether or not George, at the time of his injury, was engaged in horticultural labor was a question of fact to be determined by the commission. Its finding thereon, if supported by any rational view of the evidence, is beyond review here. On the testimony in the record, it cannot be said that the conclusion of fact drawn by the commission was an unreasonable or improper one. George's employment was dual in character. In so far as he acted as a gardener, his work was horticultural and beyond the purview of the Compensation Act. In so far as his duties were those of a janitor, his employment was not exempt from the terms of the act. His claim is that the work in which he was engaged had for its primary purpose the improvement in the condition of the schoolroom with respect to light, and that he was therefore acting as janitor, rather than as gardener. It may be doubted whether the premise justifies the conclusion. Be that as it may, the removal of the obstruction to light was completed when George first trimmed the tree in August. His injury occurred a couple of months later, in the course of a further cutting, the purpose of which was to improve the appearance of the tree. It is certainly a gardener's work to trim ornamental trees and keep them sightly, and this is the work in which the petitioner was engaged at the time he was hurt. Even though the necessity for it may have arisen from something done by him in another capacity, we cannot doubt that it was open to the commission to find, as it did, that he was engaged in horticultural labor when carrying out the later instructions of his employer.

The order is affirmed.

We concur: SHAW, J.; WILBUR, J.; MELVIN, J.; LORIGAN, J.; RICHARDS, Judge pro tem.

---

178 Cal. 764

## HESLER v. CALIFORNIA HOSPITAL CO. et al. (S. F. 7816.)

(Supreme Court of California. Aug. 23, 1918.)

1. PHYSICIANS AND SURGEONS ⟸14(1)—DEGREE OF SKILL AND CARE REQUIRED.

The law requires that a physician shall have the degree of learning and skill ordinarily possessed by physicians of good standing practicing in that locality, and that he shall exercise reasonable and ordinary care and diligence in treating the patient.

2. PHYSICIANS AND SURGEONS ⟸14(1) — SKILL AND CARE REQUIRED.

The law does not require that a physician's instructions and advice should be at all events and beyond question proper, or that his treatment should be such as to obtain an approximately perfect result.

3. APPEAL AND ERROR ⟸1064(1)—HARMLESS ERROR—INSTRUCTIONS.

Where, in an action for malpractice, it cannot be determined whether the jury followed the proper instructions clearly and accurately, stating the skill and care required of physicians, or a conflicting and erroneous instruction that the law requires skill adequate to the performance of the undertaking, the error must be considered prejudicial to the defendant.

In Bank. Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by John W. Hesler against the California Hospital Company and another. Judgment for plaintiff, and defendants appeal. Reversed.

Myrick & Deering, of San Francisco (James Walter Scott, of San Francisco, of counsel), for appellants. E. J. Mize, of San Francisco, for respondent.

SHAW, J. The appeal is from the judgment. After the appeal was taken the plaintiff died, and Effie Johnstone, as administratrix of his estate, has been substituted as plaintiff.

Briefly stated, the complaint alleges that both defendants were engaged in the practice of medicine; that in July, 1913, the Hospital Company agreed to provide for the plaintiff all necessary medical and surgical treatment, the same to be given by some physician in its service, and all necessary medicines and hospital service during the period involved in this action; that defendant Dunn was one of the physicians employed by said company; that in November, 1914, plaintiff contracted a cold and needed medical treatment therefor; that the Hospital Company thereupon assigned Dr. Dunn to the case, and Dunn undertook to give plaintiff the necessary treatment for his condition; that Dunn failed to use ordinary diligence, care, and skill in treating plaintiff, and that by reason of such failure plaintiff's sickness progressed unfavorably, he became unable to work, was confined to his room, and continued to grow worse until he became afflicted with pulmonary tuberculosis; and that he was put to great expense in procuring subsequent treatment therefor, and otherwise damaged in the sum of $5,644. There was a trial by jury, which resulted in a verdict and judgment for $2,500.

The principal contention of the appellants in support of the appeal is that errors were committed in the court below, in giving, refusing, and modifying instructions to the jury. Error is also predicated upon certain rulings in the admission of evidence. The court gave the following instructions:

"5. To sustain an action it is not necessary to establish gross culpability; mere evidence of want of proper or ordinary care or attention and advice in the discharge of duty by a physician is sufficient to take the case to the jury.

"6. Civil malpractice may be either active or passive. It is active when a certain course of

treatment is adopted and followed which is not sustained by authorities; it is passive when those things in treatment are omitted which should have been done in order to obtain a result approximating to perfectness.

"9. As a general rule, he who undertakes for a reward to perform any work is bound to use a degree of diligence, attention, and skill adequate to the performance of his undertaking; that is, to do it according to the rules of the art.

"10. The physician must give proper instructions to his patient how to take care of himself, and what diet to adopt; and in case physician fails to give these instructions he is liable for any injury that results from such failure."

The law on the subject of care and skill required of physicians in the treatment of patients is well settled:

"A physician and surgeon, by taking charge of a case, impliedly represents that he possesses, and the law places upon him the duty of possessing, that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where he practices, and which is ordinarily regarded by those conversant with the employment as necessary to qualify him to engage in the business of practicing medicine and surgery. Upon consenting to treat a patient, it becomes his duty to use reasonable care and diligence in the exercise of his skill and the application of his learning to accomplish the purpose for which he was employed. He is under the further obligation to use his best judgment in exercising his skill and applying his knowledge." Pike v. Honsinger, 155 N. Y. 209, 49 N. E. 762, 63 Am. St. Rep. 655.

"The difficulties and uncertainties in the practice of medicine and surgery are such that no practitioner can be required to guarantee results, and all the law demands is that he bring and apply to the case in hand that degree of skill, care, knowledge, and attention ordinarily possessed and exercised by practitioners of the medical profession under like circumstances." Zoterell v. Repp, 187 Mich. 330, 153 N. W. 695.

"It is never enough to show that he has not treated his patient in that mode, nor used those measures, which in the opinion of others, even medical men, the case required, because such evidence tends to prove errors of judgment, for which the defendant is not responsible, as much as the want of reasonable care and skill, for which he may be responsible." Leighton v. Sargent, 27 N. H. 474, 59 Am. Dec. 388.

[1, 2] Instruction 5 is to the effect that a physician is liable in damages if he fails to give "proper" advice to his patient. Instruction 10 reiterates this doctrine. Instruction 6 gives the jury to understand that a physician is guilty of malpractice, and liable in damages, if, in treating a patient, he fails to do anything necessary to obtain an approximately perfect result. The law, as above stated, does not require that the instructions and advice given by a physician to a patient should be at all events and beyond question "proper," or that his treatment should be certainly such as to obtain an approximately perfect result. It requires only, first, that he shall have the degree of learning and skill ordinarily possessed by physicians of good standing practicing in that locality; and, second, that he shall exercise reasonable and ordinary care and diligence in treating the patient and in applying such learning and skill to the case. The law takes cognizance of human weakness and liability to err in the application of skill and learning and it requires only the exercise of reasonable and ordinary care and diligence to avoid error. These instructions require more; they require that the advice given shall be "proper," which implies that no error shall be committed; they require that the physician shall do everything necessary to be done to produce an approximately perfect result; that he guarantees that his treatment shall be of that quality; whereas, the law only demands that he use reasonable care to attain such approximate perfection. Instruction 9 declares that the physician is bound to use, and of course to have, a degree of skill "adequate" to the performance of his undertaking; the law requires that he have the degree of skill ordinarily possessed by reputable physicians practicing in that locality. This may or may not be "adequate" to the performance of his undertaking, according to the meaning to be given to the word "undertaking." If it was intended to mean that he undertakes a cure, or to produce a result approximating perfection, as stated in instruction 6, or that he undertakes to use the highest possible degree of skill, the standard is higher than the law requires. The instruction is uncertain on this point, and it may have misled the jury.

[3] The court below in other instructions stated the rule by which the defendants were bound accurately and clearly. There is a clear conflict in the instructions. We are unable to determine which set of rules the jury followed. The case of the plaintiff on the merits, at best, is not strong. We cannot say that these instructions were not injurious to the defendant, and did not improperly control the deliberations of the jury in rendering a verdict.

A number of objections were made to rulings upon evidence which it is unnecessary to discuss.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SLOSS, J.; WILBUR, J.; LORIGAN, J.; RICHARDS, Judge pro tem.

---

(178 Cal. 629)

Ex parte PATTON. (Cr. 2194.)

(Supreme Court of California. Aug. 1, 1918.)

1. HABEAS CORPUS ⊜54—PLEADING—SUFFICIENCY.

It is incumbent on an inmate of the penitentiary seeking his release on habeas corpus to allege facts showing illegality of his imprisonment.

2. HABEAS CORPUS ⊜52—CONCLUSIONS.

Allegations, in application for writ of habeas corpus, that credits for good behavior have never been "lawfully or justly forfeited" by the board of prison directors, are insufficient, as facts showing illegality should be alleged.

In Bank. Application by William L. Patton for a writ of habeas corpus. Application denied.

Wm. L. Patton, in pro. per.

PER CURIAM. [1, 2] It is fairly inferable from the petition itself that the board of prison directors did declare forfeited all credits earned and to be earned by petitioner, which they would have the power to do under certain circumstances. As to this he alleges that his credits "have never been lawfully or justly forfeited." No attempt is made to specify or suggest wherein the action of the prison directors was illegal or unauthorized by law. If his credits were lawfully declared forfeited, his term has not expired. It is incumbent on him, in order to make out a case for habeas corpus, to allege facts showing the illegality of his imprisonment. It is proper to note that the return to the writ issued on his application by the District Court of Appeal of the First Appellate District, to which proceeding he refers in this application, shows that the records of the board of prison directors contain a record of a proceeding against him before such board resulting in a declaration of forfeiture of his credits for a violation of the terms of his parole, and, moreover, that in such proceeding he pleaded guilty to the charge.

The application for a writ is denied.

---

178 Cal. 731

## SAN PEDRO, L. A. & S. L. R. CO. v. LOS ANGELES ICE & COLD STORAGE CO. (L. A. 4501.)

(Supreme Court of California. Aug. 12, 1918. Rehearing Denied Sept. 10, 1918.)

1. WAREHOUSEMEN ⊂⊃34(6)—CONVERSION OF GOODS—EVIDENCE.

In railroad's action against warehouseman for conversion of carload of butter, where evidence showed former had notified latter by telephone to hold car subject to its order, evidence as to a custom of confirming such telephone notification by letter was immaterial.

2. WAREHOUSEMEN ⊂⊃24(1) — RAILROADS — RIGHTS OF BAILOR.

Where a railroad, to whom a carload of butter had been delivered for shipment, delivered the carload over the switch of another railroad to a warehouseman, the latter, in the absence of directions to the contrary, should have held the car subject to order of former railroad, who was bailor.

3. WAREHOUSEMEN ⊂⊃34(6)—RAILROAD'S ACTION AGAINST WAREHOUSEMEN — ADMISSIBILITY OF EVIDENCE.

In railroad's action against warehouseman for conversion of carload of butter, latter had delivered to party purporting to be consignor's agent without requiring presentation of bill of lading, evidence of a custom whereby bill of lading was not required, where car was on an open shipment, *held* inadmissible.

Department 2. Appeal from Superior Court, Los Angeles County; Z. B. West, Judge.

Action by the San Pedro, Los Angeles & Salt Lake Railroad Company against the Los Angeles Ice & Cold Storage Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Sidney J. Parsons and Horace Wilson, both of Los Angeles, for appellant. Fred E. Pettit, Jr., of Los Angeles (A. S. Halsted, of Los Angeles, of counsel), for respondent.

WILBUR, J. Defendant appeals from a judgment rendered against it in an action for the conversion of a carload of butter, consigned from North Dakota to Los Angeles to shipper's own order, via the plaintiff's railway; the bill of lading, together with draft for the value of the butter, having been forwarded to a Los Angeles bank for delivery to one Backer upon payment of draft. If it is not admitted by the pleadings, the evidence clearly shows and the court finds that the butter was delivered over a Southern Pacific switch by the plaintiff to the defendant as a warehouseman. Plaintiff, through its own agents, and also through the agent of the Southern Pacific Company, notified defendant by telephone of the arrival of the car, and of its delivery upon the tracks at its warehouse, and that said car was to be held subject to the order of the plaintiff. In view of the finding of the court in favor of the plaintiff, the fact that this telephonic communication was denied by the defendant's witnesses cannot be considered.

[1-3] Defendant attempted to prove that, in case of a delivery of a car consigned as this was, it was the custom to notify the defendant thereof by telephone, "confirmed by letter as to the facts," and that in this case no letter was sent. In view of the evidence as to actual notification by telephone, evidence of the custom would be immaterial, if otherwise admissible. In the absence of directions to the contrary, defendant should have held the butter subject to the order of the bailor, the railway company, and in this case direct orders were given and received to that effect. There was no error in ruling out the evidence as to the business custom claimed by the defendant, by which, "when a car was on an open shipment, the presentation of the bill of lading was not required, and any responsible commission merchant claiming the goods would be allowed to take them." The butter was actually sold from the premises of the defendant, the proceeds of such sale received by the defendant, and applied to a pre-existing indebtedness due from one Lambourn to defendant. The only title of Lambourn to the butter was derived from a sale to him by Backer, purporting to act as agent of the consignor; but he had no authority to deliver the butter without payment of the consignor's draft. The claims of the defendant constitute an explanation,

rather than a defense, and amount to this: That no one in the employ of the defendant remembered the telephonic communication, that no note thereof was made as was customary, and that no letter was received in accordance with what defendant claimed to be the custom, and therefore the defendant believed that the butter in its custody was subject to delivery "to any responsible commission merchant," and that it was so delivered.

The judgment is affirmed.

We concur: MELVIN, J.; LORIGAN, J.

---

(178 Cal. 736)

KROTZER et al. v. CLARK. (L. A. 4481.)

(Supreme Court of California. Aug. 12, 1918.)

1. APPEAL AND ERROR ⊜70(½) — JUDGMENTS APPEALABLE—INTERLOCUTORY JUDGMENTS.

Under Code Civ. Proc. § 963, specifying interlocutory judgments from which an appeal can be taken, a judgment, decreeing that plaintiff should tender deed and certificate of title and upon defendant's failure to make payments provided for by a contract plaintiff should have judgment, is not appealable.

2. CONTRACTS ⊜354—FINDINGS.

In contract action, proof of valid excuse for nonperformance will not support a finding of performance.

3. VENDOR AND PURCHASER ⊜135(1)—CONSTRUCTION OF CONTRACT—"EASEMENT"—"INCUMBRANCE."

A pipe line crossing one corner of a piece of land is an "easement" constituting an "incumbrance" within contract provision whereby party buying land was entitled to a perfect title free and clear of all easements or incumbrances.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Easement; Incumber.]

4. VENDOR AND PURCHASER ⊜93—RESCISSION.

Before the vendor can terminate the right of purchase because of purchaser's failure to pay, he must allege and prove, either that he has performed on his part, or that, for reasons not attributable to his fault, he is unable to perform.

Department 1. Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Henry Krotzer and another against Stephen A. D. Clark. Judgment for plaintiffs, and, from an interlocutory judgment made prior to entering of final decree and from order denying new trial, defendant appeals. Appeal from the judgment dismissed. Order denying new trial reversed.

J. Wiseman Macdonald and Thomas A. Berkebile, both of Los Angeles, for appellant. C. A. Stice and Chas. S. McKelvey, both of Los Angeles, for respondents.

SLOSS, J. After the trial the interest of Henry Krotzer, the original plaintiff, was assigned to Sidney Luther, who has been added as a respondent. We shall discuss the case as if Krotzer were the sole plaintiff.

On June 11, 1912, Krotzer made a written agreement for the sale of a parcel of land in Los Angeles county to the defendant, Clark, for $4,100, of which $50 was paid in cash, and the balance was to be paid in installments. One of the terms of the agreement was that the land was to be conveyed free and clear of all roads, easements, or incumbrances, "which shall be shown by an unlimited certificate of title, made by the T. I. and T. Co. [Title Insurance & Trust Company], of Los Angeles, California, showing the measurement of the land, names, and width of all streets, and roads touching the same, and a perfect title." The second amended complaint, upon which the plaintiff went to trial, was framed on the theory that the title was defective in that one of the conveyances in plaintiff's chain of title contained certain restrictions relative to the buildings to be placed upon the land, the drilling for oil, and the sale of liquor thereon; that plaintiff was unable to remove such restrictions, and had offered to restore to defendant $50, being all of the purchase price paid. The prayer of the complaint was that the contract be set aside and annulled, and that plaintiff's title be quieted. While the action was pending, the parties endeavored to effect a compromise, and in the course of the negotiations the restrictions in question were removed by the voluntary action of the grantor named in the deed in which they were embodied. Supplemental amendments to the plaintiff's complaint were filed by leave of court, and findings in his favor followed. Upon these findings the court entered an interlocutory judgment decreeing that the plaintiff should within a limited time tender the defendant a deed and certificate of title, and providing that, if defendant should for 20 days thereafter fail to make the payments provided for in the contract, the plaintiff should be entitled to have his title quieted. Tender was made and refused, whereupon the court entered its final decree quieting title.

[1] The defendant moved for a new trial, which was denied, and he now appeals from the order of denial. This is the only appeal which can be considered. There is, in the record, a notice of appeal from the interlocutory judgment, but it is not effectual for any purpose. The Code authorizes appeals from interlocutory judgments in certain cases only. Code Civ. Proc. § 963. This is not one of such cases, and the court is therefore without jurisdiction of the attempted appeal. Ill. Trust & Savgs. Bk. v. Alvord, 99 Cal. 407, 33 Pac. 1132; Grey v. Brennan, 147 Cal. 355, 81 Pac. 1014; Title Ins. & Trust Co. v. Cal. Dev. Co., 159 Cal. 484, 114 Pac. 838. The defendant did not appeal from the final judgment.

The second amended complaint alleges "that plaintiff has performed all the terms and conditions of the said agreement to be by him performed," and then goes on, somewhat

inconsistently, to set forth his inability to give a title free and clear of the restrictions above referred to. The answer denies all of these allegations. By his supplemental amendments, plaintiff alleges that he has removed from the title all clouds and defects existing against it. It is further alleged that plaintiff had not, before the commencement of the action, tendered to the defendant an unlimited certificate of title or the deed required by the contract, and that his failure to do so was the result of the defendant's statement that he would not accept title in the form in which it then existed.

[2] All of these allegations are found by the court to be true. The defendant assails some of the findings as unsupported by the evidence. The contract provided, as above stated, that plaintiff was to furnish a certificate of title showing the names and widths of all streets and roads touching the land. Concededly there was no compliance with this condition. The respondent points to certain evidence which, as he claims, tends to show that the performance of this term of the contract was not possible for the reason that the names and width of the streets were not shown by any instrument of record, and that the Title Insurance & Trust Company, which was to furnish the certificate, would not certify to any matter not appearing in the public records of title. This circumstance may or may not have constituted a sufficient excuse, in law, for plaintiff's failure to furnish the certificate called for by his contract. But certainly it did not warrant a finding that he had fully performed. It is thoroughly settled in this state that in an action upon a contract the plaintiff must allege and prove either performance or a valid excuse for nonperformance. "One is not the same as the other." Daley v. Russ, 86 Cal. 114, 24 Pac. 867; Roche v. Baldwin, 135 Cal. 522, 65 Pac. 459, 67 Pac. 903; Est. of Warner, 158 Cal. 441, 445, 111 Pac. 352; Peek v. Steinberg, 163 Cal. 127, 133, 124 Pac. 834. Accordingly, proof of a valid excuse for nonperformance will not support a finding of performance. Est. of Warner, supra.

[3] It may well be questioned whether the finding under discussion was sustained in other respects. The record indicates, if it does not show explictly, that the plaintiff's title was subject to an easement for a pipeline across one corner of the property. Such an easement constitutes an incumbrance, and the defendant was, under his contract, entitled to a perfect title, free and clear of all easements or incumbrances. In the absence of evidence that plaintiff had offered or, at least, was able, to convey such a title, a finding that he had fully performed all of the terms of the agreement cannot be sustained.

[4] It may be asked whether, if the plaintiff cannot make a good title, the defendant is in any way injured by a decree terminating the contract and restoring the parties to their original rights. But the findings, and the judgment finally given, are not based upon the theory that the plaintiff is unable to perfect his title. It is found that the plaintiff has done all that he is required to do, and that the defendant is in default. The defendant, throughout the litigation, seems to have taken the position that he was ready and willing to complete the purchase, upon receiving the perfect title for which he had contracted. Until such title had been tendered, or its tender excused, the defendant was not in default, and was entitled to retain whatever rights he had under the agreement. Before the plaintiff can terminate the right of purchase, he must allege and prove, either that he has performed on his part, or that, for reasons not attributable to his fault, he is unable to perform.

The appeal from the judgment is dismissed. The order denying a new trial is reversed.

We concur: SHAW, J.; RICHARDS, Judge pro tem.

---

173 Cal. 759

GOMEZ v. REED et al. (S. F. 7112.)

(Supreme Court of California. Aug. 19, 1918.)

1. VENUE ⊂⊃5(1)—REAL PROPERTY—WRONGFUL OUSTER.

Const. art. 6, § 5, providing that actions for recovery of possession of, quieting title to, and enforcement of liens on, real estate, must be brought in county in which property is situated, does not include action for damages for wrongful ouster from land in which recovery of possession could not be had.

2. TRESPASS ⊂⊃40(1)—OUSTER FROM LAND—PLEADING.

A complaint, alleging lawful possession of land and ouster therefrom without right resulting in injury to property thereon, *held* to state a cause of action.

3. ACTION ⊂⊃45(3) — MISJOINDER — DAMAGES FROM TRESPASS.

In an action for damages to property on land resulting from wrongful ouster by a single trespass, that complaint asks damages of several kinds as loss of mesne profits, injury to personal property, and the like, does not show a misjoinder of causes of action.

4. DAMAGES ⊂⊃142 — SPECIAL DAMAGES — PLEADING.

Where complaint was based on a single trespass ousting plaintiff from land and alleged damages to live stock, and other personal property, expense of moving, mesne profits, etc., in addition to general damage clause, expunging the special damages pleaded was error.

In Bank. Appeal from Superior Court, City and County of San Francisco; Geo. T. Sturtevant, Judge.

Action by Joe Gomez against W. H. Reed and others. From a judgment for defendant after overruling of demurrer to complaint, plaintiff appeals. Reversed.

Charles M. Cassin, of San Jose, and Jeremiah F. Sullivan and Theo J. Roche, both of San Francisco, for appellant. Edward F. Fitzpatrick, Ross & Ross, and A. Kincaid, all of Redwood City, for respondents.

SHAW, J. The plaintiff appeals from the judgment. A demurrer of the defendants to the complaint was sustained, leave was given to the plaintiff to amend, and, upon his failure to do so, judgment was given in favor of the defendants. The action is for damages to personal property and to recover alleged profits which plaintiff would have received from the use and occupation of certain lands during the year 1912 if defendants had not ousted him therefrom in December, 1911.

The complaint alleges that on December 1, 1911, the plaintiff was in the lawful and peaceable possession of 146 acres of land in San Mateo county, which he was engaged in farming and upon which he was carrying on a dairy and keeping a number of horses, cattle, hogs, potatoes, hay, and grain; that on that day and the following day the defendants, without right, entered upon said land, drove the plaintiff's cattle, horses, and hogs off the premises during a violent rainstorm, forcibly took possession of the premises and buildings, and compelled him to leave his residence thereon and to remove his hay, grain, potatoes, and other goods therefrom; that his said stock was accustomed to shelter and were then sheltered in the barns, sheds, and yards on the premises, and by reason of their being exposed to said storm four of his cows died and the milk-producing quality of his remaining cows was impaired, and seven of his horses became diseased; that he was compelled to expend large sums of money in moving his said property to another place and for storage thereof; that the net profits of his said dairy during the year 1912 would have been $2,300, of which profits he was deprived; that he was compelled to pasture his stock on other lands at an expenditure of $250; that the difference between the value of the use and occupation of the land from which he was ousted for one year, for which he had rented said land, and other lands which he was obliged to rent to continue his business as farmer and dairyman, was $700; that he was compelled to expend $300 in removing his property to said other lands; that the value of his horses and cows other than the four which died was depreciated to the amount of $1,000; and that he lost $6,000 which he would have earned as net profits from his farming operations during the year 1912 if he had not been excluded from the said tract of land by the defendants. He asks damages in the sum of $21,390.

On motion of the defendants, the court below struck from the complaint all the allegations of special damages above detailed. As thus altered, the complaint contained a statement of the ouster, the enforced removal of his property from the premises, and a general allegation that the plaintiff had suffered damages by reason thereof, in the sum of $21,390.

The causes of demurrer specified were that the complaint did not state facts sufficient to constitute a cause of action; that the court had no jurisdiction of the subject-matter of the action, because the land described in the complaint is situated in San Mateo county and the action was begun in the superior court of San Francisco; that several causes of action were improperly joined, and that the respective causes of action were not separately stated. The court erred in sustaining the demurrer.

[1] The claim of lack of jurisdiction is based on the provisions of section 5, art. 6, of the Constitution, providing "that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate," must be begun in the county in which the real estate, or some part thereof, is situated. This complaint does not state a cause of action either to recover the possession of real estate or to quiet the title thereto. It does not allege that defendants claim any title to or interest in the land. It does not allege that the plaintiff was entitled to possession at the time the action was begun, and it does not ask for the recovery of possession. The allegation is that plaintiff was in lawful and peaceable possession on December 1, 1911, but no facts are stated upon which the plaintiff could found a claim of right to possession of the property after the year 1912. The allegations of the complaint all imply that the period of occupation for which the plaintiff claims damage had expired before the action was begun. The complaint states a cause of action for damages to personal property and for damages from the loss of the use and occupation of lands for a specified period which had expired. Such an action may be commenced in any county in the state, and the right to have a trial in the county where the land lies, if such right exists, can only be enforced by an application to change the venue. Miller & Lux v. Kern County Land Co., 140 Cal. 132, 73 Pac. 836; Miller & Lux v. Madera Canal, etc., Co., 155 Cal. 73, 99 Pac. 502, 22 L. R. A. (N. S.) 39.

[2] The contention that the complaint does not state facts sufficient to constitute a cause of action for damages is without any merit whatever. The allegations that the plaintiff was lawfully in possession of the premises, that he had his property thereon, and that he was without right ousted therefrom by the defendants, and that damages to his property resulted from such ouster, constitute a statement of a good cause of action.

[3] There was no misjoinder of causes of action. But one cause of action is stated in the complaint, that is to say, a cause of action for damages for a wrongful ouster of the plaintiff from land of which he was lawfully and peaceably in possession, a single trespass on lands. The fact that the trespass caused damages of several kinds, such as the loss of mesne profits, injury to per-

sonal property by reason of the removal, expenses of removal, and the like, does not make more than one cause of action.

[4] We think, also, that the court erred in sustaining the motion of the defendants to strike out the allegations of damages aforesaid. Damages which are the necessary consequence of the wrongful act can be recovered under the general allegation of the amount of damage inflicted. Treadwell v. Whittier, 80 Cal. 579, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175. But where there are different elements of damage flowing from the wrong and the amount of damages from each element is capable of exact statement, "the defendant has the right to be informed of the amount of the claim for each, so that he might be prepared with evidence at the trial to meet the claim." Mallory v. Thomas, 98 Cal. 647, 33 Pac. 757; Lamb v. Harbaugh, 105 Cal. 690, 39 Pac. 56. And if damages ensue because of some particular circumstances existing at the time, though the natural consequence of the wrongful act in connection with the special circumstances, the facts must be specially alleged. Treadwell v. Whittier, supra. Under these rules, it was proper for the plaintiff to state the fact of the exposure to the rainstorm and the particular damage arising therefrom, and also the amount claimed for each element of the damage caused by the act. We are not prepared to say that plaintiff was entitled to recover all of the items of damage alleged. The defendants do not discuss the question, and we therefore deem it inadvisable to consider that subject.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.; RICHARDS, Judge pro tem.

178 Cal. 679

## FITZGERALD v. SMITH, County Clerk.

(L. A. 5805.)

(Supreme Court of California. Aug. 5, 1918.)

ELECTIONS ⇐126(2) — PRIMARY ELECTIONS — PLACING NAMES ON BALLOT.

Where officer resigned at such a time that notices of offices to be filled could not be published as required by Direct Primary Law, § 4, as amended by St. 1917, p. 1344, § 3, no candidate for such office could be nominated at the primary, but nominations must be made in the manner prescribed by Pol. Code, § 1188.

In Bank. Application for an order by Boyce R. Fitzgerald concerning the placing of names on an official primary election ballot by F. E. Smith, County Clerk of the County of Kern, and ex officio Registrar of Voters of the County of Kern. Names ordered omitted from the ballot.

Foster & Barnhart, of Bakersfield, for petitioner. Anderson & Borton, of Bakersfield, for respondent.

PER CURIAM. The respondent is about to place on the official primary election ballot to be used in Kern county at the primary election to be held on August 27, 1918, as candidates for the office of judge of the superior court of Kern county for the unexpired term of Hon. Milton T. Farmer, resigned, the names of three candidates who have filed nomination petitions in form as required by the direct primary law. The resignation of Judge Farmer as judge of the superior court of Kern county was not filed until July 11, 1918, on which date it was by the Governor duly accepted. Concededly an election for the unexpired term must take place at the next general election to be held in November, 1918, but it is claimed that under the circumstances of this case candidates for such office may not be voted for at the August primary.

We are of the opinion that this claim is well based. The direct primary law requires, for the purpose of acquainting the electors with the names of the offices for which candidates may file nomination petitions and be voted for at the primary election, that certain notices shall be given—the first at least 70 days before the date of the primary, by the secretary of state to the county clerks and registrars, designating all the offices, except township offices, for which candidates are to be nominated at such primary election; and the second one given by the county clerk or registrar in each county and city and county by publication in a newspaper or newspapers published in such county or city and county, commencing within 10 days after receipt by him of such notice from the secretary of state, which notice shall include a designation of all the offices for which candidates are to be nominated at such primary election. Section 4, Direct Primary Law (St. 1913, p. 1382, as amended by St. 1917, p. 1344, § 3). These notices were given prior to the resignation of Judge Farmer, and, of course, they did not and could not include any designation of this office as one of the offices for which candidates were to be nominated.

We are satisfied that a proper construction of the Primary Law requires the conclusion that candidates may be nominated at the primary for such offices only as may properly be included in the notices thus provided for. It is the condition existing at the time prescribed by the law for the giving of the notices that controls, in so far as the primary is concerned. For the purposes of the primary the situation here is the same as it would have been if Judge Farmer had not resigned until the time for the filing of nomination petitions had expired. Under the circumstances no candidate for this office can be nominated at the primary, with the result that the candidates to be voted for, for such office, at the general election in

November, must be nominated in the manner prescribed by section 1188 of the Political Code.

It is ordered that the respondent omit from the official primary election ballot to be used at the primary election of August 27, 1918, all mention of the office of judge of the superior court for the unexpired term of Judge Farmer, and of all names of any persons who have filed nomination petitions therefor.

---

178 Cal. 674

ALLEN v. WILSON et al. (L. A. 4528.)

(Supreme Court of California. Aug. 5, 1918.)

1. VENDOR AND PURCHASER ⊂⊃252—PASSAGE OF TITLE—"VENDOR'S LIEN."

Where an owner of land sells it under a contract payable by installments, title not to pass until the property was fully paid for, at which time he is to execute a deed, the seller does not retain a "vendor's lien"; such lien existing only when the owner of property, under the agreement selling it, parts with a legal title to it, and has only a claim to the unpaid amount of the purchase price therefor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Vendor's Lien.]

2. MECHANICS' LIENS ⊂⊃16—PROPERTY SUBJECT—INTEREST OF OWNER.

Code Civ. Proc. § 1192, providing for mechanics' liens, makes the interest of the owner or other person having or claiming any interest in the land, whatever it may be, subject to the mechanics' lien law; there being no limitation as to the interest so subject.

3. MECHANICS' LIENS ⊂⊃78—PROPERTY SUBJECT—NOTICE OF NONRESPONSIBILITY.

Under Code Civ. Proc. §§ 1183, 1192, authorizing mechanics' liens, an owner or person having an interest in the property, who has knowledge of an improvement being constructed thereon, may relieve himself from liability by giving notice of nonresponsibility.

4. MECHANICS' LIENS ⊂⊃137(1)—STATEMENT OF CLAIM—SUFFICIENCY.

Code Civ. Proc. § 1187, prescribing the statement in the claim for mechanics' liens, does not require the claim to name the owner or reputed owner of the property, when not known.

5. MECHANICS' LIENS ⊂⊃142—STATEMENT OF CLAIM—TERMS OF CONTRACT.

Code Civ. Proc. § 1187, prescribing the statement in the claim for mechanics' liens, does not require the claim to state when the work was to be done, nor when the price was to be paid, when not agreed upon.

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by O. P. Allen against W. J. Wilson and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Hocker, Morris & Austin, of Los Angeles, for appellants. Frank L. Borden, of Los Angeles, for respondent.

LORIGAN, J. Defendant on February 25, 1914, being the owner of a tract of land in Los Angeles, entered into a written contract to sell it to E. L. Barrett on the installment plan, with provisions for default in the payments and foreclosure. There were three small houses on the tract. Barrett was put in possession of the property, and shortly afterwards employed the plaintiff, without notice to or the knowledge of defendant, to wreck the three houses and from the materials thereof and new material to erect a larger house on the lot. Plaintiff completed the construction of the house, and, Barrett having failed to pay him the contract price, he filed a mechanic's lien on the premises and afterwards brought this action to foreclose it. On the trial a witness—Mr. Griffin—testified that he called at the office of the defendant Wilson about the time the cement basement for the new house on the lot was completed, and told him about its construction, and within a few days afterwards he again visited the office of defendant and informed him that they were tearing down the old buildings for the purpose of using the materials in the construction of a new one on the cement foundation. Defendant denied having any conversation with Griffin, or that he had any knowledge of any improvement made on the lot until long after it had been finished; but the court found that he knew the building was being erected and that defendant Barrett intended to erect said building. He further testified that he had not caused or authorized Barrett to make this improvement, and this was not contested by the plaintiff. Judgment decreeing a lien and foreclosure thereof was entered in favor of plaintiff against the lot, and from this judgment defendant appeals.

The liability of the property of the defendant to a mechanic's lien is based on the terms of sections 1183 and 1192 of the Code of Civil Procedure, particularly the latter section, which provides that every building constructed upon land with knowledge of the owner, or person having or claiming any interest in the land, shall be held to have been constructed by the owner or such other person, and be subject to a lien for such construction, unless the owner or person shall, within 10 days after obtaining knowledge of said construction, give notice that he will not be responsible for the same by posting a written notice on the property and recording a verified copy of it with the recorder. The principal contentions of the appellant for a reversal are that the sections referred to have no application to him, because he was not the owner of the property when the improvement was made; that under the contract between himself and Barrett the latter became in equity the owner of the land, defendant only retaining a vendor's lien on it; that the plaintiff had notice before he commenced the erection of the building of the existence of these facts; and that, whether he had such knowledge or not, the vendor's lien which existed in favor of the defendant was paramount to any mechanic's lien which the plaintiff might attempt to assert. It is

further contended that the claim of lien filed is defective.

[1] While it is true that for some purposes under a contract of sale of land the vendee is treated as the owner of the land, and the vendor as having but a lien upon it as security for the unpaid portion of the purchase money, this rule has no application, so as to defeat the assertion of a lien under the mechanic's lien law of this state. Nor is it true, as claimed by appellant, that, having contracted for the sale of the property to Barrett, he held but a vendor's lien upon it. On the contrary, he had no such lien. Under his agreement for the sale of the property to Barrett, he retained the title, and was not to part with it until the property was fully paid for, when he was to execute a deed. Under these circumstances a vendor's lien does not exist. Such a lien exists only when the owner of property, under the agreement selling it, parts with the legal title to it, and has only a claim to the unpaid amount of the purchase price therefor. It is clear that under the terms of the contract and sale here defendant parted with no title, and he could not be the owner of the property and at the same time have a lien upon it.

[2] Several cases, involving the construction of sections 1183 and 1192 as to the liability of the owner where improvements were made upon property under contract of sale by a third party at the instance of a vendee, without the actual consent of the vendor, but with his knowledge of their being made, and without notice of nonliability posted and recorded, are cited, in which it was held that the interest of the owner is subject to a lien, unless after knowledge of the improvements notice of liability is given. In those cases no such distinctions as appellant endeavors to draw now were presented, but exemption from liability on other grounds somewhat similar were made and denied. Ah Louis v. Geung Hong, 140 Cal. 500, 74 Pac. 41; Gentle v. Britton, 158 Cal. 328, 111 Pac. 9; Pacific Lumber Co. v. Wilson, 6 Cal. App. 561, 92 Pac. 654. The important ruling in these cases is that the liability does not exist by virtue of any general rule of agency, but by virtue of the terms of sections 1183 and 1192, which make the person in charge of the improvement the agent of the owner for the purposes of liability under the lien law, unless the owner gives notice of nonliability after knowledge of the improvement. Independent, however, of these cases, and taking the proposition as presented now for the first time, we think it entirely without merit. In the Code section there is no limitation as to the interest which shall be subject to the lien. The section is general and comprehensive, making the interest of the owner or other person having or claiming any interest in the land, no matter what that interest may be, whether legal or equitable, subject to the mechanic's lien law. We perceive no legal reason why this construction of the section is not proper.

[3] It is contended by appellant that, if the sections are to be construed as making the person in possession of the property or the reputed owner the agent of the real owner, the sections are to that extent unconstitutional, citing the case of Santa Cruz Rock, etc., Co. v. Lyons, 117 Cal. 212, 48 Pac. 1097, 59 Am. St. Rep. 174. That case is not in point, either as applied to the sections here under consideration or in principle. If, as in the Santa Cruz Case, the Legislature had simply declared that the person in charge of the improvement was to be deemed the agent of the owner to authorize the creation of a lien against the interest of the real owner, there would be ground for contending that the section was unconstitutional, as depriving the real owner of his property against his will. But the sections in question here do not so provide. They declare that an owner or person having an interest in property, who has knowledge of an improvement being constructed on his land, and who permits the improvement to be made and receives the benefit of it, must pay for it. If he does not desire the improvement, having knowledge that it is being made without his authority, he can relieve himself from all liability by giving notice of nonresponsibility as provided in the sections. This involves only a matter of good conscience and fairness, and if the actual owner does not give that notice when he has knowledge of the improvement being made to the benefit of his property, he is deemed to have authorized it and will be liable for its value to the extent of his interest in the land. The law does not interfere with any substantial right of the actual owner. It simply adopts and applies the just and equitable rule of estoppel.

[4] It is further contended by appellant that the court failed to find on the issue joined by him as to the knowledge of the plaintiff of the existence of the vendor's lien in favor of the defendant on the property. But the complete answer to this contention of appellant is that he did not have a vendor's lien, and necessarily the court could not find on the subject.

[5] The last point made by appellant is as to the validity of the claim of lien which was filed. This requires but short notice. The objection of appellant is that the claim of lien names no one as the owner or reputed owner of the property, nor does it state when the work was to be done nor when the price was to be paid. Section 1187 of the Code of Civil Procedure only requires a statement in the claim of lien as to when the work was to be done and when the price was payable, if they were agreed on, and the insertion of the name of the owner or the reputed owner only when it is known to the claimant. It does not appear from the evi-

dence that there was any agreement as to when the work was to be done, or payment for it to be made, or that, when he filed the claim of lien, the plaintiff knew the name of the owner or reputed owner of the lot. "The plaintiff is only required to state names mentioned [owner, etc.], if known. If the names are not known, the claim filed is sufficient if it is silent on the subject." West Coast, etc., v. Newkirk, 80 Cal. 277, 22 Pac. 231. "The name of the owner, or reputed owner, is not presumably within the knowledge of the claimant." Corbett v. Chambers, 109 Cal. 178, 185, 41 Pac. 873. "Where the time of payment is not stated, 'the presumption of the law is that no time was given.'" McClain v. Hutton, 131 Cal. 132, 137, 61 Pac. 273, 63 Pac. 182, 622.

The judgment appealed from is affirmed.

We concur: WILBUR, J.; MELVIN, J.

---

178 Cal. 740

HARE v. McGUE. (L. A. 4568.)

(Supreme Court of California. Aug. 12, 1918.)

1. CONTRACTS ⟸111 — VALIDITY — PUBLIC POLICY — CONTRACTS IN DEROGATION OF MARRIAGE RELATION.

A contract having for its object the securing of a divorce is void, being contrary to good morals.

2. CONTRACTS ⟸129(3)—VALIDITY — PUBLIC POLICY—PROCURING SPECIFIED EVIDENCE.

A contract whereby one agrees to procure testimony of certain facts which will successfully support or defeat a lawsuit, or which provides that payment to the one procuring such testimony is to be contingent upon the result of the lawsuit, is void, being calculated to induce false charges and perjured testimony.

3. CONTRACTS ⟸129(3)—VALIDITY—PROCURING TESTIMONY—DIVORCE ACTION—INVESTIGATING WIFE'S HISTORY — SHADOWING WIFE.

A contract whereby husband, who was threatened with divorce action, employed parties to investigate wife's past history, to shadow the wife, to ascertain her habits and companions, and to locate and ascertain names of witnesses to testify in husband's behalf, is not contrary to public policy, where compensation was not contingent, and there was no agreement to procure testimony as to particular facts.

Department 2. Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by D. W. Hare against A. L. McGue. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Valentine & Newby, of Los Angeles, for appellant. Thomson & Spencer and A. P. Thomson, all of Los Angeles, for respondent.

LORIGAN, J. This action was brought by plaintiff, in his own behalf and as assignee of one John M. Robinson, to recover the value of personal services rendered by both to defendant and for money expended by plaintiff in his behalf. Differences had arisen between defendant and his wife, and, she threatening an action for divorce, he, with a view of making a defense thereto, employed plaintiff and Robinson, the former to look up the acts and conduct and past history of the wife, and her conduct and life during his employment, and to locate, interview, and secure witnesses to testify on behalf of defendant; also to advise and consult with defendant concerning said action and to direct certain of his business affairs. Robinson was employed and directed to watch and shadow the wife of defendant, to ascertain her conduct, habits, and companions, and to secure the names and whereabouts of certain witnesses defendant desired to testify in his behalf in said divorce action. The court made findings of fact as above recited, and entered a judgment in favor of plaintiff, from which, and an order denying his motion for a new trial, defendant appeals.

While in the transcript there are various assignments of error, the sole point urged here by appellant for a reversal is that the contracts made the basis of the cause of action, and as found by the court, are contrary to public policy and void, and no recovery should have been had upon them. In elaboration of this proposition of law appellant asserts that any contract between parties which has for its object the dissolution of the marriage relation, or facilitating that result, is contrary to good morals and void; that, further, any contract having for its object the procurement of testimony for the purpose of securing a divorce is illegal and void.

[1, 2] There can be no question about the legal proposition asserted by appellant. We must accept as clearly established that the law is extremely solicitous about the maintenance of the marriage relation, and will not tolerate or sanction any contract which by its terms or obvious tendency has for its object the securing of a divorce. The further proposition, extending, however, not particularly to divorce suits, but to all kinds of litigation, is equally true, that a contract is void whereby one agrees to obtain or procure testimony of certain facts which will successfully support or defeat a lawsuit, or which provides that payment to the party procuring such testimony is to be contingent upon the result of the action for which he is engaged to procure it. It is the element of payment contingent on the success of the litigation in which the evidence is to be produced, or the fact that the agreement is to procure evidence, not of facts as they exist, but of particular facts necessary to the success of the party litigant, who contracted for their production, which vitiates the contract. It is the contingency on the one hand, and the agreement to furnish a given set of facts essential to a successful litigation on the other, and both of which in

their nature are calculated to induce false charges and the production of perjured testimony, to subvert the truth and pervert justice, through fraud, trickery, and chicanery at the hands of unscrupulous private detectives or other conscienceless persons, which has impelled the law, with wisdom, to declare such contracts illegal. Patterson v. Donner, 48 Cal. 369; Lyon v. Hussey, 82 Hun, 15, 31 N. Y. Supp. 281.

Now, while appellant sets forth quite extensively in his brief cases (in addition to the above) in support of these principles, he does not point out how the particular contracts entered into between the plaintiff and appellant here, and with Robinson, are brought under the ban of the rule, and our examination of the findings and the evidence show no analogy between the facts as recited in the cited cases and the case at bar. Certainly there is no rule of law which precludes a party in a divorce action or in any other action, from employing a person to do detective work, or in a divorce action itself to search for witnesses or to procure existing testimony either to support or defend such an action, or to acquire information of the past conduct or life of either spouse, or to set a watch upon the personal acts or associates of either. Any one has a right, when threatened with litigation, or desiring himself to sue, to employ assistance with a view of ascertaining facts as they exist, and to hunt up and procure the presence of witnesses who know of facts and will testify to them; and this is true whether the action be one of divorce or of any other character. Neece v. Joseph, 95 Ark. 522, 129 S. W. 797, 30 L. R. A. (N. S.) 278, Ann. Cas. 1912A, 655; Quirk v. Miller, 14 Mont. 467, 36 Pac. 1077, 25 L. R. A. 87, 43 Am. St. Rep. 647. Any other rule would leave the parties in a divorce suit, and every other suit, restricted to their own individual efforts to obtain existing evidence which would be absurd.

[3] Examining, now, the contracts by the defendant with plaintiff and Robinson, there was no element in either of them contravening public policy. The compensation of neither was contingent. They were to be paid, whether they ascertained facts or procured witnesses to testify to them or not. There was nothing contingent on the result of the divorce suit. Neither did they agree, nor were they asked by appellant, to procure witnesses to testify to any particular state of facts, but only to obtain from witnesses information of what they knew, and report the matters to the attorneys for appellant. They were not informed on their employment of the names of the witnesses, nor what they were expected to testify to, and only ascertained both these things while working under their employment. Particular stress is placed by appellant on testimony of plaintiff as to the seeking out and production of a certain witness designated "a red-headed dressmaker." As to this witness, however, all that plaintiff agreed to do was, at the express request of appellant, to attempt to find her. The assumption that plaintiff was to obtain particular evidence of certain things from her is unwarranted. It clearly appeared that plaintiff did not know this person. He did not agree to get her to testify to any particular facts, or in truth to testify at all. His mission was only to find her, the defendant saying that, if he could find her, he (defendant) could get evidence from her himself. Plaintiff found her, and she was taken in charge by defendant. This is all there was to that matter. Taking the case in its entirety, there was nothing agreed to be done, and nothing actually done, under the contracts of plaintiff and Robinson with defendant, which was not entirely proper and legitimate and the trial court correctly so held.

The judgment and order appealed from are affirmed.

We concur: WILBUR, J.; MELVIN, J.

---

178 Cal. 634

## BOWDOIN v. SOUTHERN PAC. CO.
(L. A. 4479.)

(Supreme Court of California. Aug. 2, 1918.)

1. Railroads ⟸278(5) — Trespasser on Freight Car — Contributory Negligence.
Where 15 year old boy riding without permission on a freight car, while holding on to the iron ladder on the side of the car, let go or lost his hold because brakeman was stamping near his fingers and threatened to stamp upon them, he was not guilty of contributory negligence in loosening his hold or in not waiting for a more safe place to alight.

2. Negligence ⟸85(2)—Contributory Negligence—15 Year Old Boy.
A 15 year old boy is not expected to use that degree of judgment and discretion which would be expected and required of an adult.

3. Appeal and Error ⟸1066 — Harmless Error—Instructions.
In action for death of 15 year old boy, who while riding on freight car released his hold of iron ladder and fell in front of freight engine, defendant railroad was not prejudiced by failure to base instruction on contributory negligence on theory that boy jumped, where, if boy jumped because of fear that his fingers would have been stamped on, he would not have been contributorily negligent.

4. Appeal and Error ⟸932(1) — Review — Verdict.
The fact that jury gave parent a verdict for only $1,000 for death of 15 year old boy does not raise inference that jury did not wholly believe testimony of plaintiff's witnesses, the parent being entitled by law to only compensatory damages for pecuniary loss.

5. Trial ⟸140(1) — Credibility of Witnesses—Question for Jury.
The credibility of the witnesses was exclusively for the jury.

6. Appeal and Error ⟸1001(1)—Review—Verdict Upon Sufficient Testimony.
A verdict based upon sufficient testimony cannot be overturned on appeal.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Department 2. Appeal from Superior Court, Los Angeles County; Edward Judson Brown, Judge.

Action by Nettie Bowdoin against the Southern Pacific Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Henry T. Gage and W. I. Gilbert, both of Los Angeles, for appellant. Hocker, Morris & Austin, of Los Angeles, for respondent.

WILBUR, J. Defendant appeals from a judgment after verdict for $1,000 in an action brought by plaintiff to recover for the death of her son, Lindsay, 15 years of age, alleged to have been caused by the negligent and willful misconduct of a brakeman of the defendant, in ejecting him from an iron ladder on the side of a freight car upon which he was riding without permission, by means whereof he fell in front of a passing switch engine and was killed. Cecil Sanders, a companion of deceased, testified: That he saw the brakeman climb down the ladder and smash decedent's fingers. That he heard the brakeman say something to him, but could not distinguish what it was. That he "stomped where Lindsay was holding on to the ladder. * * * Lindsay fell off. He seemed to light on his left foot, * * * seemed to lose his balance, and fell in front of the east-bound switch engine and was run over." In its answer the defendant denied negligence and alleged contributory negligence. The brakeman and others in charge of the train testified, denying all knowledge of the presence of the deceased, and any knowledge of the means by which he was thrown in front of the switch engine. The jury were instructed fully on the subject of negligence, and no complaint is made of such instructions. Defendant, however, complains of the following instruction, given at plaintiff's request:

"If you find that the deceased in this case was a boy of 15 years of age, you are instructed that he would not be expected to use that degree of judgment and discretion which would be expected and required of an adult; and if you find that from the commands or acts, if any, of the brakeman in charge of the train, the boy had reason to believe that force would be used, or if you find that force was used to eject him from the train, and even if you find that the boy jumped from the train by reason of such belief, he cannot under such circumstances be charged with contributory negligence for not having waited for a more safe place to alight."

[1-3] It is claimed that this instruction is erroneous for the reason that it is based upon a theory not involved in the evidence. If we accept the testimony on behalf of plaintiff as true, the hold of decedent was released by reason of the fact that his fingers were stamped upon, or that he lost his hold, or let go his hold, because the brakeman was stamping near his fingers and threatening to stamp on his fingers, it could not be said that the deceased was guilty of contributory negligence in loosening his hold under such circumstances. There is no evidence that he jumped. Under the circumstances, he could not be charged with negligence in not choosing a safe place to alight. Upon the question of the negligence of the deceased it was proper for the jury to be instructed "that he would not be expected to use that degree of judgment and discretion which would be expected and required of an adult," and the effect of the instruction was that the boy in jumping from the train, if he did jump, was not guilty of contributory negligence, if as a boy of his discretion he had reason to believe that his fingers would be stamped on, or if they were stamped on. Defendant was not prejudiced by an instruction upon the theory that the deceased jumped.

[4-6] The point is made that, notwithstanding the conflict in the evidence, this court should take into consideration the fact that the verdict for $1,000 was a very light verdict, and therefore infer that the jury did not wholly believe the testimony of the plaintiff's witness. The defendant cannot complain that the verdict was too small, and, in view of the rule of law that parents are only entitled to compensatory damages for pecuniary loss, we cannot say that the jury rendered a verdict for less than they thought was proper under the measure of damages as given it by the court. The credibility of the witness was exclusively for the jury, and the verdict based upon sufficient testimony cannot be overturned by this court.

The judgment is affirmed.

We concur: LORIGAN, J.; MELVIN, J.

---

178 Cal. 536

BUSCH v. LOS ANGELES RY. CORPORATION (two cases). (L. A. 4529.)

(Supreme Court of California. July 17, 1918.)

1. STREET RAILROADS ⊜117(5)—OPERATION—LEFT-HAND TRACKS.
It is not, as a matter of law, negligence to operate a street car west on the south track of a double track line.

2. APPEAL AND ERROR ⊜930(1)—PRESUMPTIONS.
Where verdict was for defendant street railway, its evidence as to care in operating its cars must, on appeal, be taken as true.

3. APPEAL AND ERROR ⊜1002—REVERSAL—CONFLICT IN EVIDENCE.
That the evidence is conflicting is not available for reversal, when the verdict resolved the conflict; the verdict being conclusive on appeal.

4. STREET RAILROADS ⊜114(13) — COLLISIONS—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.
In action for personal injuries and damage to automobile in collision with street car, evidence *held* to sustain verdict of contributory negligence.

5. APPEAL AND ERROR ⊜171(3)—SCOPE—INSUFFICIENT PLEADINGS.
In action for personal injuries and damage to automobile in collision with street car, where plea of contributory negligence was not attacked, and trial proceeded on theory that it was

sufficient, plaintiffs on appeal could not obtain reversal on ground that plea was insufficient.

6. STREET RAILROADS ⊂⊃112(2)—COLLISIONS —RES IPSA LOQUITUR DOCTRINE.

In action for personal injuries and damage to automobile in collision with street car, maxim "res ipsa loquitur" does not apply.

7. TRIAL ⊂⊃191(8) — COLLISIONS — INSTRUCTIONS.

Instruction that motorman, operating street car at reasonable speed with due care, may assume that others on the street will exercise ordinary care, and will see that which is plainly to be seen, was not objectionable, as assuming that the street car could be plainly seen.

8. STREET RAILROADS ⊂⊃85(1)—COLLISIONS —RIGHT OF WAY.

It is duty of drivers of automobiles along street upon which there is laid street car track to yield right of way to street cars, when they can reasonably do so.

9. STREET RAILROADS ⊂⊃81(1)—OPERATION—CARE REQUIRED.

Though it is unusual to operate a westbound street car on a south track, the railroad need use only reasonable and ordinary care under the circumstances, and not special and particular care.

Department 1. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Two actions, consolidated, by Reinhardt J. Busch and by Mary E. Busch against the Los Angeles Railway Corporation. Judgment for defendant, and order denying motions for new trial, and plaintiffs separately appeal. Affirmed.

Gray, Barker & Bowen, H. Perk, Jr., N. Blackstock, and Wheaton A. Gray, all of Los Angeles, for appellants. Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for respondent.

SHAW, J. The defendant is operating two double track street railways in the city of Los Angeles; one along Pasadena avenue, and the other on Avenue 20, which crosses Pasadena avenue. Reinhardt J. Busch and his wife, Mary E. Busch, were traveling easterly along the south side of Pasadena avenue in an automobile driven by the said Mary E. Busch and owned by her. A street car operated by the defendant was going westerly on the south track of the Pasadena Avenue line between Avenue 21 and Avenue 20, and at a point near Avenue 20 the automobile and the car collided, whereby Reinhardt J. Busch sustained personal injuries and the automobile was materially damaged. To recover these damages the two parties respectively began actions against the defendant. The two causes were consolidated and tried together, and resulted in a verdict and judgment for the defendant. From this judgment, and from an order denying their respective motions for a new trial, the two plaintiffs have taken separate appeals to this court.

[1] Plaintiff's first point is that the railroad company was negligent in its methods of operating its cars and laying its tracks in this: That usually street cars travel on the right-hand track in the direction in which they are going, and that this car was going west on the left-hand track. No law or ordinance is pointed out by appellants which required the defendants to operate its cars in either mode. It was therefore lawful to run them in either direction. Running a car west on the south side track cannot be said to be negligence in law.

[2, 3] It is claimed that the evidence showed that the defendant was negligent in the manner of operating the car in this: That inasmuch as the car was going in the opposite direction from that usually taken by cars upon that railroad, it was the defendant's duty to use more than usual care to warn persons of the fact, so as to avoid danger of collision, and that the defendant failed to sound any gong or otherwise give signals of warning. There was evidence that the defendant did sound the gong, and also that the injury occurred about dusk, that the inside car lights were lighted, that a headlight was burning brightly, and that the car was not going more than about four miles per hour at the time of the collision. The verdict of the jury having been for the defendant, this evidence must be taken as true. The fact that the plaintiffs' evidence contradicted it is not available for reversal in such a case. It was a question for the jury to determine, and its verdict on that subject is conclusive here.

[4] Plaintiffs further claim that there was no evidence of contributory negligence on the part of Mary E. Busch, who was driving the automobile. There was evidence to show that as she crossed Avenue 20 going east, just before the collision, she observed another automobile near the curb line, going as she first believed in the same direction, but which in fact had stopped, or was about to stop; that, seeing this to be so, she undertook to pass the automobile on the left-hand side, being the side next to the street car track; that in doing so she swerved considerably to the left at the instant when the car came opposite to the standing automobile, and thereby she drove her automobile against the side of the street car; that at that time the lights on the street car were burning, so that with ordinary care she could have seen it in time to stop her car, or guide it so as to avoid the collision. A verdict finding the plaintiff guilty of contributory negligence upon these facts cannot be said as a matter of law to be contrary to the evidence.

[5] Plaintiffs further contend that there was no sufficient pleading of the contributory negligence of the defendant in the answer, within the rule stated in Crabbe v. Mammoth, etc., Co., 168 Cal. 500, 143 Pac. 714. The Crabbe Case was decided after the answers in this case were filed. The trial

was conducted throughout upon the theory that contributory negligence of the plaintiffs was properly alleged and that the fact was in issue. Under these circumstances the well-settled rule prevails that the parties cannot on appeal claim a reversal on the ground that the plea was insufficient. It is unnecessary to cite cases on the subject.

[6] The court instructed the jury as follows:

"The fact that there was a collision between the automobile in which the plaintiffs were riding and the street car of the defendant does not raise a presumption of negligence against the defendant."

We see no error in this instruction. The maxim "res ipsa loquitur" does not apply in such cases.

[7] Another instruction was to the effect that a motorman, who is operating a street car at a reasonable rate of speed and with due care along and upon a public street, "has a right to assume that other persons who are using the street will exercise ordinary care in doing so, and will see that which is plainly to be seen." The objection made to this instruction is that the evidence showed that it was impossible for the plaintiffs to have seen the street car. On the contrary, as we view the evidence, it would seem to have been impossible for her not to see it, except by shutting her eyes or looking the other way. The instruction does not assume that the car was plainly to be seen, but says that if it was plainly to be seen the motorman had a right to expect that she would see it. The jury were left to determine from the evidence whether or not it was plainly to be seen.

[8] There was no error in instructing the jury that it is the duty of drivers of automobiles along a street upon which there is laid a street car track to yield the right of way to the street cars, when they can reasonably do so.

[9] The instruction that, when running a car in a direction the opposite to that usually taken on the south track, the motorman must use "special and particular care" to avoid collision with vehicles going in the other direction, was properly refused. Reasonable and ordinary care, under the existing circumstances, is the standard required of a street car company lawfully operating its cars on the street.

The instructions on all the questions in the case were full and clear. The appellants make other criticisms of instructions given, and complain of the refusal of others. We will not discuss them further. We are satisfied that the rulings were either correct, or that they were not sufficiently prejudicial as to have caused a miscarriage of justice.

The judgment and order are affirmed.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

178 Cal. 562

## GLIDDEN v. DIAMOND 66 CATTLE & DAIRY CO. et al. (L. A. 4517.)

(Supreme Court of California. July 25, 1918.)

1. CORPORATIONS ⊂=211(3) — STOCKHOLDER SUIT—COMPLAINT—DEMAND.
Complaint of stockholder suing on behalf of corporation, to avoid transfer of its property, should show demand on it to sue, and refusal, or uselessness of demand.

2. CORPORATIONS ⊂=211(7)—SUIT BY STOCKHOLDER—COMPLAINT—SPECIAL DEMURRER.
Defect of complaint of stockholder, suing on behalf of corporation, not alleging demand on it to sue, but leaving uncertain whether any demand would be effectual, can be availed of only by special demurrer.

3. APPEAL AND ERROR ⊂=230 — MATTERS AVAILABLE IN SUPPORT OF NONSUIT — DEFECTIVE COMPLAINT.
Defect of stockholder's complaint in not showing demand on corporation to sue, and its refusal, or certainty that demand would have been useless, is not available in support of nonsuit granted; it not having been urged till defendant's evidence showed demand would have been futile.

4. APPEAL AND ERROR ⊂=236(2) — MOTION PRESENTING OBJECTION—PLEADING.
A defect in a complaint not made ground of motion will not be considered on appeal.

5. CORPORATIONS ⊂=204 — SUIT BY STOCKHOLDER—PENDING SUIT BY CORPORATION.
A stockholder's action to avoid a transfer of its property, as unauthorized, is not defeated by fact of the corporation having already sued to have the contract upheld, and violation of it restrained, and the property accounted for according to contract; the suits being entirely dissimilar.

Department 1. Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by D. F. Glidden against the Diamond 66 Cattle & Dairy Company and others. From an adverse judgment and order, plaintiff appeals. Reversed.

D. F. Glidden and Will H. Holcomb, both of San Diego, for appellant. Hendee & Rodabaugh and F. F. Grant, all of San Diego, for respondents.

RICHARDS, Judge pro tem. This is an appeal from a judgment of nonsuit and from an order denying the plaintiff's motion for a new trial. The action is one commenced by the plaintiff as a director and one of the stockholders of a corporation known as the Diamond 66 Cattle & Dairy Company against said corporation, the other four directors, and two other defendants named H. H. Peterson and R. H. McGinness; the latter two being the respondents herein. The purpose of the action as set forth in the complaint was to have set aside a certain bill of sale purporting to transfer all of the property of the corporation to the defendant Peterson, the plaintiff alleging that said purported transfer was illegal because attempted to be authorized at a special meeting of the other four directors of the corporation held without proper notification, of the holding of which meeting said

plaintiff was given no notice and at which he was not present; that the property of the corporation had thus been transferred to the defendant Peterson for a sum far less than its actual value; and that as a consequence the said corporate property was being dissipated, and the plaintiff's stock, which had theretofore been worth $10 per share, rendered valueless. The defendant R. H. McGinness was made a party defendant because of a subsequent arrangement between himself and Peterson by which he was to assist in selling off the property, receiving therefor a share in the excess of profits above its purchase price. The defendant corporation and its four directors who were responsible for this transaction were duly served with process, but defaulted. The defendants Peterson and McGinness did not demur to the complaint, but answered, specifically denying all of its material allegations, but, after doing so, set up affirmatively certain averments in which the due execution of the bill of sale to Peterson was alleged and sought to be justified. The cause came to trial upon the issues as thus made up. The plaintiff proved the averments of his complaint as to the illegality of the meeting of the four directors of the corporation at which the transfer of its property had been sought to be authorized. He also proved by practically uncontradicted evidence that the said property of the corporation was worth several thousand dollars more than was agreed to be paid for it by Peterson.

During the cross-examination of the plaintiff, it developed that three days prior to the filing of his complaint the corporation, at the instance evidently of its other four directors, had commenced an action against the defendants Peterson and McGinness, wherein the same agreement for the transfer of the property of the corporation was set up and averred to be legal, but in which it was also averred that the said defendants were failing and refusing to comply with its terms, by reason of which an accounting was prayed for and further sales of said property sought to be restrained. A copy of said complaint was offered and admitted in the evidence by said defendants as a part of the plaintiff's cross-examination. The plaintiff having rested his case, the defendants Peterson and McGinness moved the court for a nonsuit upon the following grounds:

"That the action by D. F. Glidden, stockholder, is shown by the evidence to have been unlawfully brought, that is, not according to law, in that the corporation itself had filed a suit three days prior to the filing of the suit by the plaintiff stockholder in this case; second, that the ultimate prayers of both complaints, I mean both the corporation's complaint and the stockholder's complaint, are the same, the relief prayed for being the same."

The court granted said motion, and also later denied the plaintiff's motion for a new trial, whereupon he prosecuted these appeals.

[1-4] The contention of the respondents upon these appeals is that the plaintiff as a stockholder of the corporation was not entitled to maintain this action on its behalf in the absence of either pleading or proof of a demand upon the corporation that it should institute the action, with which demand it had refused to comply. There can be no doubt that under the well-settled rules of law applicable to this class of cases the plaintiff's pleading is defective in this regard: Although there are some averments in the complaint to the effect that the four directors of the corporation who were in control of its affairs acted fraudulently in authorizing and making said transfer of its property, which might make it uncertain as to whether or not any demand on plaintiff's part to have the corporation, still controlled by these directors, repudiate its former action, would have been effectual. The defect would thus become a mere uncertainty, which could only be taken advantage of by special demurrer. The difficulty, however, with the respondents' present contention, is that they not only did not either by demurrer or answer direct attention to the defect, but that they did not make its existence a ground of their motion for nonsuit either specifically or through their vague objection that the action of the plaintiff was "shown by the evidence to have been unlawfully brought." Having thus failed to urge this objection to the sufficiency of the plaintiff's complaint until such time in the progress of the case as the evidence presented at their own instance showed that such a demand would have been futile, and having also failed to make the point as a ground of their motion for nonsuit, and thus given the plaintiff an opportunity to correct the defect and thus avoid the force of the motion, the respondents cannot now be heard to urge the point upon this appeal.

[5] The second ground which the defendants specified upon their motion for nonsuit was that the evidence showed that three days before the plaintiff had brought his action the corporation had itself commenced an action against the same defendants in which practically the same relief was sought. Had this been shown to be the case, it would have furnished a sufficient reason why the plaintiff should be nonsuited and his action dismissed; for, aside from the matter of pleading, the plaintiff was bound to prove his right to maintain his action on behalf of the corporation by showing that the corporation had itself failed, refused, or neglected to take the necessary steps for the protection of the interests of itself and its stockholders, which, as one of the latter, he was seeking to take on its behalf; and hence a showing that the corporation had itself done previously what he was seeking to do on its behalf would necessarily have been fatal to the plaintiff's action. But the difficulty with the respondents' contention in this regard lies in the entire absence of similarity between these two suits. The plaintiff in his action seeks to have the alleged unauthorized and

hence illegal transfer of the entire property of the corporation to a stranger set aside and the property or its value restored to the corporation. The corporation, on the other hand, seeks in its action to have the contract between itself and the defendant Peterson upheld and the said defendant and his associate, McGinness, restrained from violating it and required to account for the residue of the property received by them according to its terms. The institution of such a suit by the corporation furnished as above stated, sufficient proof of its determination to stand by its illegal contract to have made a demand that it bring suit to set aside such contract unnecessary, and hence to have justified rather than defeated the plaintiff's action.

It follows from the foregoing considerations that the defendants' motion for a nonsuit should have been denied, and hence, also, that the plaintiff's motion for a new trial predicated upon this error should have been granted.

Judgment and order reversed.

We concur: SHAW, J.; SLOSS, J.

---

178 Cal. 713

In re HURLEY'S ESTATE. (S. F. 8706.)

(Supreme Court of California. Aug. 8, 1918.)

WILLS ⇐133 — OLOGRAPHIC WILL — EXECUTION — SIGNATURE.

Olographic will, containing name in the exordium, but no conclusion or signature or punctuation mark at end, *held* insufficient to be entitled to probate; there being no inference that testatrix intended name in the introduction as the executing signature.

Department 1. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of Margaret E. Hurley, deceased. Petition by Catherine E. Kane and others to have order admitting will to probate revoked, opposed by W. J. Hynes, administrator, and others. From an order refusing to revoke the previous order, petitioners appeal. Reversed.

David L. Levy, Walter Shelton, and George K. Ford, all of San Francisco, for appellants. Ervin S. Best, Louis H. Brownstone, and Cullinan & Hickey, all of San Francisco, and Edward R. Eliassen, of Oakland, for respondents.

SHAW, J. The appeal is taken from an order refusing to revoke a previous order admitting to probate a certain document as the last will of Margaret E. Hurley, deceased. The petition for revocation alleged as grounds therefor that the will so admitted was not signed by the hand of the deceased, nor subscribed at the end thereof by the deceased, and is not her last will. The following is a copy of the document as set forth in the record:

"San Francisco June 6th 1902

"I Margaret E. Hurley being of sound mind and body do make this my last will and testament I be-queath to Lavinia Giesting one thousand dollars to Irma Giesting one thousand dollars to Gertrude Giesting one thousand dollars to Mrs. Nash and her sister Mrs. Hanig five hundred dollars each to Miss Nelly White five hundred dollars to Edgar Gillern of Alameda five hundred dollars to Mrs. Blanchard of 1366 Ellis St five hundred dollars to Mrs. Titcomb five hundred dollars to Mrs. Skelly of Alameda five hundred dollars to Lilian and Bertha Morris five hundred each"

The rule in this state regarding the place of the signature and the essentials thereof to an olographic will, is settled by the two decisions in Estate of Manchester, 174 Cal. 417, 163 Pac. 358, L. R. A. 1917D, 629, Ann. Cas. 1918B, 227; and Estate of McMahon, 174 Cal. 423, 163 Pac. 669, L. R. A. 1917D, 778. The first case was decided by Department 1 and the second by Department 2, but the entire question was carefully considered by the whole court in deciding the two cases. In Estate of Manchester the document proposed as a will began in a manner similar to that of the document here in question, and it terminated without any signature other than the one at the beginning. There was nothing on the face of the will to indicate that the testatrix intended to adopt the signature in the introduction as the signature to the will. It was held that the will was not signed, and did not constitute a will. In Estate of McMahon the signature appeared in the opening clause, and there was no signature at the close of the will or elsewhere therein; but the concluding clause contained the statement: "I do hereby publish and declare the *foregoing*, entirely written, dated and *signed* by my own hand, to be my last will and testament." (The italics are ours.)

This was held to be a sufficient declaration of the intention of the testatrix to adopt the signature written by her in the exordium of the will as her signature in execution of it, and accordingly the order admitting the will to probate was affirmed. In Estate of Manchester, on this subject, the court said:

"The true rule, as we conceive it to be, is that, wherever placed, the fact that it was intended as an executing signature must satisfactorily appear on the face of the document itself. If it is at the end of the document, the universal custom of mankind forces the conclusion that it was appended as an execution, if nothing to the contrary appears. If placed elsewhere, it is for the court to say, from an inspection of the whole document, its language as well as its form, and the relative position of its parts, whether or not there is a positive and satisfactory inference from the document itself that the signature was so placed with the intent that it should there serve as a token of execution. If such inference thus appears, the execution may be considered as proven by such signature."

This rule was followed in Estate of McMahon with the result above stated. In the pres-

ent case the signature appears in the opening statement of the paper, but there is nothing in the document or in the closing paragraph to indicate that the testatrix intended to adopt that signature as the executing signature of the will. Indeed, the contrary may be inferred from the fact that the will terminates without even a punctuation mark, thereby indicating that the testatrix ceased writing before she had completed declaring her intention and that she did not regard the document as a completed will. But the contrary inference need not appear. In the absence of anything on the face of the will to raise the inference that the name in the exordium was intended as a signature in execution, the olographic document cannot be deemed a valid will.

For these reasons, we think the court erred in admitting the will to probate, and that the application to revoke the same should have been granted.

The order is reversed.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

37 Cal. App. 676

## SIMMONS v. SUPERIOR COURT OF CALIFORNIA IN AND FOR SAN DIEGO COUNTY et al. (Civ. 2671.)

(District Court of Appeal, Second District, California. June 27, 1918.)

1. JUSTICES OF THE PEACE ⟸160(4)—NOTICE OF APPEAL—FILING OF NOTICE.

Notice of appeal, deposited with justice on certain date and indorsed as filed of that date, was filed on such date, although fees required by Code Civ. Proc. § 981, to be paid justice for transmission of papers to superior court, were not paid on such date, but were paid within period in which to perfect appeal.

2. JUSTICES OF THE PEACE ⟸159(10)—UNDERTAKING ON APPEAL—TIME FOR FILING.

Where undertaking on appeal and notice of appeal were deposited on certain day with the justice, who indorsed the notice as having been filed on that day although fees for transmission of appeal papers to superior court, required to be paid by Code Civ. Proc. § 981, were not paid at such time, the bond was filed within five days after the filing of notice, as required by Code Civ. Proc. § 978a, despite nonpayment of fees until later, but within time in which to perfect appeal.

3. JUDGMENT ⟸745—MATTERS CONCLUDED—FILING OF APPEAL NOTICE.

Court's decision, on petition for writ of prohibition, that a notice of appeal was filed on a certain date, is conclusive on the court, on subsequent certiorari proceedings involving question of whether undertaking was filed within five days after filing of such notice, where such question depended upon date upon which notice was filed.

Certiorari by Martha B. Simmons against the Superior Court of the State of California in and for the County of San Diego and another, to review order denying motion to dismiss an appeal from a justice of the peace. Affirmed.

See, also, 30 Cal. App. 252, 157 Pac. 817.

Albert J. Lee, of San Diego, for petitioner. Theodore Stensland, of San Diego, for respondents.

SHAW, J. Certiorari. On November 11, 1915, in a certain case wherein petitioner was plaintiff and one Elizabeth G. Clarke was defendant, a judgment was rendered in the justice's court of San Diego township in favor of plaintiff. On November 20th defendant served upon plaintiff's attorney a notice of appeal to the superior court, wherein it was further stated:

"You will further take notice that an undertaking on said appeal was this day filed in said justice's court."

This notice, together with the undertaking on appeal, was on the same day deposited with the justice of the peace, who indorsed thereon:

"Filed November 20, 1915.
"J. Edward Keating, Justice of the Peace."

At the time of depositing and filing these documents the appellant did not pay the justice of the peace the fees provided by law to be paid to the county clerk for filing the transcript on appeal and placing the action on the calendar in the superior court. On December 10th, however, which was within the time specified by law for perfecting the appeal, she did pay to the justice of the peace such fees, which were transmitted to the county clerk, together with the papers on appeal. Thereafter, upon the ground that the court was without jurisdiction to try the case, plaintiff moved to dismiss the appeal, which motion by order of court being denied, petitioner by this proceeding seeks to have the same annulled.

[1, 2] Her contention is that no undertaking on appeal was filed within five days after the filing of the notice of appeal, as required by section 978a, Code of Civil Procedure. As we have stated, the notice was duly served on November 20th, on which day it was deposited with the justice, who indorsed it as filed of that date. It is conceded that an undertaking in due form was filed within five days thereafter. Petitioner insists, however, that the filing of the undertaking was ineffectual, for the reason that the notice of appeal must be deemed to have been filed on December 10th, at which time the fees were paid. In the case of Simmons v. Superior Court, 30 Cal. App. 252, 157 Pac. 817, wherein this petitioner sought a writ of prohibition to restrain the superior court from proceeding with the trial of the case, upon the ground that, since the fees were not paid at the precise time of filing the notice of appeal, the filing thereof was ineffectual for the purpose of conferring jurisdiction upon the superior court, this court, in considering such question, said:

"The purpose of the enactment of section 981 of the Code of Civil Procedure was to pro-

vide for the payment of the clerk's fees at the time of transmitting to the superior court the papers on appeal; and where the fees, though not paid to the justice at the time of presenting for filing the notice of appeal, are nevertheless paid within the thirty days allowed for taking the appeal, so as to enable him to transmit the fees, together with the papers on appeal, it is, in our opinion, a sufficient compliance with the statutory provision."

We adhere to the conclusion reached in that case, viz., that the notice of appeal was filed on November 20th when deposited with the justice and indorsed as filed of that date, from which it follows that, since the undertaking on appeal was filed within five days thereafter, it constituted a sufficient compliance with the provisions of section 978a, Code of Civil Procedure.

"The provisions conferring the right of appeal and prescribing the procedure are remedial and should not be unduly hampered with constructive restrictions which will cast doubt upon the jurisdiction of the appellate court." Rigby v. Superior Court, 162 Cal. 339, 122 Pac. 958.

[3] It is true that, in the opinion in the case referred to, this court, in response to one line of argument urged by the petitioner therein said:

"Assuming, as claimed by petitioner, that the notice of appeal could not be deemed filed until payment of the fees in question was made, then, since it was left with the justice whose duty it was to file it upon payment of the fees, it should be deemed filed as of the date on which the fees were paid."

It is clear, however, that the decision was not based upon the correctness of petitioner's contention, but even if well founded, the court held it insufficient to warrant the relief asked. The statement based upon the assumed correctness of petitioner's claim was unnecessary to the decision, which was clearly founded upon other grounds, which must be deemed conclusive as to the question involved in the instant case.

Since the notice of appeal, as held in Simmons v. Superior Court, supra, was filed on November 20th and the undertaking on appeal, as conceded, was filed within five days thereafter, it necessarily follows that such act constituted a full compliance with the provisions of section 978a, Code of Civil Procedure.

The order sought to be annulled is affirmed.

We concur: CONREY, P. J.; JAMES, J.

---

37 Cal. App. 355

## WILSON v. FULLER. (Civ. 2242.)

(District Court of Appeal, Second District, California. May 28, 1918.)

1. CONTRACTS ⟸198(6)—CONSTRUCTION.
Contract by which well digger agreed to sink well to minimum depth of 150 feet, but not to exceed 500 feet, providing that he might stop drilling after reaching the minimum depth, permitted the digger to stop drilling at any time after reaching 150 feet.

2. CONTRACTS ⟸354—BREACH—DAMAGES.
Where well digger agreed to drill a well to minimum depth of 150 feet and maximum of 500 feet, but stopped digging when he reached 174 feet, but through his negligence the last 24 feet were worthless, and the landowner employed another digger to redig the last 24 feet and complete the well, but the court's findings, in action for agreed price by the original digger, failed to show what portion of the amount paid by the owner to the second digger was for the 24 feet, and what portion was for digging the well, he could not recover any compensation for the redigging.

3. CONTRACTS ⟸231(2)—RIGHT TO COMPENSATION.
Where plaintiff's assignor agreed to dig well to minimum depth of 150 feet, the contract permitting him to stop digging after reaching such depth, and he did stop, plaintiff could recover the full amount earned, notwithstanding the contract required only half payment at the reaching of each 100 feet in the digging.

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Action by J. H. Beck against Clifford A. Fuller, wherein J. M. Wilson, as plaintiff's assignee, was substituted as plaintiff. From the judgment rendered, defendant appeals. Affirmed.

E. L. Foster and Chas. A. Barnhart, both of Bakersfield, for appellant. W. W. Kaye, of Bakersfield, for respondent.

CONREY, P. J. By the findings of the court in this case the following facts appear: By agreement in writing plaintiff's assignor, J. H. Beck, agreed to drill a well for the defendant for which the defendant agreed to pay the sum of $1.50 per foot for the first 100 feet, and an increase of 25 cents per foot for each additional 100 feet; one-half the contract price to be paid at the completion of each 100 feet, "and the balance at completion of well." The contractor agreed "to sink such well to a minimum depth of 150 feet, but in no event to exceed a maximum depth of 500 feet." The contract also provided that "after the minimum depth has been reached first party may stop drilling, and must stop drilling if requested by second party." By supplementary agreement made before the commencement of the work, it was arranged that the work should be done by Wilson under the supervision of Beck. After Wilson ceased work, as hereinafter stated, Beck assigned to Wilson all his interest in the contract.

When the well had been drilled to a depth of 174 feet, Wilson ceased work thereon. The defendant failed and refused to pay to Wilson or to Beck the one-half of the contract price for the drilling of the well upon the completion of 100 feet, and failed and refused to pay any sum of money upon the completion of the drilling of the well to said depth of 174 feet. The contract provided that, in the event of default by the defendant in making any payment and the institution of suit to collect the same, de-

fendant would pay a reasonable sum as attorney fees. It became necessary for the plaintiff to prosecute this action, and a reasonable attorney fee therein is the sum of $50. The well was properly constructed to a depth of 150 feet. By reason of the carelessness and negligence of Wilson in not carrying the casing down with the hole as the same was being drilled, sand and débris from the walls of the well filled it up 24 feet from the bottom, whereby the work done by Wilson in putting down the last 24 feet was valueless. The defendant was obliged to employ another driller, one Schutz, to complete the drilling of the well, and was obliged to pay and did pay Schutz the sum of $150 for moving his drilling rig and setting the same up over the said well for the drilling thereof, and for the redrilling of said well below the depth of 150 feet to 174 feet, as well as other sums paid to said Schutz for completing the well to a depth below 174 feet.

Upon the facts found the court determined that the plaintiff was entitled to judgment against the defendant in the sum of $237.50, the price agreed upon in the contract for drilling the well to the depth of 150 feet, together with interest from the date when the work ceased to the entry of judgment herein, and for the sum of $50 as attorney fees. The defendant appeals from the judgment.

[1] The plaintiff's right to recover the sum allowed depends upon the construction to be given the terms of the contract. Appellant contends that the contract is a contract to drill a well to the depth of 500 feet, and that the only time that the contractor could stop drilling would be at the depth of 150 feet. We do not so understand the meaning of the contract. There was a minimum depth of 150 feet, to which depth the contractor was bound at all events to prosecute his work. Then he was given the privilege to stop drilling, not merely "at" the depth of 150 feet, but "after the minimum depth has been reached."

[2] Since the last 24 feet in depth of the well as drilled by Wilson was, by reason of Wilson's negligence, without value, he was not entitled to recover any compensation therefor. But the defendant may not receive any additional allowance as damages on that account, since the findings do not show how much of the money paid by him to Schutz was for redrilling, nor that the amount so paid was a reasonable sum. A part of the $150 paid to Schutz was for moving his drilling rig and setting it up over the well. But this work was also done for the purpose of carrying the well to a lower depth, the expense whereof is not chargeable to the plaintiff. No suggestion is made by appellant that the findings are defective or erroneous.

[3] The appellant further contends that at all events the judgment could not exceed $75, because by the terms of the contract only one-half of the contract price should be paid at the completion of each 100 feet. We think that, under a fair construction of the contract as a whole, the contractor was entitled to recover the entire amount which had been earned by him at the time when, in accordance with the privilege given him by the terms of the contract, he ceased work. It is very clear that this would have been so if, as specified in the contract, he had stopped drilling on request of the defendant; and we see no reason why the same result does not follow when the contractor, acting within his rights as given by the contract, stopped the work without such request.

The judgment is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

---

37 Cal. App. 696

## VAN ALEN et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (Civ. 2696.)

(District Court of Appeal, Second District, California. June 28, 1918.)

MORTGAGES ⊂⊃469—APPOINTMENT OF RECEIVER—"EX PARTE ORDER"—BOND—MORTGAGES.

Where a complaint in a mortgage foreclosure contained no allegations that a receiver be appointed, and no notice was given defendants of the application for a receiver, defendants having defaulted, the application was an ex parte one, under Code Civ. Proc. § 566, and was void where no bond was given.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ex Parte.]

Petition for writ of prohibition by Egbert Van Alen, Eugenia D. Porter, and Charles L. Evans, against the Superior Court of the State of California in and for the County of Los Angeles, Grant Jackson, Judge of said Court, and E. L. Kinney. Writ issued.

Charles L. Evans, of Los Angeles, for petitioners. D. H. Parke, of Los Angeles, for respondents.

WORKS, Judge pro tem. In a certain action in the superior court, brought for the foreclosure of a mortgage, in which the petitioners here were defendants, an order was made, after decree of foreclosure, appointing the respondent Kinney a receiver to take possession of the property mentioned in the decree. The receiver endeavored to take possession, but the petitioners refused to surrender it, and were cited to show cause, in the superior court, why they should not be punished for contempt. They are here on a petition for a writ of prohibition preventing the respondent court from so punishing them.

It is contended by the petitioners that the order appointing the receiver is void on vari-

ous grounds, but one only of them need be considered. The petitioners defaulted as defendants in the foreclosure action, but there were no allegations in the complaint upon which a receiver could have been appointed. No notice was given the petitioners of the application for the appointment of a receiver. Therefore, considering the form of the complaint, and notwithstanding the default of the petitioners, the application was an ex parte one. Section 566 of the Code of Civil Procedure provides:

"If a receiver is appointed upon an ex parte application, the court, before making the order, must require from the applicant an undertaking, * * * to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver. * * *"

In the present instance no such bond was required or given, either before or after the appointment of the receiver. The order was void. Stoff v. Erken, 172 Cal. 481, 156 Pac. 1033.

A peremptory writ of prohibition will issue, restraining the respondent court from punishing the petitioners for contempt.

We concur: CONREY, P. J.; JAMES, J.

37 Cal. App. 656

## PEOPLE v. POPE. (Cr. 437.)

(District Court of Appeal, Third District, California. June 26, 1918.)

CRIMINAL LAW ⊂⊃1206(3)—SENTENCE—OFFENSE BEFORE INDETERMINATE SENTENCE LAW—STATUTE.

A determinate sentence was properly imposed for a crime committed prior to the passage of Pen. Code, § 1168, as added by St. 1917, p. 665, relating to indeterminate sentences.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Joe U. Pope was convicted of rape, and he appeals. Affirmed.

S. Luke Howe and C. H. Crocker, both of Sacramento, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM. Defendant was accused by information of the crime of rape alleged to have been committed on the ——— day of May, 1917, his victim being of the age of 11 years. He was convicted by a jury, and the court sentenced him to serve the term of 15 years in the state prison at San Quentin. The crime was alleged and shown to have been committed on May 3, 1917, and prior to the passage or adoption of the new section 1168 to the Penal Code (as added by St. 1917, p. 665), relating to indeterminate sentences, and hence the sentence was properly imposed. Ex parte Lee, 171 Pac. 958.

The transcript was filed January 18, 1918, and was placed upon the June calendar. No brief has been filed by defendant, and he made no appearance at the call of the calendar. On motion of the Attorney General, the cause was submitted on the record. Although not required to do so, we have examined the transcript of the evidence and rulings of the court, with the result that the verdict is shown to have support and that no prejudicial rulings appear.

The judgment is affirmed.

37 Cal. App. 387

## PACIFIC RYS. ADVERTISING CO. v. LION CLOTHING CO. (Civ. 2193.)

(District Court of Appeal, Second District, California. May 29, 1918.)

CONTRACTS ⊂⊃322(3) — ADVERTISING — EVIDENCE.

In action by street railway advertising company for compensation under street railway advertising contract, evidence *held* not to support general finding of nonperformance.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by the Pacific Railways Advertising Company against the Lion Clothing Company. From a judgment for defendant, plaintiff appeals. Reversed.

W. P. Cary, of San Diego, for appellant. A. J. Morganstern, of San Diego, for respondent.

WORKS, Judge pro tem. The plaintiff and the defendant entered into a written agreement whereby the former bound itself to carry certain advertising matter for the defendant in all cars of certain street and interurban railway lines in and about San Diego; the contract specifically providing that the advertisement should be carried in "end frames in all cars equipped with same." These end spaces for advertising matter are more valuable to advertisers than spaces on the sides of cars, as they come more readily within the range of vision of passengers. The defendant, believing that the plaintiff was committing a breach of the agreement in not giving a proper amount of service in the matter of advertising in the end spaces, gave notice that the contract was at an end and refused to make certain monthly payments provided for in it. The plaintiff sued to recover the amount of these and other installments, judgment went for the defendant, and the plaintiff apeals.

The trial court found that the appellant had not performed its agreement; that, in the month preceding that in which the respondent had attempted to cancel the contract, one of the street car companies mentioned in it "changed its street cars, and the new cars put upon said lines contained no end frames, and therefore no display in end frames of the advertising of this defendant was had"; and that, in the same month in which the cancellation was attempted, "the street car lines covered by said contract had

so changed and altered practically all of their cars that end frames were no longer used therein for the display of advertising matter." The appellant contends that these findings are not supported by the evidence. There was but one witness, the president and manager of the respondent, who was sworn in its behalf. The record shows that on his direct examination he stated that, after a certain date, "I think our ad was not displayed in end frames at all"; but on his cross-examination he said upon this question, "If I said that the Lion Clothing Company got no end displays at all after" the date mentioned, "I was mistaken." On his direct examination he also said, referring to a time before the attempted cancellation of the agreement:

"In some of the cars with end frames the Lion Clothing Company advertisements were not displayed, although I don't know just how many there were."

On being cross-examined upon this particular phase of his testimony, he said:

"I can't state when it was that I noticed some cars in which our advertisement was not in the end frames, only it was before the cancellation of the contract. It was probably two dozen times that I saw this, but I'm not positive."

This witness was recalled to the stand later, and, after examination by counsel as to other matters, made the following statement in response to questions by the court:

"A good many times my ad was not in the end spaces. It's very hard for me to give the number of times. It might have been 30, and it might have been 50."

On cross-examination, immediately after this statement, he said:

"I might have said 24 times a little while ago, because I am not certain."

This is the only evidence which tends, even in slight degree, to support the general finding of nonperformance. We may at once dispose of the special findings above quoted by the assertion that they show no breach of the agreement and therefore do not support the judgment.

The question remaining, then, is: Does the evidence give substantial support to the finding of nonperformance? The witness is so uncertain in his testimony that he ranges the times when he noted the absence of the respondent's advertising matter in end frames from 24 to 50. He kept, as far as his testimony shows, no check or account of either dates or car numbers. He says he is unable to tell when he noticed the omissions. The contract was, in effect, from the commencement of operations under it to the date of the attempted cancellation, during a period of a little more than 2 years. If we take even 50 omissions, the greatest number stated by the witness, we cannot fail to note the trifling and unsubstantial character of the breach proven. He may have noted the omission on one and the same car once on each of 50 days out of a total of the 730 days going to make up the 2 years, while the undisputed evidence produced by the appellant shows that 86 cars, or thereabouts, equipped with end frames, were in service on the city streets the greater portion of the 2 years, and that there were never less than 50 such cars in service at any time. When we contemplate a multiplication of the number of cars in service by the 730 days of the 2 years, that product to be multiplied by the number of trips made by each car over the streets each day—whatever the number may have been, for the record does not disclose it—there is brought home to our minds the worthlessness of the evidence as a substantial support to the finding of nonperformance. If we have regard to the statement of the witness first made, as to the number of omissions of advertisements, that number being 24, we note that it, like the statement of larger numbers, is based on no data whatever. The circumstance that the witness stated these various numbers, taken together with the tone and tenor of his entire testimony, is plainly indicative of the fact that his statement of numbers is based on no definite recollection and does not rise above the dignity of a guess. Upon the evidence in the record the court could not have made the finding of nonperformance of the contract without the aid of an excursion into the realm of conjecture.

There is a question whether the general finding of nonperformance amounts to a finding of fact, or whether it is but the statement of a conclusion of law (9 Cyc. 732, and cases cited); but we merely mention the point in passing, without deciding it, as the judgment is manifestly erroneous upon the ground above discussed.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

---

37 Cal. App. 693

## DUTTON v. LOCKE-PADDON et al.

(Civ. 2343.)

(District Court of Appeal, First District, California. June 28, 1918. Rehearing Denied by Supreme Court Aug. 26, 1918.)

1. COVENANTS ⊂⊃7—NOTES—PRESUMPTIONS.
One who accepted deed containing covenant to assume payment of note and trust deed is presumed to have had knowledge of existence of such covenant.

2. COVENANTS ⊂⊃7—VALIDITY.
Where a deed contained a covenant that the grantee would assume payment of a promissory note and trust deed, it was not necessary that the grantee formally promise to pay the obligation.

3. ALTERATION OF INSTRUMENTS ⊂⊃10—PRIOR TO DELIVERY—VALIDITY.
Where owner of land standing in name of another had him make deed to owner's wife, and, on arranging trade with another person, deed to wife never having been delivered, the owner, with consent of title holder, erased her name and inserted that of the purchaser, the deed was valid, since such acts were equivalent

to filling in a blank form; no title having been actually conveyed to the wife because of nondelivery of the deed.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action by D. C. Dutton against William Locke-Paddon and others. Judgment for plaintiff, and the named defendant appeals. Affirmed.

J. L. Smith, of San Francisco, for appellant. Snook & Church, of Oakland, for respondent.

KERRIGAN, J. This is an appeal from the judgment in an action brought to recover the amount of a deficiency arising under a sale of real property by virtue of a deed of trust given to secure the payment of a certain promissory note. Very briefly, the essential facts of the case are these:

In the month of April, 1915, A. W. Morey owned a certain piece of real property, which stood in the name of M. McDonough. At that time Morey was or became indebted to the plaintiff, D. C. Dutton, in the sum of $1,250, whereupon, at the instance of Morey, McDonough gave to plaintiff his promissory note in that amount, secured by a deed of trust to said property. Thereafter, at the request of Morey, McDonough signed and acknowledged a deed conveying said property to Ella B. Morey, the wife of A. W. Morey, and wherein there was a covenant to the effect that the grantee assumed payment of said note. Ella B. Morey was not informed of the execution or existence of this deed, and it was never delivered to her. Shortly after it was made Morey agreed to a trade of the land with William Locke-Paddon, the appellant herein; but, instead of causing a new deed of the land to be made, he, with the consent of McDonough, altered this deed made to his wife by inserting in place of her name the name of appellant, and, as so altered, he delivered the deed to the appellant. The note secured by the deed of trust not being paid when due, the trustee sold the land under the terms of the trust, and after payment of the expenses of the trust the balance received from the sale was credited by plaintiff upon his note, leaving a deficiency, to recover which this action was brought.

[1] The evidence abundantly supports the finding of the court that the appellant agreed to assume payment of the obligation secured by the deed of trust. From the circumstance that a covenant to that effect appears in his deed he is presumed to have had knowledge of its existence from the time he accepted that instrument. It was also shown that he had actual knowledge that such covenant was contained in his deed, and that the holder of the obligation intended to look to him for its payment. He not only accepted the deed burdened with this covenant, but on several occasions treated with the plaintiff concerning phases of the transaction on the basis that this covenant was contained in the deed. In a word, and as before stated, the evidence shows clearly by the conduct of appellant that he assumed the payment of the note for which the trust deed had been executed.

[2] In an action like this it is not necessary that there should be a formal promise on the part of the grantee to pay the obligation incumbering the land conveyed, in order to render him liable therefor, if his obligation so to do appears from a consideration of the entire conveyance. "The obligation may be made orally or in a separate instrument, it may be implied from the transaction between the parties, or it may be shown by the circumstances under which the purchase was made, as well as by the language used in the instrument." Hopkins v. Warner, 109 Cal. 133, 41 Pac. 868. See, also, Lick v. Anderson, 29 Cal. App. 491, 156 Pac. 70.

[3] The only other point in the case seriously urged by the appellant is one concerning the effect of the alteration of the deed whereby the name of the appellant was substituted for the name of Ella B. Morey. As to that point, while it may be said that the method pursued was unusual, it cannot for that reason be said that the deed is void. The paper, not having been delivered to Mrs. Morey, conveyed no title to her, and was, considered as a conveyance of real property, no better than a blank form. The erasure of Mrs. Morey's name, and the insertion in its place of that of the appellant, was not the alteration of an instrument, since the instrument had not yet been created. It was merely equivalent to filling in a blank form, although one a little more complete than is usually the case. Morey, the real owner of the property, delivered the deed to appellant, with the intention thereby to pass title, and in our opinion it had that effect. As to whether or not there should have been a reacknowledgment of its execution need not here be considered, as that question refers to its status considered from the point of view of its right to recordation, with which we are not at present concerned.

The judgment is affirmed.

We concur: BEASLY, Judge pro tem.; ZOOK, Judge pro tem.

---

37 Cal. App. 236

HEITMAN v. CUTTING. (Civ. 2369.)

(District Court of Appeal, First District, California. May 14, 1918. Rehearing Denied June 13, 1918.)

1. TRUSTS ⇐33—CREATION OF TRUST.

Where money was given to another, with intention to make a transfer of a present immediate and indefeasible title for benefit of a third person, a trust was created, although it was not stated when the money was to be paid to the third person.

---

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

2. TRUSTS ⟸38—ACCEPTANCE.
Where money was given to another for the benefit of a third person, silence on the part of the person to whom the money was given was a tacit acceptance of the trust.

3. TRUSTS ⟸160(2)—TRUSTEE—NECESSITY.
Equity will never allow a trust to fail for want of a trustee.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Henry Heitman against Alice M. Cutting. From a judgment for plaintiff, defendant appeals. Affirmed.

A. J. Treat, of San Francisco, for appellant. Gerald C. Halsey and Halsey L. Rixford, both of San Francisco, for respondent.

KERRIGAN, J. This action was brought to recover $1,000, which sum, it is claimed, was received by defendant in trust for plaintiff. Judgment was for plaintiff, from which defendant appeals.

The facts are as follows: Plaintiff was for many years the gardener and coachman of one Francis Cutting, deceased, and was unintentionally omitted by Cutting from any benefits under his will. On September 27, 1913, Mrs. Francis Cutting telephoned to her stepson, F. P. Cutting, that his father was ill in bed and desired to see him. Francis Cutting at this time was blind, 79 years old, and had been ill for some months. Upon the son's arrival, Mrs. Cutting informed him that his father was very much distressed because he had not remembered his coachman, Henry Heitman, in his will. After greeting his sick parent, there was a short conversation between father and son, in which Francis Cutting, the father, ordered his son to draw the sum of $1,000 from the bank "and give it to her for him." Appellant was in the room at the time, close to her husband's bedside. The son was instructed to attend to it at once, and promised to do so. For some weeks prior to the death of Francis Cutting, and owing to his blindness, the son had a power of attorney authorizing him to sign checks on the American National Bank of San Francisco in the name of his father. After receiving these instructions, F. P. Cutting went to San Francisco the same morning, and drew a check in the name of Francis Cutting on the American National Bank in the sum of $1,000. and mailed the same to the First National Bank of Oakland, together with a letter containing instructions to place the same to the account of Mrs. Cutting. That evening he informed her of what he had done. The check was credited to the account of Mrs. Cutting, and a day or so after, on October 1, 1913, Francis Cutting died. Upon these and other facts hereinafter stated the trial court found that the defendant, Alice M. Cutting, received to the use of plaintiff the sum of $1,000, to be paid to plaintiff when Francis Cutting should die, and gave judgment accordingly.

[1] It is the claim of appellant that the judgment cannot be sustained upon the theory of a gift, either causa mortis or inter vivos, nor upon a trust imposed upon appellant for the benefit of respondent. In this behalf it is argued that the facts do not show a gift causa mortis. for the reason that there is no evidence that decedent was in fear or contemplation of death; and as there was no direction when the gift was to take effect, it could neither constitute a gift inter vivos nor a trust imposed upon appellant for the benefit of respondent. It is true that there is no evidence to support the finding that the money was to be paid "when Francis Cutting should die." This portion of the finding, however. is not material, and cannot be made the basis of a reversal. The facts show that the intention of deceased was to make a transfer of a present immediate and indefeasible title to the money for the benefit of Heitman. The transfer was full and complete by the payment of the check, and passed from the donor the legal power, dominion, and title over the money beyond his recall or control, and vested in Heitman an immediate title to the fund, with the right to reduce the same into his possession by enforcing the obligation according to its terms.

[2, 3] Nor does the evidence support the claim that the trust was never accepted by appellant. Aside from the fact that equity will never allow a trust to fail for want of a trustee, appellant by her conduct indicated her willingness to act, and the evidence further shows that the relation she assumed was subsequently acknowledged by her. The absence of positive testimony that the trust was accepted can avail her nothing. Her silence was a tacit agreement to comply with the request. To stand mute under such circumstances is equivalent to consent. Becker v. Schwerdtle, 141 Cal. 386, 74 Pac. 1029.

From what we have said. it follows that the evidence clearly shows the character of obligation imposed upon appellant regarding the money and the purpose for which it was given, and fully supports the conclusion of the trial court that she received the sum for the use and benefit of plaintiff.

Judgment affirmed.

We concur: BEASLY, Judge pro tem.; ZOOK, Judge pro tem.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

37 Cal. App. 329

MITCHELL v. WOOD. (Civ. 2245.)

(District Court of Appeal, Second District, California. May 22, 1918.)

1. PLEADING ⊂=214(8)—DEMURRER—SCOPE OF ADMISSIONS.

In an action by a chattel mortgagee against a third person for conversion of the mortgaged property, an automobile, an allegation in the complaint "that said automobile was at said time and ever since has been in the possession of the defendant" was not, when considered on demurrer and the admissions incident thereto, inconsistent with the mortgagor's right to execute the mortgage, where the complaint also alleged that defendant had no title or claim to the property, since it must be assumed that defendant was in possession as agent or trustee.

2. CHATTEL MORTGAGES ⊂=17 — TITLE OF MORTGAGOR.

The owner of personal property may execute a valid mortgage thereon, though the property at the time is in the actual possession of another.

3. CHATTEL MORTGAGES ⊂=170(1) — CONVERSION OF PROPERTY BY THIRD PERSON.

Where at the execution of a chattel mortgage the property is in the possession of a third person, the act of such person in refusing to deliver the property to the mortgagee after default constituted a conversion as of the date of the demand; his prior possession being immaterial.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Robert Mitchell against F. G. Wood. Judgment for defendant, and plaintiff appeals. Reversed.

Slosson & Mitchell, of Los Angeles, for appellant. Hyman Schwartz, of Los Angeles, for respondent.

SHAW, J. Action for the conversion of mortgaged property. The appeal is from a judgment of dismissal entered upon sustaining defendant's demurrer to the complaint.

It appears from the complaint that on July 1, 1915, one Bertha M. Dailey was the owner of an automobile of the value of $850, which she mortgaged to the plaintiff to secure payment of her promissory note in the sum of $300; that at said time, and ever since, the automobile was and has been in the possession of defendant, who at all times mentioned had no right, title, or interest in the same and was not entitled to its possession; that after default in the payment of the note plaintiff, by a writing sufficient in form and substance, demanded delivery of the possession of the chattel, which demand was by defendant refused. By the terms of the mortgage, the plaintiff, on default by the debtor, was entitled to possession of the mortgaged property.

[1-3] One who converts personal property which is subject to a chattel mortgage, is liable to the mortgagee for the full amount due under the mortgage. De Costa v. Comfort, 80 Cal. 507, 22 Pac. 218. Respondent, while conceding the correctness of this proposition, insists that as an authority it is inapplicable to the instant case for the reason that, as shown by the complaint, the conversion by defendant occurred prior to the time of the execution of the mortgage. This contention is based upon the allegation "that said automobile was at said time, and ever since has been, in the possession of the defendant." There is nothing in the fact so stated inconsistent with the mortgagor's right, as alleged owner, to mortgage the same. We must assume, since, as alleged, defendant had no right, title, claim, or interest therein, that he held the automobile as agent or trustee of the mortgagor. The owner of property may execute a valid mortgage thereon, notwithstanding the fact that the chattel may be in the actual possession of another. Until the mortgagor made default in the payment of the note, she, in person or through her agent, was entitled to possession of the automobile. The act of defendant after default in the payment of the note, when, having no right, title, or interest therein, he refused upon written demand of plaintiff to deliver the same to him, constituted a conversion of the property, and under the allegations of the complaint, if true, rendered him liable to plaintiff for the amount of the mortgage.

The ruling of the trial court, as we gather from respondent's brief, was based upon the assumption that the conversion occurred prior to the execution of the mortgage; whereas, it appears from the complaint that Dailey at the time of the execution of the mortgage was the actual owner of the automobile which at the time was in the possession of defendant who had no right, claim, or title thereto, and the conversion occurred when he refused on demand to deliver the same to plaintiff who, under the terms of the mortgage, was entitled to the property.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

---

37 Cal. App. 348

PARAMORE et al. v. COLBY. (Civ. 2672.)

(District Court of Appeal, Second District, California. June 25, 1918.)

APPEAL AND ERROR ⊂=629—FILING TRANSCRIPT—EXCUSABLE NEGLECT.

Where an appeal was taken to the Supreme Court, which granted an extension of time for filing a brief, but before the expiration of such time ordered the appeal transferred to the Court of Appeals, ex parte, on the ground that the action was not one in equity, the appellant was not bound by the decision of the Supreme Court, except for the purpose of the transfer, where the defense of the appellant turned on the question of whether the action was one in equity, and he should be allowed to file his brief, under Code Civ. Proc. § 473, relating to mistake, inadvertence, and excusable neglect; the appellant believing in good faith that the action is one in equity.

Action by Harriet H. Paramore and Helen Montgomery Paramore against Hayward Colby. Judgment for plaintiffs, and defendant

appeals. On motion to dismiss appeal by respondents, and counter motion by appellant for relief from default. Motion to dismiss denied, and motion for relief from default granted.

Victor T. Watkins, of Los Angeles, and Sims & Church, for appellant. Groff & Van Etten, of Los Angeles, for respondents.

CONREY, P. J. This case now comes before the court upon a motion of respondents for dismissal of the appeal, and a motion of appellant for an order permitting him to file his opening brief on appeal.

The defendant appealed to the Supreme Court from the judgment entered against him. The action was brought to recover from the defendant a certain sum, less than $2,000, claimed as the balance due on a contract for the sale of land between the plaintiffs' testator as vendor and the defendant as vendee. If, as claimed by the defendant, the action is a suit in equity, his appeal was properly taken to the Supreme Court. If, as claimed by the plaintiffs, it is merely an action at law for money due on a contract, the appeal should have been taken to the Second District Court of Appeal. The transcript on appeal was filed in the Supreme Court February 19, 1918. Under rule 2 of the Supreme Court, appellant's brief was due on the 21st day of March. On March 19th the Supreme Court made an order extending appellant's time for filing said brief to and including April 20th. On the 8th day of April the Supreme Court made its order transferring the cause to this court. Appellant's brief has not yet been filed, but on the 22d day of April it was tendered to the clerk of this court for filing, in accordance with appellant's motion, of which notice had been duly given.

The respondents claim that the appeal was wrongly taken to the Supreme Court; that therefore the Supreme Court was without jurisdiction to make the order extending time, but could only make an order transferring the case to this court, unless it (the Supreme Court) first made an order transferring the cause to the Supreme Court. These contentions are based upon the provisions of section 4 of article 6 of the Constitution. Whatever our opinion of these contentions may be, it is not necessary to make decision thereon, since at all events we think that the appellant's motion for relief from his alleged default should be granted. That motion is made under the provisions of section 473 of the Code of Civil Procedure, upon the ground of mistake, inadvertence, and excusable neglect, arising from the fact that in good faith appellant believed and still believes that the action is one in equity and that the appeal was properly taken to the Supreme Court. It is true that the Supreme Court has made its order transferring the cause to this court upon the stated ground that the case is not one within its jurisdiction. But the decision thus made ex parte by the Supreme Court should not be regarded as binding upon appellant, except for the purpose of the transfer. An inspection of the pleadings as set forth in the transcript shows that the defense made by the defendant turns upon the question as to whether the action is in fact of an equitable nature. That is the very matter which will be discussed in the briefs, and upon that matter appellant should have a hearing.

Respondents' motion for dismissal of the appeal and for an order vacating said order extending time is denied. Appellant's motion for relief from default is granted, and it is ordered that his brief be filed.

We concur: JAMES, J.; WORKS, Judge pro tem.

---

37 Cal. App. 482

FERGUSON v. MARSH et al. (Civ. 2173.)

(District Court of Appeal, Second District, California. June 7, 1918.)

1. CONTRACTS ⇐321(1)—CONSTRUCTION.

Under contract for hauling gravel from cars by which the hauler agreed to save the contractor harmless from demurrage charges, and the contractor agreed to pay for all the gasoline and grease used in the hauling, where the hauler defaulted after permitting demurrage to accrue and contracting a bill for oil and gasoline, the contractor could retain first, out of sums due the hauler, the amount of the demurrage charges, the balance, if any, to be paid to the holder of the claim for oil and gasoline.

2. CONTRACTS ⇐187(2)—RIGHTS OF THIRD PERSONS.

Under contract for hauling gravel from cars, by which the hauler agreed to save the contractor harmless from demurrage charges, and the contractor agreed to pay for all the gasoline and grease used in the hauling, where the hauler defaulted after permitting demurrage to accrue and contracting a bill for oil and gasoline, the agreement to pay for oil and gasoline was not, within Civ. Code, § 1559, a contract made expressly for the benefit of a third person, and the seller of the oil used could not enforce it.

3. EVIDENCE ⇐165(1)—PAROL EVIDENCE AS TO WRITTEN CONTRACTS.

It is incompetent for witnesses to state orally what were the terms of a contract, when the terms were expressed in writing.

Appeal from Superior Court, Los Angeles County; J. E. Barber, Judge.

Action by D. E. Ferguson, doing business as the Mission Garage, against John D. Marsh and another. Judgment for plaintiff, and defendant named appeals. Reversed.

J. Vincent Hannon and T. G. Dalton, both of Los Angeles, for appellant. W. J. Hittson, of Los Angeles, for respondent.

JAMES, J. The judgment in this case was in favor of the plaintiff. Defendant John D. Marsh has appealed therefrom.

In the year 1913 the defendant Marsh was

the contractor named in a contract made with the state of California, which provided for the construction of certain road work on a public highway in the county of Los Angeles. In the prosecution of this work it was necessary that there should be used a large quantity of rock and sand. Appellant arranged for the procurement of the rock and sand, which was to be delivered in cars at several stations in the vicinity of the highway on which the work was to be done. Appellant then contracted with three persons, Anway, Bente, and Miller, to haul the rock and sand, as it arrived at these different stations, to the places where the same might be needed. This contract last mentioned was in writing, providing that Anway, Bente, and Miller should do all the work and furnish the tools, implements, motor trucks, and labor necessary for the expeditious handling of the cars and the delivery of the rock and sand. The contract also provided that Anway, Bente, and Miller should "save said first party [appellant, John D. Marsh] harmless against any demurrage charges by reason of said cars remaining unloaded upon the track after delivery; it being expressly understood and agreed that said second parties shall, upon the placing of said cars by the railroad at the said stations, or either of them, immediately proceed and with all due diligence accomplish the unloading of said cars, and expeditiously and with all due diligence deliver said rock and sand on the job as hereinbefore outlined. * * *" The contract further contained the agreement that Marsh "covenants and agrees to pay for all gasoline and lubricating oil used by said second parties in the operation of the motor trucks in the performance of this contract, deducting the amounts so paid by said first party for such gasoline and lubricating oil from the said contract price, and such payment to be considered as a payment on account of said contract price. * * *" Anway and his two associates entered upon the work of unloading and hauling the rock and sand, and, after proceeding with this work for some days, they ceased their labors and abandoned their contract. During the time that they had been at work under the contract they incurred a debt of more than $300 for oils and gasoline which they purchased from the plaintiff. The plaintiff, before furnishing the majority of the merchandise to the truck owners, saw the contract as made between appellant, Marsh, and Anway, Bente, and Miller. Failing to receive payment from the debtors, Ferguson presented his demand to Marsh, and requested payment of the same. He also presented a written order, made by Anway and Miller, requesting Marsh to pay the bill. The plaintiff here testified that, when he presented the order and made demand, Marsh stated that Miller and Anway owed him (Marsh) for demurrage on cars amounting to $500 or $600. This witness testified that Marsh said that, if there was any money left, he would settle the oil and gasoline bill. The plaintiff was asked the question: "Well, he told you he had money on hand belonging to Miller and Anway?" to which he replied, "Yes, sir, $500 or $600, but he was going to take that out and pay this demurrage."

[1] While no date is fixed as that upon which the order was given, or this conversation had, it seems indicated from the testimony that the bill was not presented until after Anway and his associates had ceased work under the contract. The trial judge made his findings all in favor of the plaintiff, determining that at the time the demand was made upon the appellant, Marsh, there was sufficient money owing from the appellant to the hauling contractors to satisfy plaintiff's demand. This finding cannot be sustained on the evidence, unless it is to be determined that Marsh, in ascertaining the amount of money due to the hauling contractors, had not the right to offset demurrage charges; this because the testimony was uncontradicted to the effect that the demurrage charges, as claimed by the railroad company and as finally paid by Marsh, more than consumed the amount which was chargeable against Marsh by the haulers for work performed. A construction of the contract which would deprive Marsh of the right to adjust the debt of Anway et al. to him, in ascertaining the state of the account, would be most absurd and unjust. The contract expressly and particularly covered the matter of demurrage charges in favor of Marsh. Those demurrage charges constituted a necessary and proper item of credit, which Marsh was entitled to deduct from the earnings of Anway et al. No term of the contract provided that the number of cars delivered should be limited or regulated in any particular manner, but the obligation of the haulers was to expeditiously remove the rock and sand from the cars when they arrived. The witness Miller did testify that a great many cars arrived on one day, and that he could not get the cars moved. It does not appear from the contract that Marsh assumed any duty as to the moving of the cars after they arrived, or the handling of them in any way. That was a matter that the haulers had exclusively in their charge, any inconvenience in the doing of which was to be endured by them.

[2] That term of the contract, whereby Marsh agreed to pay for oil and gasoline used by the haulers, may not be said to be "a contract made expressly for the benefit of a third person, * * *" which under section 1559, Civil Code, may be enforced by the person in whose favor it exists. It has been repeatedly held that, while the particular party for whose benefit such a contract is made need not be named therein, it must ap-

pear by direct terms of the contract that it was made for the benefit of some particular party, and that this will not be implied from the fact that if the parties perform the contract strictly, it may operate incidentally to the benefit of the third person. Chung Kee v. Davidson, 73 Cal. 522, 15 Pac. 100, second appeal in same case 102 Cal. 188, 36 Pac. 519. See, also, Thomson v. Bettens et al., 94 Cal. 82, 29 Pac. 336; Hamilton v. Bates, 4 Cal. Unrep. Cas. 371, 35 Pac. 304. In order to sustain the judgment it would be necessary to determine here, either that the contract to pay for oils and gasoline was a contract made expressly for the benefit of the plaintiff, or that when the order was presented by the plaintiff to Marsh requesting payment of the bill there was money resting to the account of the drawers of the order which Marsh would be required to pay. As a matter of law, the first proposition cannot be maintained; and, as we have indicated, the evidence was insufficient to sustain the finding of the court in the last particular.

[3] There were errors committed by the court in its rulings upon the introduction of evidence. It was incompetent for witnesses to be required to state orally what the terms of the contract were, because the same were expressed in writing, and the obligations of the parties should have been ascertained from the writing itself which was very clear and explicit. Were the latter errors alone to be considered, however, it might perhaps be said upon the whole case that no prejudice resulted; hence we have given particular attention to those matters only which are most vital to a determination of the appeal. In our examination of the case we have not had the benefit of brief or oral argument from counsel who represents the respondent.

The judgment appealed from is reversed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

---

37 Cal. App. 258

DAVIDSON v. RAFAEL et ux. (Civ. 2410.)

(District Court of Appeal, First District, California. May 16, 1918.)

APPEAL AND ERROR ⊂1161—DISPOSITION—CONFESSION OF ERROR.

Where, on appeal from judgment refusing interest on note sued on, contrary to Civ. Code, § 1918, defendant's attorney confessed the error, the judgment must be reversed.

Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by M. Davidson against M. Rafael and wife. From the judgment rendered, plaintiff appeals. Reversed and remanded.

William G. Weiss, of San Francisco, for appellant. M. H. Wascerwitz, of San Francisco, for respondent.

PER CURIAM. The plaintiff brought suit upon a promissory note executed by the defendants, husband and wife, bearing interest at the rate of 5 per cent. per month. Defendant C. Rafael filed her answer, in which she set up the defenses of payment, want of consideration, and false pretenses used in obtaining her signature to the obligation. The court found all these issues in favor of the plaintiff, but also found that the contract to pay interest at the rate of 5 per cent. per month was unreasonable, unconscionable, and usurious. Accordingly, in arriving at the amount due to the plaintiff, the court allowed interest on the principal of the note at the rate of 2 per cent. per month from the time interest was payable; and it appearing that the defendant had paid, during a period of about two years, interest at the higher rate, the court credited three-fifths of the sum thus paid as interest, namely, 3 per cent. per month, on the principal of the note, and entered judgment for the plaintiff for the balance.

The note in suit being unsecured, and there having been no showing in the court below that the plaintiff was a personal property broker, and therefore subject to the provisions of the act limiting the interest allowed to be charged by such brokers to 2 per cent. per month, it is urged by the appellant that the method of calculation adopted by the trial court was incorrect; that, the parties having agreed upon the rate of interest, it should have been allowed in accordance with the terms of the agreement until the entry of judgment. Civ. Code, § 1918. Counsel for the respondent, while pointing out that the interest already paid by his client amounts to a sum greater than the principal of the note plus 7 per cent. interest per annum, concedes that legally the plaintiff was entitled to his pound of flesh and confesses error.

Accordingly it is ordered that the judgment be reversed, and the cause remanded for a new trial.

---

37 Cal. App. 761

TULLOH v. BOYCE et al. (ALSTON et al., Interveners). (Civ. 2441.)

(District Court of Appeal, First District, California. July 11, 1918. Rehearing Denied by Supreme Court Sept. 6, 1918.)

MECHANICS' LIENS ⊂268—CONTINUANCE OF LIEN—NOTICE OF PROCEEDING—RIGHTS OF PURCHASERS.

Code Civ. Proc. § 1190, specifying the continuance of a mechanic's lien, implies that when proceedings to foreclose the lien are commenced within the time designated, the lien continues, rendering it unnecessary to file a notice of such proceedings to charge and hold the property against purchasers pendente lite.

Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Action to foreclose a mechanic's lien by William A. Tulloh against E. J. Boyce and

others, with intervention by Bernice Alston and another. Judgment for interveners against plaintiff, and from an order denying his motion to vacate the judgment and conclusions of law and to enter a different judgment and conclusions, he appeals. Judgment and order reversed.

Frank W. Sawyer, of San Francisco, for appellant. W. B. Rinehart, of Oakland, for respondents.

KERRIGAN, J. This is an action to foreclose a mechanic's lien. The appeal is from the judgment in favor of the interveners and against the plaintiff, and from an order denying plaintiff's motion to vacate the judgment and conclusions of law, and to enter a different judgment and conclusions of law upon the same findings.

The plaintiff was the contractor and lien claimant. The defendants were the owners of the property when the work was done, the lien filed, and the action commenced. The interveners were the purchasers of the property pendente lite. The claim of lien was filed, as provided in section 1187 of the Code of Civil Procedure in due time in the recorder's office, the action to foreclose the same being commenced within 90 days thereafter; and the sole question presented on the appeal is, Does a party who in due time records a sufficient and valid mechanic's lien have to record a notice of lis pendens upon the foreclosure of that lien in order to charge and hold the property against purchasers pendente lite? Section 1190 of the Code of Civil Procedure, specifying the time of continuance of a mechanic's lien, in part reads:

"No lien provided for in this chapter binds any" building, mining claim, improvement or structure "for a longer period than ninety days after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same."

By implication this provision plainly means that when proceedings to foreclose the lien are commenced within the time designated the lien continues, rendering it unnecessary to file a notice of the pendency of the action.

The authorities sustain this view. In the case of Empire Land & Canal Co. v. Engley, 18 Colo. 388, 392, 33 Pac. 153, 155—where the statute providing for the filing of a mechanic's lien and its foreclosure is similar to ours (reading that the lien should not hold the property longer than six months after filing the claim unless an action to enforce the same be commenced within time)—it was held that a purchaser or incumbrancer of property upon which a mechanic's lien has been filed is charged with notice thereof by virtue of the mechanic's lien statute itself, without the filing of a notice of lis pendens. Upon this point the Colorado court said:

"Considering the design of these statutes, we are of the opinion that it is not necessary to file a notice of lis pendens in an action brought to enforce a mechanic's lien. The mechanic's lien statute prescribes the kind of notice to be filed by the claimants of such liens, and no additional notice is necessary. * * * It is true that the statute provides that such lien shall not hold the property for a longer period than six months, unless an action shall, within that time, be commenced to enforce the same. But this is equivalent to an affirmative declaration that the lien shall hold the property for a longer period than six months, where an action is commenced within that time to enforce the same."

In Bolsot on Mechanic's Lien, § 593, p. 620, the author states:

"It is not necessary, in the absence of express statutory direction, to file a notice of lis pendens in order to preserve the lien as against purchasers pending suit."

And in Bloom on Law of Mechanic's Liens, p. 601, § 658, we read:

"Contrary to the general rule, it has been held that a purchaser or incumbrancer of property upon which a claim of mechanic's lien is filed and suit is brought to foreclose the same is chargeable with notice by virtue of the mechanic's lien without the necessity of filing a lis pendens."

It results from the foregoing that the trial court was in error in entering judgment in favor of the interveners and in denying plaintiff's motion above described. The judgment and order are therefore reversed.

We concur: ZOOK, Judge pro tem.; BEASLY, Judge pro tem.

---

37 Cal. App. 732

## CLARK et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (Civ. 2718.)

(District Court of Appeal, Second District, California. July 5, 1918. Rehearing Denied by Supreme Court Sept. 3, 1918.)

1. ATTACHMENT ⟸268—DISSOLUTION—NONSUIT.

Where nonsuit was granted and entry thereof duly made under Code Civ. Proc. § 581, the attachment previously levied was thereby dissolved, and it became at once the sheriff's duty to enter satisfaction thereof, under Pol. Code, § 4157, subd. 7.

2. ATTACHMENT ⟸275 — DISSOLUTION—NONSUIT—REINSTATEMENT.

Where attachment levied was dissolved by entry of nonsuit, subsequent vacation of the nonsuit order could not revive the lien of the attachment, since, in the absence of appeal from the order within five days under Code Civ. Proc. §§ 553, 946, it became a final judgment, extinguishing the attachment.

Original proceeding for writ of mandate by Rex B. Clark and others against the Superior Court in and for Los Angeles County and another. Alternative writ made peremptory.

Perry F. Backus and Herbert W. Kidd, both of Los Angeles, for petitioners. Arthur C. Vaughan, J. M. Love, and Charles R. McCarty, all of Los Angeles, for respondents.

SHAW, J. This is an original proceeding wherein an alternative writ of mandate was issued out of this court, directed to James C. Byers, as sheriff of San Diego county, requiring him to release of record a writ of attachment levied upon certain real estate in said county, or show cause why he should not do so. It appears that in a certain action wherein Marvin Lathrop was plaintiff and petitioners, Frank C. and Jennie L. Woodford, were defendants, a writ of attachment was issued and by the sheriff of San Diego county levied upon the real estate in question; that thereafter in a trial of said action, had on December 7, 1917, defendants, under subdivision 5 of section 581, Code of Civil Procedure, moved the court for a nonsuit, in response to which motion the court made the following order:

"Cause called, J. M. Love, Esq., appearing as attorney for the plaintiff and Perry F. Backus, Esq., appearing as attorney for defendants. Cause argued by counsel; motion of attorney for defendants for a nonsuit granted."

This order was entered upon the minutes of the court, and on the same day the clerk of the court made a note thereof in his register of actions, all as provided in section 581 supra. Whether these entries were made on December 7th, as claimed by petitioners, or on December 15th, as claimed by respondents, is immaterial, since, as shown, no appeal was at any time taken from the order.

[1, 2] The claim of petitioners is that the effect of the granting of the nonsuit was to dissolve the attachment, and in this contention we think they are correct. "An attachment is a creature of statute, and its existence and operation in any case can continue no longer than the statute provides it may." Loveland v. Mining Co., 76 Cal. 562, 18 Pac. 682; Hamilton v. Bell, 123 Cal. 93, 55 Pac. 758. Section 553, Code of Civil Procedure, provides that if defendant recovers judgment against the plaintiff and no appeal is perfected and undertaking executed as provided in section 946, Code of Civil Procedure, the order of attachment shall be discharged and the property released therefrom. As stated, no appeal was at any time perfected from the order granting the nonsuit. That this order constituted a judgment in favor of defendants from which an appeal might have been prosecuted admits of no doubt. As declared by the statute, such orders, when entered in the minutes and by the clerk noted in his register of actions, are effective for all purposes. Brown v. Sterling Fixture Co., 166 Pac. 322; Hamilton v. Bell, supra. The effect of the entry of the order and notation thereof made by the clerk, in the absence of an appeal therefrom within five days as provided in sections 553 and 946, Code of Civil Procedure, was to ipso facto dissolve the attachment; and thereupon it was, as declared in subdivision 7 of section 4157, Political Code, the duty of the sheriff of San Diego county to release the same of record. It is true the court on December 29th made an order granting plaintiff's motion to set aside and annul the order of nonsuit. But such order could not, in the absence of statutory provision therefor, revive the lien of the attachment which had theretofore been dissolved by the judgment in favor of defendants, and which, in so far as concerned the attachment, had become final.

It is ordered that the alternative writ of mandate heretofore issued to James C. Byers, as sheriff of San Diego county, be and the same is made peremptory.

We concur: CONREY, P. J.; JAMES, J.

---

37 Cal. App. 764

## COHN v. SMITH et al. (Civ. 2271.)

(District Court of Appeal, Second District, California. July 11, 1918. Rehearing Denied by Supreme Court Sept. 5, 1918.)

1. HUSBAND AND WIFE ⟸131(1)—SEPARATE PROPERTY OF WIFE — CONVEYANCE — PRESUMPTION OF GIFT.

Lots having been acquired with husband's money in name of wife were presumptively her separate property, a presumption not conclusive, court being entitled to consider competent evidence tending to disclose manner of acquisition of property, and, from conduct of husband, determine whether transaction constituted gift.

2. ESTOPPEL ⟸78(3)—OBLIGORS IN CONTRACTOR'S BOND — DENIAL OF LIABILITY TO OWNER.

Where husband contracted for construction of buildings as owner of land and as owner expended his money, giving of contractor's bond was part of inducement to him, and obligors named should not be heard to deny his title to land and thereby escape liability.

3. PRINCIPAL AND SURETY ⟸119—SURETIES ON CONTRACTOR'S BOND — POSSESSION OF PREMISES BY OWNER—STIPULATION—"NOTICE IN WRITING."

Stipulation between owner's architects and contractor for building, unsigned by contractor and owner, *held* substantially notice in writing to contractor within contract that if he did not furnish items within three days, owner, through architects, would complete same, so that sureties on contractor's bond were not released by owner's taking possession and ejecting contractor.

4. PRINCIPAL AND SURETY ⟸82(2)—CONTRACTOR'S BOND—LIABILITY OF SURETY—ATTORNEYS' FEES.

Reasonable amount paid by owner of building under construction to his attorneys for their services in securing release of property from lien claims by proceedings in court was direct damage from breach of contract by contractor for building, and of covenants thereof, for which contractor's bond with sureties was security.

5. PRINCIPAL AND SURETY ⟸82(2)—CONTRACTOR'S BOND—LIABILITY OF SURETIES — ATTORNEYS' FEES.

Fact that part of attorneys' fees, for which compensation has been allowed in judgment recovered by owner of building under construction against contractor's sureties, has not been actually paid by owner does not affect right to recover therefor; he having been compelled to employ attorneys to release premises from lien claims.

---

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Nathan Cohn against Carlin G. Smith and others. From judgment for plaintiff, defendants appeal. Affirmed.

J. Wiseman MacDonald, of Los Angeles, for appellants. Kenton A. Miller and Fred. W. Smith, both of Los Angeles, for respondent.

CONREY, P. J. The plaintiff, as owner of two lots in the city of Los Angeles, entered into a contract with the defendant, Carlin G. Smith, as contractor, for the construction of a building on said lots. At the same time the contractor as principal, and the other two defendants as sureties, executed a bond to the plaintiff as owner. The conditions of the bond were that the contractor "shall keep and strictly perform all the covenants and agreements of the contract by him to be kept and performed and shall on or before 35 days after the acceptance of said building on completion of said contract cancel and release the said building and premises from all claims of liens that may have accrued against the same in and from the performance of said contract, and shall save said owner free and harmless from all damage therefrom, all as in said contract provided." The judgment covers items allowed as damages for delay in completion of the building, and compensation on account of attorney's fees and costs incurred by the plaintiff in actions brought for the foreclosure of certain liens growing out of the performance of the contract. From that judgment the defendants appeal.

The defendants in their answers alleged that the plaintiff was not at the time said bond was given, nor was he at any time subsequent thereto up to and including the time of bringing this action, the owner of the land on which the buildings were constructed, or of the buildings erected thereon. The court found that these allegations were not true. Appellants contend that this finding is not supported by the evidence, and that the plaintiff is not the real party in interest, and therefore is not entitled to maintain this action. At the trial of the case it was stipulated that during all of said time the record title to the property described in the contract was, by virtue of a deed from a third person, in the name of Fannie Cohn, wife of the plaintiff. The plaintiff testified that when the lots were purchased he gave his personal check for the price paid, and that his wife did not pay anything for them, and did not pay anything to the plaintiff for them when the property was placed in her name; and that he did not intend to give the property to her. He further stated that he paid for everything connected with these two buildings, and that she did not pay anything for their construction.

[1] It is our opinion that the court's finding is sustained by the evidence. The lots, having been acquired in the name of Fannie Cohn, were presumptively her separate property, but this was not a conclusive presumption. The court was entitled to receive and consider any competent evidence which tended to disclose the manner of acquisition of the property, and from the acts and conduct of the husband determine whether the transaction whereby the property was conveyed to the plaintiff's wife constituted a gift to her. Killiam v. Killiam, 10 Cal. App. 312, 101 Pac. 806.

[2] We are further of the opinion that the defendants are estopped to deny plaintiff's ownership of said property. The plaintiff entered into the contract as owner, and as owner expended his money for the buildings. The giving of this bond was part of the inducement to him for entering into the contract. The obligors named in the bond should not now be heard to deny his title and thereby escape their liability. As to them he should conclusively be presumed to be the real party in interest.

[3] The building contract contained the following paragraph:

"Sixth: Should the contractor at any time during the progress of said works, refuse or neglect to supply a sufficiency of materials or workmen, the owner shall have the power to provide materials and workmen (after three days' notice in writing given) to finish the said works, and the reasonable expenses thereof shall be deducted from the amount of said contract price."

The court found that the contractor at a stated time abandoned said buildings, and thereafter refused to furnish material or labor therefor, and that the work was completed by the owner after due notice to the contractor in accordance with the contract. Appellants claim that the notice required by the contract was not given, and that without giving notice to the contractor the plaintiff wrongfully took possession of the premises and ejected the contractor therefrom; that thereby the sureties on the bond were released from their obligation. Edelman and Barnett were the architects named in the contract, under whose direction and supervision and subject to whose approval the work was to be done. Mr. Barnett testified that at the time the contractor ceased to work, Barnett, acting for the owner, served upon the contractor a written notice, notifying him to finish the buildings. The so-called notice was produced in evidence by the plaintiff; not the paper served on the contractor, but the copy retained by the architects. This copy, which was signed by the contractor only, purports to be a stipulation between Edelman and Barnett, architects, and Smith, contractor, and sets forth certain items of work which must be done before the architects will accept the buildings. The stipulation then states that:

"If the hereinabove mentioned items are not finished within three days, then the said archi-

tects shall have the privilege of completing the same, paying the necessary expenses thereof," etc.

The copy retained by the contractor was not signed. About one week later, the contractor having failed to proceed with the work, the architects, under instructions from the owner, proceeded to complete the buildings. Upon these facts appellants base their contention as stated. We think that the stipulation was in substance a notice in writing within the terms of the contract. Although not signed by the owner, it was given by his authority, and was accepted by the contractor as the equivalent of a signed notice and as being in fact a notice in writing. Under these circumstances the mere failure of the owner to sign the written notice does not operate to prevent it from being a notice in writing. The acts of the owner, in proceeding upon the theory that such notice had been given as required by the contract, did not constitute any substantial alteration of the obligations, rights, or remedies of the parties. Therefore we hold that there was nothing in the facts shown which operated to exonerate the sureties from the obligations of their bond.

[4] It is next suggested by appellants that the plaintiff was not justified in paying attorney's fees in defending actions to recover upon lien claims filed against the premises on which these buildings were constructed, and that such expenditures do not fall within the terms of the bond. As found by the court, lien claims were filed by numerous laborers and materialmen, and actions were prosecuted to foreclose those liens. The contractor having failed to defend the actions, or to release, cancel, or discharge the liens, it became necessary for the plaintiff to employ counsel, and he did employ counsel to defend said actions. The amount of money in the hands of the owner applicable to the contract price was less than the amount of these lien claims. In order to secure a determination of the amount that he must pay in order to release the liens, the owner had to prove how much he had reasonably expended for the completion of the buildings after the abandonment of the contract by the contractor, and he was entitled to have the rights of the lienors established by decree of court. "The contractors failing to perform their covenant, plaintiff's only course of safety was to secure a release of his property by proceedings in court. To accomplish this result it was necessary to employ an attorney to represent him in such actions as were brought to enforce the liens." The reasonable amount paid to his attorneys for those services was a direct and proximate damage resulting from the contractor's breach of his contract, and of a covenant thereof for which the bond was security. Klokke v. Raphael, 8 Cal. App. 1, 96 Pac. 392; Tally v. Ganahl, 151 Cal. 418, 90 Pac. 1049; Bird v. American Surety Co. of N. Y., 166 Pac. 1009. If, as claimed by appellants, Alcatraz, etc., Association v. United States Fidelity, etc., Co., 3 Cal. App. 338, 85 Pac. 156, and Growall v. Pac. Surety Co., 21 Cal. App. 185, 131 Pac. 73, are in conflict with the Supreme Court decisions cited above, they must yield to the superior authority of those decisions.

[5] The fact that a part of the attorney fees for which compensation has been allowed in the judgment has not been actually paid by the plaintiff does not affect his right to recover therefor. Henne v. Summers, 23 Cal. App. 763, 139 Pac. 907.

The judgment is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

37 Cal. App. 770

## ALSAGA v. HART. (Civ. 1766.)

(District Court of Appeal, Third District, California. July 12, 1918. Rehearing Denied by Supreme Court Sept. 10, 1918.)

1. SALES ⟸197—EXECUTORY CONTRACT.
In view of Civ. Code, § 1661, defining executed and executory contracts, and sections 1140, 1141, as to when title to personal property passes, under agreement to sell and deliver six head of cows at a future date, where no particular property was identified, and no possession was given or offered, no title passed; the agreement being an executory and not an executed contract.

2. APPEAL AND ERROR ⟸907(3)—PRESUMPTIONS—FINDINGS.
On appeal from judgment roll alone, the court, having no record of the evidence before it, will presume that evidence justified and supported the findings.

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Action by Baptista Alsaga against Charles F. Hart. Judgment for defendant, and plaintiff appeals. Affirmed.

F. A. Kelley, of Berkeley, for appellant. Grover C. Julian, of Susanville, for respondent.

HART, J. The action here is in claim and delivery. Judgment passed for the defendant, and the plaintiff appeals therefrom, on the judgment roll alone.

The complaint is based on a transaction between the plaintiff and one J. F. Swan, in which the former sold to the latter eight head of horses "at an agreed price of $510," of which amount Swan paid the plaintiff $150 in money, "leaving a balance of $360," for the satisfaction of which the said Swan "agreed to sell and deliver to plaintiff, on the last day of April, 1917, six head of cows, but instead of delivering said cows to plaintiff as so agreed, J. F. Swan sold said cows to one Charles F. Hart, who now has the possession of all of said cows, and wrongfully withholds the possession of all said cows, against the consent of plaintiff." Then fol-

low the usual allegations in an action in claim and delivery that the plaintiff demanded of the defendant, Hart, possession of said cows, and that the defendant still "unlawfully withholds and detains said cows from the possession of this plaintiff, to his damage in the sum of $360." The prayer is for the recovery of the possession of the said cows, or, in case delivery of such possession cannot be had, for the recovery of the above-mentioned sum, together with $150 as damages and for costs of suit. The complaint is unverified, and the issues as to the ownership and the right of possession of the cows were made by a general denial of the averments of the complaint. The court found that the plaintiff and Swan entered into the transaction and agreement as alleged in the complaint, but that the cows were thereafter sold by Swan to the defendant, Hart "who now has the possession of said cows," and that the defendant is the owner of said cows and is entitled to the possession thereof. Judgment followed as above indicated.

The appellant argues, in support of this appeal, that the transaction between the plaintiff and Swan involved an executed contract—that is, that it constituted an agreement by which Swan sold to the plaintiff the six head of cows in dispute. The complaint, however, pleads no such an agreement between the plaintiff and Swan. "An executed contract is one, the object of which is fully performed. All others are executory." Civ. Code, § 1661. And "title is transferred by an executory agreement for the sale or exchange of personal property only when the buyer has accepted the thing, or when the seller has completed it, prepared it for delivery, and offered it to the buyer, with intent to transfer the title thereto, in the manner prescribed by the chapter upon offer of performance." Civ. Code, § 1141. See, also, section 1140, Civ. Code, as to when the title to personal property passes.

[1] The contract pleaded involves nothing more than an agreement by Swan to sell and deliver the cows to the plaintiff. In other words, according to the contract pleaded by plaintiff, Swan merely obligated himself to sell the cows to the plaintiff at some future time. There was no agreement of sale, but only an agreement to sell. So far as Swan was concerned, it was purely an executory contract, his part of the same being still unperformed. No title passed, no possession was given or offered, and no present transfer agreed upon and the particular property identified. If the plaintiff has any right of action at all growing out of the transaction, it would be against Swan for the breach thereof, and not against the defendant. It is not expressly charged, nor even impliedly, so far as the defendant is concerned, that there was fraud as against the plaintiff in the transaction between Swan and the defendant. Indeed, so far as said transaction is explained by the complaint, the defendant was a purchaser of the cows in good faith and for a valuable consideration.

[2] But, supposing that what was intended to be alleged in the complaint was that Swan by the agreement had transferred to the plaintiff the title to the cows in question, but had postponed delivery of the possession thereof to a future time, and that thus a completed sale had been effected, still the judgment on the record before us cannot be disturbed. The court found that the agreement between the plaintiff and the defendant was precisely as it was made to appear on the face of the complaint—that is to say, that the said Swan, as a part of the consideration for the horses sold to him by plaintiff, "agreed to sell and deliver to plaintiff on the last day of April, 1917, six head of cows," etc. As above shown, the appeal here is on the judgment roll alone, there being no record of the evidence before us. The presumption is therefore that the evidence justified and supports said finding—that is, that the agreement between Swan and the plaintiff, as the complaint alleges, was one by which Swan agreed to sell at a future time the cattle to the plaintiff, and therefore not one whereby an absolute sale of the cows was effected. Moreover, so far as we can know from the record, the cows sold to the defendant may not be the same cows which Swan agreed to sell and deliver to the plaintiff.

The appellant has cited a number of cases which we have found, upon examination, do not support his position upon the record in this case. It is not necessary to review those cases herein. The appeal here is absolutely destitute of merit.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

---

37 Cal. App. 650

## PEOPLE v. BOOTH. (Cr. 446.)

(District Court of Appeal, Third District, California. June 26, 1918.)

CRIMINAL LAW ⊂⊃993—INDETERMINATE SENTENCE—RESENTENCE.

A judgment imposing an indeterminate sentence in a case wherein the sentence was unauthorized was in legal effect no judgment at all, and the court did not thereby lose jurisdiction to pronounce a valid judgment, after accused was committed and ordered returned to court for that purpose.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Ernest G. Booth, imprisoned under an indeterminate sentence for forgery, wrote the judge, complaining of his sentence, and was ordered returned into court, that legal judgment might be pronounced and entered. He

was thereupon sentenced for a term of five years, and he appeals. Affirmed.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. On the 20th day of September, 1917, the defendant was charged by information filed by the district attorney of Butte county in the superior court of said county with the crime of forgery, alleged to have been committed on or about the 8th day of the preceding month of June. On the said 20th day of September, upon being duly arraigned upon said information, the defendant entered a plea of guilty to the crime therein charged, and the court thereupon fixed Monday, September 24, 1917, at 10 o'clock a. m., as the time for the pronouncement of judgment of sentence, and on the day last mentioned the court, after due proceedings, sentenced the accused to be punished by imprisonment in the state prison at San Quentin "for the indeterminate term of 1 to 14 years." The defendant was thereafter and in due time delivered by the sheriff to the custody of the warden of the state prison at San Quentin.

On the 18th day of March, 1918, and after serving 6 months in the state prison, the defendant addressed to the judge of the superior court of Butte county a letter in which he called the attention of the judge to the case of Ex parte Lee, 171 Pac. 958, on habeas corpus, and declared that, under the ruling in that case, the judgment sentencing him (defendant) to an indeterminate term was voidable, inasmuch as the crime for which he had been sentenced was committed before section 1168 of the Penal Code, authorizing indeterminate sentences, went into effect; the Supreme Court holding in the Lee Case that the said section, as to defendants whose offenses had been committed prior to its enactment, was ex post facto, and therefore unconstitutional and void. Upon receiving and reading the said letter, the court, recognizing that error had been committed in the matter of pronouncing judgment of sentence against the defendant, made an order for the return of the prisoner into court, to the end that a legal judgment might be pronounced and entered in the case. In pursuance of said order, the defendant was, on the 22d day of March, 1918, brought into court by the sheriff, and, after due proceedings, the court sentenced the defendant to serve a term of 5 years in the state penitentiary at San Quentin. The defendant thereupon in open court gave notice of an appeal from the judgment so pronounced and entered.

The case was placed on the calendar of the June term of this court, and all the parties duly notified thereof. When the case was called in the regular order for argument, no one appeared for the defendant, and, as no brief had been filed (and it may be added none has since been filed) in support of whatever point or points the defendant intended to rely upon, the Attorney General submitted the case on the record, and so it now stands for our consideration. We would have been justified in affirming the judgment without presenting, as above we have, a history of the case; but it appears from the record that the defendant has at all times been without the aid of counsel, and we conceived that it was only just to him to reproduce herein the facts as to the proceedings in the case, and thus show that there is no legal merit whatever in his appeal. The purported judgment originally pronounced was in a legal sense no judgment at all. Of course, it will not be contended that the court, under the circumstances indicated herein, lost jurisdiction to pronounce a valid judgment of sentence against the defendant.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

---

37 Cal. App. 433

## PEOPLE v. KAWANANAKOA. (Cr. 724.)

(District Court of Appeal, First District, California. June 4, 1918. Rehearing Denied by Supreme Court Aug. 1, 1918.)

LARCENY ⊂=15(3)—BY CARETAKER—DISTINGUISHED FROM EMBEZZLEMENT.

Pen. Code, § 508, providing that clerks, agents, or servants fraudulently appropriating property coming under their control or care by virtue of such employment shall be guilty of embezzlement, does not apply to a mere caretaker, and his theft of the property is "larceny."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Larceny.]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Leo Kawananakoa was convicted of grand larceny, and, from the judgment of conviction and an order denying a new trial, he appeals. Judgment and order affirmed.

Jay Monroe Latimer, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. Defendant was charged by information with the crime of grand larceny. He was tried, convicted and sentenced under the indeterminate sentence law. He now appeals from the judgment and from an order denying his motion for a new trial.

The information charged the defendant with having, on or about November 10, 1916, at the city and county of San Francisco, feloniously taken an electric lamp, one lot of silverware, one lot of cut glass, certain pictures, a sewing box, and one lot of linen; the same being the personal property of C. E. Blanchard.

Defendant makes no point on this appeal other than that of the sufficiency of the evidence. As to this he claims that the evidence is insufficient in four respects, namely: (1) That there is no proof that the property in question was that of the complaining witness; (2) that the evidence failed to show that the property was stolen by defendant from Blanchard; (3) that the evidence was insufficient to show that the value of the articles stolen was more than $50; (4) that there is a variance in that the crime proven is that of embezzlement and not larceny.

An examination of the record discloses that there is no merit in points 1, 2, and 3. As to the fourth, appellant's contention is that the defendant was shown to be a servant who fraudulently appropriated property which had come into his care by virtue of his employment as such servant, and that this brought him within the provisions of section 508 of the Penal Code. But in making this contention counsel overlooks the fact established by the complaining witness' testimony, that the defendant was a mere caretaker of his premises, whose principal duty was to see that no one took anything out of the house. Quoting the record:

"A. He was not hired for a servant. He was hired for a caretaker. Q. And as a caretaker what were his duties? A. To look after the house and see that it was kept clean, and that nobody took anything out of it, principally."

Counsel erroneously assumes that, because the defendant was possibly a custodian of the property, the same was in his possession; but he overlooks the distinction between possession and custody. This distinction is quite appropriately pointed out in Bishop's New Criminal Law, vol. 2, p. 486:

"Sec. 824. 1. Possession and custody are in this branch of the law widely distinguishable. There can be no trespass against the custody; it is always against the possession, and it can be committed as well by the custodian as by any other person. For example—

"2. *Servant.*—When a master's goods in possession come within the handling of the servant, the latter has in law no more than a custody of them, the possession remaining in the former. Therefore the servant may commit larceny of them, as, if a clerk in a store feloniously remove goods from it, this is larceny. * * *

"3. *Custodian Generally.*—Where any person, whether servant or not, has the bare charge or care of another's effects, 'the legal possession,' observes East, 'remains in the owner; and the party may be guilty of trespass and larceny in fraudulently converting the same to his own use.'"

Thus it was held in the case of People v. Belden, 37 Cal. 51, where a livery stable owner had employed the defendant as caretaker of his livery stable, and although the owner was absent and the defendant was in charge at the time the latter asported certain horses, the defendant was guilty of larceny and not embezzlement. The court there said:

"The defendant occupied only the relation of servant to McComb, and, although he had labors and duties to perform in respect to the horses, he was not intrusted with them in the sense of the statute."

This fourth contention of the appellant must therefore, be disallowed.

The judgment and order are affirmed.

---

37 Cal. App. 682

## PEOPLE v. PIMENTEL. (Cr. 438.)

(District Court of Appeal, Third District, California. June 27, 1918.)

CRIMINAL LAW ⊂=1163(1) — APPEAL — PRESUMPTION—PREJUDICIAL ERROR.

The presumption, on appeal from a conviction, is that no prejudicial error was committed, and that the verdict is amply supported.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Frank Pimentel was convicted of robbery, and from the judgment, and order denying motion for new trial, he appeals. Affirmed.

B. M. Bainbridge, of Stockton, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was convicted of robbery, and from the judgment, and the order denying his motion for a new trial, he brings this appeal.

No appearance in his behalf has been made in this court, and we have been furnished with no statement of any reason for disturbing the verdict found against the defendant. Of course, the presumption is that no prejudicial error was committed, and that the verdict is amply supported. We may add that we have sufficiently examined the record to be convinced that the defendant was justly convicted.

The judgment and order are affirmed.

---

37 Cal. App. 737

## MAGEE v. W. J. BURT MOTOR CAR CO. (Civ. 2182.)

(District Court of Appeal, Second District, California. July 5, 1918. Rehearing Denied by Supreme Court Sept. 3, 1918.)

SALES ⊂=479(14) — CONDITIONAL SALES — RIGHT TO RESELL.

Under a conditional sale contract making time of payment of the essence, where the seller took possession of the automobile sold, after buyer's default, and buyer made no reasonably prompt tender of performance, the seller had the right to resell, which right was not lost by accepting partial payments after the entire contract became due.

Appeal from Superior Court, Los Angeles County; C. A. Raker, Judge.

Action by D. I. Magee against the W. J. Burt Motor Car Company. Judgment for plaintiff, and defendant appeals. Reversed.

James W. Bell, of Los Angeles, for appellant. Gilbert & Levy and James R. Jaffray, all of Los Angeles, for respondent.

CONREY, P. J. The defendant appeals from the judgment. The record has been

prepared under the alternative method. Counsel in their briefs have complied very slackingly with the provisions of section 953c of the Code of Civil Procedure. So far as shown by those portions of the record which are set out in the printed briefs, or stated by counsel on one side and definitely admitted by counsel on the opposing side, the facts of the case are as hereinafter stated. Matters not so presented will not be discussed.

Respondent brought this action to recover damages for the conversion of a certain automobile. On July 29, 1914, appellant delivered to the respondent the said automobile under a conditional sale agreement, pursuant to which respondent paid appellant $150 and gave to appellant 22 promissory notes, the first of which matured one week after that day and the remaining ones at the rate of one each week thereafter until the 30th day of December, 1914. The notes represented weekly payments of $100, except the last payment, which was to be $80. The first of said notes was as follows:

"$100.00 Los Angeles, Cal., July 29, 1914.

"One week after date, without grace, for value received, I promise to pay to the order of W. J. Burt Motor Car Company one hundred dollars, payable in gold coin of the United States of America, with interest thereon in like gold coin, from date until paid, at the rate of 7 per cent. per annum. And in case a suit or action is instituted to collect the money above mentioned, or any portion thereof, I promise to pay ten per cent. on the sum first aforesaid, additional to said amount, as attorney's fees, in such suit or action. The above note is given upon and for the consideration that the said W. J. Burt Motor Car Co. have agreed and promised that upon the payment of said note and all other notes outstanding of even date herewith, principal and interest, at maturity (time being the essence of this contract), they will sell and transfer to the undersigned, at the price of said principal and interest, the one white, six cylinder, Auburn touring car, factory number 11539, fully equipped, which said W. J. Burt Motor Car Company have this day intrusted to the care of the undersigned. It is admitted and agreed that said property so intrusted is the property of said W. J. Burt Motor Car Co., and the legal title thereof is in the said W. J. Burt Motor Car Co., and shall remain in them until they shall make the aforesaid sale and transfer after the principal and interest aforesaid shall be paid.

"And the undersigned agrees to return and deliver the said automobile to the said W. J. Burt Motor Car Co., if requested at any time before said sale and transfer, in good order.

"Principal and interest payable in U. S. gold coin at First National Bank, Los Angeles, Cal.

"D. I. Magee."

It was stipulated that the note above set forth constituted the entire and only contract between the parties to this action; which means, presumably, that all of the notes were alike in form.

Respondent paid 12 of these notes, the last of the 12 being paid February 11, 1915, at which time all of the notes were past due. Respondent paid $100 additional in three checks, of which one was dated February 2d and the others February 11, 1915, and by his own admission he still owed $880, with interest. On the 11th day of May, 1915, appellant took possession of the automobile under a claim and delivery action in the superior court of Los Angeles county, and surrendered in court all the unpaid notes. At the time of retaking the automobile its value was about $800. Appellant paid out and expended in repairs on the automobile the sum of $458, and on the 27th day of December, 1915, sold it for the sum of $1,400. Respondent claimed, and by the judgment herein was awarded, the difference between the unpaid portion of this contract and the amount of the resale, which difference was found to be $429.55.

Appellant contends that, upon its taking possession of the automobile, all obligations under the contract between it and the respondent were thereby terminated. The rule relied upon was stated in Pacific Carbonator Co. v. Haydes, 26 Cal. App. 607, 147 Pac. 988, to the effect that:

"A vendor of property which has been delivered to his vendee under a conditional-sale contract has the option in case of default either to recover payments provided to be made under the contract, or to retake the property and put at an end all further obligation on the part of either party."

In that case, the vendor did not elect to retake the property, but prosecuted its action to recover the full contract price. It was held that the plaintiff was entitled to recover. The contract in that case differed from the one now before us, in this, that the contract there expressly provided that, in the event of default as to any payment agreed to be made by the vendees, repossession of the machinery sold might be had by the vendor, and in that event all payments theretofore made should be deemed to have been payments made for the use of the machinery. In the present case the contract authorizes the vendor to demand and have possession of the property "at any time before said sale and transfer" (independently of any default of the vendee), and provides further that time is of the essence of the contract. "It has been held in this state that where the vendor, in case of a conditional sale, retakes possession pursuant to the terms of the contract, the defaulting vendee may still complete the purchase and perfect his right to receive the property by paying the balance due. Miller v. Steen, 30 Cal. 407 [89 Am. Dec. 124]. This upon the theory that a mere delay in the payment of money is ordinarily "capable of exact and entire compensation," and will not, unless time has expressly been made of the essence of the obligation, bar the right of the party in default to tender payment, with interest, at a later date, and demand performance of whatever obligation was due him upon such payment." Liver v. Mills, 155 Cal. 459, 462, 101 Pac. 299, 300. But even so, in the absence of any reasonably prompt tender of performance by the

delinquent purchaser, the vendor cannot be held guilty of conversion when he sells the property to a third person. Nor is the vendor's right to resell the property lost by accepting partial payments from the conditional vendee after the entire contract price became due. In the case at bar the respondent did not pay or offer to pay anything on account of his contract at any time after February, 1915. Appellant obtained possession of the automobile in May, 1915, but did not sell it until the following December. Under the same conditions, and under a very similar contract, it was held that the vendor, in making a resale, acted within his rights. Benedict v. Greer-Robbins Co., 26 Cal. App. 468, 147 Pac. 486. So here the plaintiff being in default, and the defendant being the owner of the automobile, and lawfully in possession thereof, the defendant cannot, by reason of making such sale, be held guilty of an unlawful conversion thereof to its own use.

The judgment is reversed.

We concur: JAMES, J.; WORKS, Judge pro tem.

---

37 Cal. App. 741

DONNELLY v. WETZEL et al. (Civ. 2435.)

(District Court of Appeal. First District, California. July 6, 1918. Rehearing Denied by Supreme Court Sept. 3, 1918.)

PARTITION ⊂⊃83 — PERSONAL JUDGMENTS — DISCLAIMER.

Where A. purchased land jointly with B. and C. but paid more than her share, and B. and C. conveyed their interest to D., A. was entitled to a personal judgment against B. and C. for the excess she paid over her share, in an action for partition, although B. and C. filed a disclaimer of any interest in the property, and contended that they were not proper parties.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Minnie E. Donnelly against Edwin C. Wetzel, Eva L. Wetzel, and others. From a judgment for plaintiff, the two named defendants appeal. Affirmed.

J. W. Henderson, of Eureka (J. G. Reisner, of San Francisco, of counsel), for appellants. J. P. O'Brien, of San Francisco, for respondent.

BEASLY, Judge pro tem. This was primarily an action in partition. In addition to a judgment that the property involved be sold and the proceeds divided, as will hereinafter appear, the court also gave a personal judgment of $600 in favor of the plaintiff, Minnie E. Donnelly, and against the defendants, Edwin C. and Eva L. Wetzel, his wife, and from this money judgment against them the Wetzels appeal. The authority of the court to render this personal judgment in this action is the only question in the case.

The plaintiff and the Wetzels purchased the property from H. C. Petray for $4,500, payable $1,500 in cash and the remaining $3,000 to be secured by a mortgage on the premises to Petray. The plaintiff paid $1,100 of the initial payment, and the Wetzels paid only $400 thereof. It appears, therefore, that Miss Donnelly paid $600 of the purchase price which the Wetzels should have paid. Pursuant to this, the payment of the $1,500 and the execution of the mortgage to him of the $3,000 by the purchasers, Petray, the owner on the 27th day of June, 1911, conveyed the property to the plaintiff and the Wetzels. On February 14, 1914, the Wetzels, without paying the plaintiff the $600 which she had advanced upon their part of the purchase price, conveyed an undivided two-thirds interest in the property to the defendant Honey. On February 21, 1914, Petray, the mortgagee, assigned the mortgage to the defendant Gazzola.

It was conceded at the trial and found by the court that the property could not be divided, and the court therefore adjudged that it be sold. It was decreed that the plaintiff and Honey were tenants in common of the property, a one-third undivided interest therein belonging to Miss Donnelly, and the remaining two-thirds to Honey; that $2,000 and certain interest was still unpaid on the mortgage; and the court thereupon directed the application of the funds which should result from the sale of the property to the settlement of the mortgage, the costs, etc., and that the balance be divided between Miss Donnelly and Mr. Honey in the proportion of one-third to her and two-thirds to him, and, as hereinbefore stated, in addition to this judgment, the propriety of which is unquestioned, gave Miss Donnelly a personal judgment for $600 against the Wetzels. On this appeal the Wetzels claim that the court had no jurisdiction in this partition suit to decree a personal judgment in Miss Donnelly's favor against them, but should have left her to her action at law. In the complaint the plaintiff alleged on information and belief that Honey had acquired the property with full knowledge of her overpayment. The court, however, found that Honey acquired the property without notice or knowledge of this. The Wetzels answered, filing a disclaimer of any interest in the property, and contended that they were not proper parties at all to the partition suit on the ground that they had parted with their interest before it was begun; but the allegation that Honey acquired the property with notice of Miss Donnelly's claim for the $600 against the Wetzels made the Wetzels proper, if not necessary, parties to this action. Their disclaimer could not relieve them from the position in which they were placed as parties to this suit in equity who appeared therein; and, once being parties to the action and personally before the court, the trial court, as a

court of equity, had authority to adjust all of the claims arising out of the transaction which might exist between the parties. This it did.

The judgment is affirmed.

We concur: KERRIGAN, J.; ZOOK, Judge pro tem.

---

(37 Cal. App. 735)

RAVN v. PLANZ. (Civ. 2418.)

(District Court of Appeal, First District, California. July 5, 1918.)

DISMISSAL AND NONSUIT ⟸60(2)—FAILURE TO BRING ACTION TO TRIAL.

Code Civ. Proc. § 583, providing that an action shall, where not brought to trial within five years, be dismissed unless parties have stipulated in writing that time may be extended, being mandatory, that trial was postponed several times without plaintiff's consent upon defendant's motion is a matter of no significance.

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Action by J. L. Ravn against Theodore Planz. From an order dismissing the action, plaintiff appeals. Affirmed.

Brewster F. Ames, William A. Nunlist, and Frank J. Golden, all of San Francisco, for appellant. Hadsell, Sweet & Ingalls, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from an order dismissing the action because not brought to trial within five years after the defendant filed his answer.

Section 583 of the Code of Civil Procedure provides that an action "shall be dismissed * * * on motion of the defendant after notice to plaintiff, or by the court on its own motion, unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended." This action was not brought to trial within the designated time, and it is not claimed that the parties entered into a stipulation in writing extending the time within which it might be tried. To save this case from the operation of the statute, the plaintiff shows that on several occasions the trial of the action was postponed upon the motion of defendant, and that upon a date within about six months prior to the expiration of the five years after the case was at issue, it being then upon the calendar for trial, he appeared in court with his counsel and witnesses ready to proceed; but, upon motion of the defendant and over his objection, a further postponement of the trial was granted. Later the case was again called for trial, when a motion to dismiss was made by the defendant and granted.

The provision of section 583 above set forth is mandatory. Romero v. Snyder, 167 Cal. 216, 138 Pac. 1002; Larkin v. Superior Court, 171 Cal. 719, 154 Pac. 841, Ann. Cas. 1917D, 670. The circumstance, therefore, that the trial of the cause was postponed several times without plaintiff's consent, one of those occasions being a relatively short time before the date when the defendant would be entitled to require the court to dismiss the action, is a matter of no significance. Courts are, of course, loth to deny to a litigant a trial upon the merits; but the section of the Code of Civil Procedure above recited directs in plain terms that it shall be done when a case falls within the conditions stated, and the present is such a case. The trial court had no discretion. The motion being made, its duty was to dismiss. To relax the rule to cover hard cases would be to set at naught the express will of the Legislature.

As to the suggestion of counsel for the plaintiff that to construe this statute as mandatory will result in extraordinary anomalies, it may be said that other statutes are subject to the same criticism; many of our statutes, whether relating to procedure or other matters, are not ideal, and often are but compromises, and sometimes work injustice. But in the present case it may be said that if the plaintiff, at the time of the last postponement of the trial, had called the court's attention to the consequence which would flow from it, he could readily have secured an earlier date for the trial, or possibly a stipulation from opposing counsel waiving the benefit of the statute. As to the hardships suggested by counsel in supposed cases, it is not necessary to consider them at this time. It is sufficient to decide the case presented.

In view of what has been said and of the rule laid down by the Supreme Court in the cases above referred to, it follows that the portion of the decision of this court in Mazitelli v. Crane, 169 Pac. 721, at variance with the conclusion here arrived at, must be deemed overruled.

The order is affirmed.

We concur: ZOOK, Judge pro tem.; BEASLY, Judge pro tem.

---

(37 Cal. App. 500)

KAUFFMAN v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 2697.)

(District Court of Appeal, Second District, California. May 16, 1918. On Motion for Rehearing, June 12, 1918. Denied by Supreme Court July 15, 1918.)

On Motion for Rehearing.

MASTER AND SERVANT ⟸398 — WORKMEN'S COMPENSATION ACT — "FURTHER DISABILITY."

Under Workmen's Compensation Act, § 16, subds. (a), (b), and (c), as amended by St. 1915, p. 1085, providing that proceedings for collection of compensation for "further disability" are

not barred within six months, proceedings cannot be commenced after six months from the date of an injury, in any case whatever, where no proceedings were commenced nor payment of indemnity, or agreement therefore, made for the original injury within the six months.

Proceeding by Frank I. Kauffman under the Workmen's Compensation Act, to obtain compensation for personal injuries, opposed by the Federal Drilling Company, a corporation, the employer, and the London & Lancashire Indemnity Company of America, insurer. Compensation was denied, and petitioner applies for a writ of review. Denied.

Alfred Siemon, of Bakersfield, for petitioner. R. P. Wisecarver, of San Francisco, for respondents Federal Drilling Co. and London & Lancashire Indemnity Co. of America.

PER CURIAM. Petition for writ of review denied.

On Motion for Rehearing.

PER CURIAM. Petitioner has applied to this court for an order setting aside the order by which the court denied his application for a writ of review.

On December 6, 1917, petitioner filed with the Industrial Accident Commission an application for adjustment of his claim against Federal Drilling Company, a corporation, and London & Lancashire Indemnity Company of America, a corporation, by which he sought to obtain compensation for disability resulting from an injury received by petitioner on the 10th day of March, 1916, while in the employ of Federal Drilling Company. No application had been filed by petitioner within six months from the date of the injury; but he claimed, and now claims, that at the time of filing his application he was still entitled to make an original application for "further disability" caused by and suffered from the original injury, upon the ground that such original injury had in fact caused further disability within the meaning of the provisions of the statute to which we shall refer.

Section 16 of the Workmen's Compensation, Insurance and Safety Act, approved May 26, 1913 (St. 1913, p. 287), as amended in 1915 (St. 1915, p. 1085), so far as applicable to this proceeding, reads as follows:

"(a) Unless compensation is paid or an agreement for its payment made within the time limited in this section for the institution of proceedings for its collection, the right to institute such proceedings shall be wholly barred.

"(b) The periods within which proceedings for the collection of compensation may be commenced are as follows:

"(1) Proceedings for the collection of the benefit provided by subsection (a) of section fifteen or for the collection of the disability indemnity provided by subsection (b) of said section fifteen must be commenced within six months from the date of the injury, except as otherwise provided in this act.

"* * * (c) The payment of the disability indemnity * * * or any part thereof, or agreement therefor, shall have the effect of extending the period within which proceedings for its collection may be commenced, six months from the date of the agreement or last payment of such disability indemnity * * * or any part thereof; provided, however, that nothing contained in this section shall be construed to bar the right of any injured employé to institute proceedings for the collection of compensation within two hundred [and] forty-five weeks after the date of the injury, upon the grounds that the original injury has caused further disability; and the jurisdiction of the commission, in such cases, shall be a continuing jurisdiction at all times within such period."

By the findings of fact of the Industrial Accident Commission, set forth in its order as amended by the commission upon rehearing, it appears that the applicant sustained his injury on March 10, 1916, the injury consisting in his left eyeball being penetrated by a minute piece of steel. At that time and for some time thereafter, the injury appeared to be very slight, and it was not known until the following September that there was any foreign substance in said eye. The piece of steel was removed in September, 1916. The disability increased gradually from that time until about the time of the filing of the application for adjustment of claim on December 6, 1917. Within the six months immediately preceding the filing of the application there was no substantial change in the applicant's condition, nor in the character of his disability, except that the vision continued to decrease slowly and gradually as before. Upon the facts the commission held that the claim was barred by the period of limitations contained in the statute as above set forth.

The question here presented depends upon the meaning of the words "further disability" in the proviso contained in subdivision (c) of section 16. What is the additional disability intended by the use of the words "further disability"? The answer must be found in the preceding portions of section 16. We there find that within six months from the date of the injury the employé may commence proceedings before the commission for the collection of a disability indemnity. Or there may be payment of the disability indemnity, or some part thereof, or agreement therefor; and if there be such payment or agreement, the period within which proceedings for its collection may be commenced is extended for a period of six months from the date of the agreement or last payment of such disability indemnity, or any part thereof. Taking into consideration these provisions of the statute, together with the proviso concerning the right to institute proceedings for the collection of compensation for "further disability," it seems clear that this additional disability may reasonably be defined as referring to any disability in addition to that for which proceedings were com-

menced within six months from the date of the injury, or that for which disability indemnity has been paid or agreed to be paid. If there have been no proceedings commenced within six months from the date of the injury, and if there has been no payment of disability indemnity or agreement therefor, the employé is not entitled to institute proceedings grounded upon "further disability" after the expiration of six months from the date of the injury.

Following our usual custom in cases where the application for an original writ is denied, we made our former order without filing any written opinion. In this case, however, the applicant in his petition for rehearing has urgently requested a written statement of the grounds of decision; and this opinion is our answer to that request.

The application for a rehearing is denied.

---

37 Cal. App. 773

## WAHL et al. v. YORI. (Civ. 1687.)

(District Court of Appeal, Third District, California. July 13, 1918.)

1. APPEAL AND ERROR ⟸1002 — REVIEW — JUDGMENT ON VERDICT—CONFLICTING EVIDENCE.

Where the evidence before the court on appeal is conflicting, the judgment on the verdict cannot be disturbed.

2. WITNESSES ⟸398(2)—CONTRADICTION.

Where a witness testifies as to conversation with defendant, it is permissible for latter, although no foundation for impeachment has been laid, to testify as to statements defendant had made, to show statements were not as testified to by the witness.

3. EVIDENCE ⟸271(12) — DECLARATIONS — PRESENCE OF ADVERSE PARTY.

In action for purchase price, where defendant claimed cattle had been sold to him by plaintiffs' father and not by plaintiffs, defendant's testimony as to statements by father, not made in the presence and hearing of plaintiffs, *held* inadmissible for purpose of showing title of cattle to be in father.

4. EVIDENCE ⟸151(1) — MOTIVE — SELLER'S ACTION.

In seller's action for price of cattle, where buyer claimed cattle had not been sold by plaintiffs but by plaintiffs' father, evidence as to the deposit to father's account of a check drawn by buyer and payable to father *held* inadmissible for purpose of showing defendant's motive in making the payment where plaintiffs did not receive the money and did not know about deposit.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Willey Wahl and another against H. Yori. Judgment for plaintiffs, and defendant appeals. Affirmed.

J. Oscar Goldstein, of Chico, for appellant. Guy R. Kennedy and Jerome D. Peters, both of Chico, for respondents.

CHIPMAN, P. J. Plaintiffs commenced the action to recover the sum of $830, which it is alleged defendant agreed to pay for 12 head of cows at the agreed price of $65 per head, and two calves at the agreed price of $25 per head, sold and delivered by plaintiffs to defendant, on or about November 13, 1915. A second count is for the like number of cattle of the reasonable value of $830. The answer is a specific denial of the averments of the complaint, except that defendant admits nonpayment. The cause was tried by a jury, and plaintiffs had the verdict for the amount claimed, and judgment was entered accordingly. The appeal is from the judgment under the alternative method, and is here on the judgment roll and the evidence taken at the trial.

The defense on the merits of the case made at the trial was that the cattle in question were purchased by defendant from Albert Wahl, the father of plaintiffs, and hence defendant was not indebted to plaintiffs in any sum. Neither the number nor the value of the animals is controverted.

[1] Plaintiffs were engaged in the business of farming and stock raising near the city of Chico, Butte county; their father, Albert Wahl, was also engaged in the same business in a different part of the county. Defendant was a tenant of Albert's and had purchased some cattle from him previous to the present transaction. He desired to make further purchase, and applied to Albert, who told him his sons, plaintiffs, had cattle for sale. There was testimony that Albert took defendant to plaintiff's farm, where the latter examined and picked out the animals referred to in the complaint and agreed upon the price to be paid; that the cattle belonged to plaintiffs, and that the sale was made and cattle delivered by plaintiffs to defendant. Witnesses for defendant testified that the sale was made by Albert, and that plaintiffs took no part in the transaction. Upon the question of ownership of the cattle and as to the person who sold them to defendant the evidence was conflicting. The jury accepted the evidence submitted by plaintiffs as true, and so found by their verdict. Under the rule the judgment on the verdict cannot be disturbed by the reviewing court.

The trial court sustained certain objections to evidence offered by defendant, "and," says defendant's brief, "the chief point preserved on this appeal is that the court committed prejudicial error in the exclusion of evidence offered by defendant."

Albert Wahl had testified to the transaction and that the negotiations were between Henry Wahl, one of the plaintiffs, and the defendant, and that he, Albert, had nothing to do with it and did not own the cattle nor did he sell them to defendant.

Defendant was called as a witness in his own behalf. He was asked to state the conversation he had at that time with Albert Wahl, in the presence of Henry Wahl. Objection was made that the question was self-serving, and might be in Henry Wahl's

presence and not in his hearing. The witness stated that he did not know whether Henry heard the conversation. Objection sustained. He was then asked if he had any conversation with Albert Wahl in regard to buying the cattle which were delivered to him "by the men of Henry Wahl, or the cattle that came from Henry Wahl's place." Objection that it was irrelevant, incompetent, self-serving, and not in the presence of either of the plaintiffs and not binding on them. "Mr. Goldstein: We allege here we bought no cattle from the plaintiffs and we bought the same cattle from Albert Wahl. The Court: The objection will be sustained. You can show whom you bought the cattle from, if you bought it from a different person." He was then asked what conversation he had with Henry Wahl and replied that he "didn't have a conversation with Henry Wahl at all; the only conversation was with Albert Wahl. Q. You spoke to Albert Wahl? A. Yes, sir; I spoke to Albert Wahl all the time. Q. When did you have a conversation with Albert Wahl? A. One time I come to Chico, he said it would be a good thing to pay something for the cattle; he said I was making good money, and he said I should pay something for the cattle that I bought last time in Dayton," referring to the purchase in question. Objection was made as self-serving and not in the presence of plaintiffs. Sustained, and the last answer stricken out. The record shows that defendant consented to the ruling in this instance.

Defendant seems to treat Albert Wahl as the agent of plaintiffs, and hence his declarations would bind them. There was no evidence tending to show that Albert was acting as plaintiffs' agent. In fact, defendant's contention is that Albert was the principal—that he owned the cattle and sold them to defendant. The cattle were on plaintiffs' premises and bore their brand. It did not appear that any declarations made by Albert or any of the conversations sought to be brought out were in the hearing of plaintiffs.

[2, 3] In his cross-examination Albert Wahl had said something about a conversation he had with defendant—nothing definite or specific, nothing resembling a proper foundation for impeachment. The purpose of defendant's counsel in asking defendant, as a witness, to state the conversations he had with Albert was doubtless to show that he made statements to defendant contradictory to those to which he had testified. This is permissible sometimes without laying the foundation for impeachment. Doudell v. Shoo, 20 Cal. App. 424, 449, 129 Pac. 478. We incline to think for that purpose alone the questions were permissible. But defendant did not ask them at the trial, nor does he now urge that they should have been allowed on that ground. His contention is that they should have been permitted to show title in Albert and not in plaintiffs. For that purpose declarations made by Albert, not in the presence and hearing of plaintiffs or either of them, would no more be admissible than the declarations of a stranger. As already suggested, Albert's statements could not bind plaintiffs on the theory of agency, for there was no agency established. Nor were they admissible on the ground of estoppel, for upon no principle would plaintiffs be bound or estopped by conversations between Albert and defendant, of which they were ignorant or to which they did not consent and did nothing and said nothing to lead defendant to believe that they had knowledge thereof or consented thereto. But if error be conceded there were other witnesses besides Albert Wahl who testified to plaintiffs' ownership of the cattle, and that the sale, as well as the delivery, was made by them, upon whose testimony the verdict of the jury may rest. Besides, defendant and other witnesses in his behalf were permitted to testify, and did testify, fully as to the transaction and what took place at the time of the sale. This testimony was to the effect that the barter was entirely between Albert Wahl and defendant, and that Henry Wahl had nothing to do with it. Unfortunately for defendant, the jury did not accept this testimony as satisfactory or convincing.

Henry Wahl, witness for plaintiffs, was cross-examined as to a conversation he had with defendant in January, 1916, after this sale of the cattle. He testified that he asked defendant for some money. His attention was then called to meeting defendant in Chico on January 24, 1916, and was asked if he did not then ask defendant "for money to be paid on these cattle. A. He gave me $200 or a $200 check to Albert Wahl, and not to me." He testified that he had asked his father for money, and was told "that probably Mr. Yori could dig up some"; that he asked defendant for money he had agreed to give his father; that they went into the Butte County National Bank, and witness wrote the check and defendant signed it, "Pay to Albert Wahl or bearer"; that he asked for the money for Albert Wahl; that he did not ask him for money for himself, and did not tell him he wanted the money for the cattle he had sold defendant; that defendant told witness to make the check payable to Albert Wahl; that he did not know why it was made payable to Albert unless it was "his indebtedness to Albert Wahl." Further answering: "The only reason was that I would pay the money to my father, and if I could borrow it from my father, I went to him to collect it for him, to borrow it"; that no money was deposited in the bank for plaintiffs' stock.

It appeared from witness' testimony on redirect that defendant was indebted to witness' father, and that he wrote the check at defendant's request and as directed by him and delivered the check to Albert Wahl.

[4] In his testimony defendant testified

fully to what occurred at this meeting in January, 1916, when this check was given, and that it was made payable to Albert because he owed him, and not Henry, for the cattle. At this point a check for $250 was shown defendant, and he was asked what he did with it. He answered that it was deposited in bank to the account of Albert Wahl. Defendant then sought to show that it was deposited in part payment for the cattle sold by plaintiffs. Objection was sustained. It is not claimed that plaintiffs got this money or knew anything about the deposit. Albert Wahl knew that the deposit was made, and testified that it was on account of defendant's indebtedness to him for rent. The evidence might have had some tendency to contradict Albert's testimony, but it was not offered for that purpose. The object was to show by defendant's act that he purchased the cattle from Albert. In the absence of any knowledge by plaintiffs of the payment or its purpose, we cannot see that they would be bound by defendant's motive in making the payment.

We are unable to discover any prejudicial error in the rulings upon these two checks.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

---

37 Cal. App. 659

FEDERAL CONST. CO. v. KNEESE, Superintendent of Streets. (Civ. 2466.)

(District Court of Appeal, First District, California. June 26, 1918.)

1. MUNICIPAL CORPORATIONS ⟸293(1) — STREET IMPROVEMENT — REFERENCE TO STREETS.

Under St. 1911, p. 733, § 3, providing that the streets to be improved may be referred to in the resolution of intention by the name whereby they are commonly known, the resolution need not mention the official names.

2. MUNICIPAL CORPORATIONS ⟸293(1) — STREET IMPROVEMENT — UNCERTAINTY OF RESOLUTION.

Where resolution of intention to improve city streets, pursuant to St. 1911, p. 730, as amended by St. 1915, p. 1464, is uncertain in some particulars, but plans and specifications accompanying resolution make lines certain as to location, uncertainty of resolution is no objection to improvement.

3. MUNICIPAL CORPORATIONS ⟸293(1) — STREET IMPROVEMENT—EXCEPTION OF RESOLUTION—"TO BE CONSTRUCTED."

A city's resolution of intention to improve certain streets, pursuant to St. 1911, p. 730, as amended by St. 1915, p. 1464, excepting a certain strip of vitrified brick pavement "to be constructed," is not uncertain in that it cannot be determined whether the strip is in existence or to be hereafter constructed; "to be constructed" implying future action.

4. MUNICIPAL CORPORATIONS ⟸298—STREETS —CHANGE OF GRADE—NOTICE OF HEARING OF PROTESTS.

Proceeding for change of grade of city street, pursuant to St. 1909, p. 1018, was not futile because of failure to give notice of hearing of certain protests, where all persons who signed protests actually did appear, presented protests, and were heard, except that one protestant appeared by his son.

Petition for writ of mandate by the Federal Construction Company, a corporation, against George Kneese, as Superintendent of Streets of Daly City. Judgment for petitioner that a peremptory writ issue as prayed.

Raymond Benjamin, of San Francisco, and A. C. H. Hart, of Los Angeles, for petitioner. George Appell, of San Francisco, for respondent. Frank H. Powers, of San Francisco, for intervener Lange.

BEASLY, Judge pro tem. The Federal Construction Company petitions for a writ of mandate to compel the superintendent of streets of Daly City to sign a contract for the improvement of certain streets of that municipality pursuant to proceedings taken by its board of trustees under the improvement act of 1911 (Stats. 1911, p. 730) in conjunction with the act amendatory thereof of 1915 (Stats. 1915, p. 1464). The case is an amicable one instituted for the purpose of determining the validity of the proceeding involved to the point which they have reached.

[1] The first objection to the proceedings is that the streets involved are not mentioned by their official names in the resolution of intention. It is provided in section 3 of the improvement act of 1911 (Stats. 1911, p. 733) that the streets to be improved may be referred to by the names by which they are commonly known, and this was done.

[2] The next objection is that the resolution of intention is uncertain in some particulars. The plans, however, which accompanied the resolution of intention, and the specifications that are referred to therein, if we understand counsel correctly, answer these objections by making the lines, which it might be impossible to locate if the resolution of intention stood alone, quite certain as to location.

[3] Another objection to the resolution is that it cannot be determined therefrom whether a certain strip of vitrified brick pavement excepted from the work to be done is in existence or to be hereafter constructed. It is plainly said in the resolution that this pavement is "to be constructed." This can only mean that it is to be constructed in the future, of course.

Other criticisms are aimed at the resolution and plans and specifications; but with all respect to counsel, who have so ably presented this matter as to lighten the labor of the court, we think them inconsequential. The reference in the resolution of intention embraces matters concerning which the resolution may properly refer to the plans and specifications for a more particular description of the work, and the reference itself is

sufficient for this purpose. This disposes of criticisms aimed at the resolution of intention. It seems to be sufficient.

[4] As we understand the next contention of counsel opposing the issuance of the writ, it is that the improvement is to be to a grade attempted to be established by a proceeding for change of grade had under chapter 677 of the statutes of 1909 (Stats. 1909, p. 1018), and that the attempt in that proceeding to change the grade was futile because of the failure to give notice of the hearing of certain protests against the change of grade that were filed in that proceeding. It is stipulated by all the parties to this proceeding that the resolution of intention to change the grade was duly passed as provided by chapter 677 of the Statutes of 1909 and that notice thereof was given in the manner provided by section 2 of that chapter. The protests which were filed were made by owners of less than a majority of the property fronting on the streets where the change of grade was proposed to be made. The act under which the proceeding was had provided that the board of trustees should fix a time for hearing such protests, and give notice thereof in the manner therein specified to be given; and it was further provided that the board of trustees should hear said protests at the time and place appointed, or at any time to which the hearing thereof might be continued, and pass upon the same, and that its decision thereon shall be final and conclusive. While no notice was given of the hearing, the persons signing the protests did actually all appear before the board of trustees and present their protests, and were heard upon the same, except that in one instance the protestant did not appear personally, but did appear by his son, who, it is stipulated, represented him in the matter. It is now contended that this son did not have authority to represent this protestant, his father; but the stipulation is broad and can mean nothing if it does not mean that the son had such authority.

It is argued on behalf of the petitioner that the appearance by the protesting property owners before the board of trustees, and the hearing then given them, was all that was necessary to give the board jurisdiction to proceed with the work; that the reason for the publication of the notice was simply to apprise the protestants of the time and place of the hearing of their protests, and the notice was not addressed to any other person; and that, they having been heard and their protests denied, the board thereupon acquired jurisdiction to proceed. On the other hand, the contention is made by the respondent that the purpose of the publication of the notice was to give notice to all persons owning property fronting upon the streets the grade of which it was proposed to change, whether protesting or not protesting; and therefore the fact that the actual protestants appeared before the board and were heard does not give the board jurisdiction, as it is said, to proceed with the work although the protests were denied.

With this latter contention we are unable to agree. Throughout the whole of section 3 of the act under which the proceeding for change of grade was taken, in mentioning who were to be heard upon the protests the Legislature has used the words "such protests," and "said protests," referring definitely to the protests filed and to no other persons or objections whatever. No other construction can be given to the language of that lengthy section than that the protests to be heard were the protests which were filed, and none other. One reason for the adoption of the method of publication or posting instead of a personal service of notice of the hearing is the common one, that it was easier to meet the difficulty of serving a large number of persons by this substituted method—if it may be so called—than by seeking out the persons protesting at their various residences or places of business, and personally serving them there. Perhaps it might also have been considered less expensive and more certain, and its proof less open to the infirmities of oral testimony, than a personal service. There is another sentence of section 3, however, which seems to us to conclusively point to the intention of the Legislature as to who should be heard upon these protests. After providing for the nature and contents of the protests, it is said that "any protest not complying with the foregoing requirements shall not be considered by said city council." This, if the contention of the superintendent of streets be correct, would exclude from hearing an informal protest actually filed, and at the same time permit hearing a person who had not protested at all. That the Legislature intended such a result is not reasonable to suppose. It is settled in Farley v. Reindollar, 174 Cal. 706, 165 Pac. 19, that property owners not protesting cannot object to the disposition of protests to which they are not a party. It follows that, if the nonprotesting property owners could not object to the disposition of the protests, the notice was not for their benefit. Gray v. Burr, 138 Cal. 109, 70 Pac. 1068, relied upon by the respondent in this case, is not in point, because in that case the protest was by the owners of a majority of the frontage, and the resolution ordering the work was passed without giving the protesting owners any opportunity to be heard at all.

Other cases relied upon by respondent are Creed v. McCombs, 146 Cal. 449, 452, 80 Pac. 679; So. Construction Co. v. Howells, 21 Cal. App. 330, 131 Pac. 756; Girvin v. Simon, 127 Cal. 491, 59 Pac. 945; People v. O'Neill, 51 Cal. 91; and Mahoney v. Braver-

man, 54 Cal. 565. All these were cases where the notice which was not given was a notice of a hearing on an assessment for street work. Typical of the language of those cases is that of Mr. Justice James, of the Second appellate district, in Southern Construction Co. v. Howells, as follows:

"The city council, when it proceeds to give a hearing on an appeal against a street assessment under this act, cannot assume jurisdiction to make any order of determination therein until all property owners affected by the assessment, whether parties to the appeal or not, have been given notice of the hearing; there is but one way provided by the statute for the giving of this notice, and that is that it shall be published for five days."

There is, however, a fundamental distinction between the notice required in a proceeding for change of grade under the statute followed in the proceeding under review, and the notice of an assessment in a street improvement case. The protest of the protesting party in the case of an assessment, if granted, to the extent of either reducing his assessment or relieving him altogether from payment of that portion of the cost of the work assessed against his property, necessarily has the effect of raising the assessments of all the other property owners whether they have protested or not. Therefore they will be affected injuriously if the protest is granted. On the other hand, the change of grade act of 1909, under which this proceeding was begun, provides for only two results upon the hearing of a protest on the change of grade. One of those results is the denial of the protest, following which the entire grade of the street would be changed as provided in the resolution of intention and the plans and specifications. On the other hand, if the protest is granted the whole proceeding stops. There is no middle course. The proposed grade is either abandoned or adopted in toto as planned and in accordance with the resolution of intention. Therefore nonprotesting property owners lose nothing of which they have not had previous notice by not being given an opportunity to be present at the hearing of the protests against the change of grade. We think the change of grade so established by the proceeding under examination was valid.

Judgment for plaintiff that a peremptory writ issue as prayed.

We concur: KERRIGAN, J.; ZOOK, Judge pro tem.

---

37 Cal. App. 446

## CEREMONY v. DRUMMOND et al.

(Civ. 2263.)

(District Court of Appeal, Second District, California. June 5. 1918.)

1. PLEADING ⟸279(3) — SUPPLEMENTAL COMPLAINT—SUFFICIENCY OF PLEADING.

In an action on a contractor's bond, if the complaint as originally filed was not sufficient in that it failed to show that at the date of the commencement of the suit plaintiff had actually paid out money, it could not be helped out by supplemental complaint filed thereafter.

2. PRINCIPAL AND SURETY ⟸155 — CONTRACTOR'S BOND—ACTION—PLEADING.

In an action on a contractor's bond, an allegation that certain enumerated claims were made for materials furnished to be used and actually used in the construction of the building was a sufficient allegation that the claims were bona fide.

3. APPEAL AND ERROR ⟸907(2)—FINDINGS OF FACT—REVIEW.

Where no evidence was brought up on appeal and no point made as to its sufficiency, it will be presumed, in support of the findings of fact, that there was evidence to sustain them.

4. PRINCIPAL AND SURETY ⟸75—CONTRACTOR'S BOND—ACCRUAL OF SURETY'S LIABILITY.

Where the condition of a contractor's bond was that contractor would pay all claims for labor and material, where the contractor failed to pay claims for material, owner could maintain an action on bond without actually satisfying such claims, since liability on the bond accrued when the contractor failed to pay the claims.

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

Action by Peter Ceremony against F. L. Drummond and the Pacific Coast Casualty Company, a corporation. Judgment in favor of plaintiff, and the Casualty Company appeals. Affirmed.

V. J. Cobb, of Los Angeles, for appellant. Miguel Estudillo, of Riverside, for respondent.

JAMES, J. The defendant casualty company appeals from a judgment entered in this action favorable to the plaintiff. A contract having been made between the plaintiff as owner and defendant Drummond as contractor, the appellant casualty company became surety for the contractor that the contract would be faithfully performed. The general obligation of the surety was expressed in that clause of the undertaking which guaranteed that the contractor would pay in full the claims of all persons performing labor upon or furnishing materials to be used in the work. Plaintiff in his complaint alleged that the contractor neglected and failed to comply with the terms of his contract and failed to pay for labor and materials in excess of the contract price (specifying names of claimants and amounts), which labor and materials it was further alleged "were furnished to be used and were used in the construction of said building." Allegations followed to the effect that the contractor's debtors mentioned had filed claims of lien against the property of the plaintiff and were threatening to foreclose the same.

[1] Two objections are made as against the judgment: First, that the complaint did not in its allegations show that the claims made against the property of the plaintiff on behalf of Drummond's debtors were valid or en-

forceable; second, that no recovery could be had on the bond given by appellant until payment of the claims had actually been made by the plaintiff. It may be here stated that in the course of the trial a supplemental complaint was allowed to be filed which showed that the plaintiff had satisfied the demands of the lien claimants. Of course, it is clear that if the complaint as originally filed was not sufficient, in that it failed to show that at the date of the commencement of the suit plaintiff had actually paid out the money reimbursement of which was sought in the action, it could not be helped out by supplemental complaint filed thereafter. So, then, the case is to be viewed as though no supplemental complaint had been filed.

[2] The condition of the bond of appellant was that the contractor would pay all claims for labor and material. It is alleged in the complaint that this was not done, but that certain enumerated claims were made for materials alleged to have been furnished to be used and actually used in the construction of the building. We think the allegations of the complaint were sufficient to show a breach of the contract. We think that the effect of the allegations in the complaint respecting the claims made is that the claims were bona fide and for actual labor and materials furnished.

[3] As no evidence is brought up and no point made as to its sufficiency, we must presume, in support of the findings of fact, that there was evidence to sustain them.

[4] The second point urged—that plaintiff could not maintain an action on the bond until he had actually satisfied the claims of claimants—viewing the contract of the surety, we think should not be sustained. Contracts of this nature are now generally held to be contracts of indemnity against liability, rather than indemnity against loss sustained and paid. As we have before noted, the surety under its contract guaranteed that the building contractor would pay all claims for labor and materials furnished. The contractor's default in this regard created a breach of the obligation of the surety towards the owner. Almost identical conditions in a bond on a building contract were considered by the Supreme Court of Washington in Friend v. Ralston et al., 35 Wash. 422, 77 Pac. 794, where the court said:

"The covenant in the building contract on the part of the contractors with Mrs. Friend is, as between them, equivalent to a direct promise to pay for materials used in the construction of the building, and a breach of the contract occurred when the contractors suffered the obligation to become a charge on her property. At least, she was entitled to treat the same as a breach. It may be true that she was not obligated to do so; that she could have waited until the lien had become fixed and determined by judgment against her property, and treated that as the breach of the bond, thus escaping the onus of establishing at the trial the validity of such lien and the amount of the indebtedness. But she was not obliged to delay action in that behalf. She could treat the failure of the contractors to keep her property free from such incumbrance as a breach of the contract. Therefore the position of appellant's counsel that this action was prematurely brought is untenable."

See, also, Kiewit v. Carter, 25 Neb. 460, 41 N. W. 286; and note following Stephens v. Pennsylvania Casualty Co., 3 Ann. Cas. 478.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

---

37 Cal. App. 646

## HORNLEIN v. BOHLIG et al. (Civ. 2403.)

(District Court of Appeal, First District, California. June 25, 1918.)

1. MECHANICS' LIENS ⟸36 — ENGINEERING DESIGNER—STATUTE—"PERSONS BESTOWING SKILL."

One who furnished engineering designs for a building, actually used in its construction, at the instance of the owner's architect, was entitled to a lien under Code Civ. Proc. § 1183, providing "persons bestowing skill" in construction at instance of owner or any authorized person are entitled to a lien.

2. MECHANICS' LIENS ⟸113(2) — MONEYS DUE CONTRACTOR — EQUITABLE GARNISHMENT BY LIENOR.

Code Civ. Proc. § 1184, as amended in 1911, does not, save at the owner's option, secure to persons claiming lien and giving the requisite notice an equitable garnishment upon moneys due or to become due to the contractor.

3. MECHANICS' LIENS ⟸291(1) — FORECLOSURE—JURISDICTION.

In action to foreclose mechanic's lien, where owner's wife was sued and made party under fictitious name, was never served with summons, and did not appear or participate, trial court had no jurisdiction to foreclose lien against portion of property in which she had interest.

Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by Belle E. Hornlein, as executrix of the will of A. E. Hornlein, deceased, substituted as plaintiff in place of said deceased, against J. H. Bohlig and others, copartners doing business under the firm name of Hladik & Thayer, and Lotta Bohlig. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

W. T. Kearney, of San Francisco, for appellants. Sullivan & Sullivan and Theo J. Roche, all of San Francisco, for respondent.

PER CURIAM. This is an appeal from a judgment in favor of plaintiff against the defendants for the foreclosure of a mechanic's lien filed by plaintiff upon the property of defendants J. H. Bohlig and Lotta Bohlig. Bohlig, the sole owner of a portion of the real property subjected to the lien, entered into a contract with Hladik & Thayer, architects, whereby said architects agreed to furnish all plans, specifications, architectural work, and superintendence employed in the construction of a building to be erected, and which was erected, upon Bohlig's land and

partly upon land owned by Bohlig and his wife, Lotta Bohlig. Thereafter plaintiff entered into a contract with Hladik & Thayer, whereby plaintiff agreed to furnish the engineering designs of the building for which he was to receive $620. The court found that plaintiff duly performed his part of the contract, that the engineering designs so furnished by plaintiff were actually used in the construction of the building, that defendants Hladik & Thayer paid on account the sum of $270, and that $350 remained unpaid. From these findings the court deduced the conclusion of law that plaintiff was entitled to judgment against defendants for the sum of $350, and that said sum constituted a lien upon the real property.

[1] Appellants contend that the furnishing of engineering designs was not a service of the character contemplated by section 1183 of the Code of Civil Procedure. That section provides, inter alia, that architects and all persons of every class bestowing skill or other necessary services to be used in the construction of a building are entitled to a lien, whether at the instance of the owner or of any other person acting by his authority or under him as contractor, and further that every architect having charge of the construction, either in whole or in part, of any building, shall be held to be the agent of the owner for the purposes of the lien law. It follows that the employment of plaintiff by the architects is equivalent to his employment by the owner. An engineering expert, employed for a single and specified purpose in the construction of a building, even though he may not be classed as an architect, comes, we think, within the provisions of section 1183, Code of Civil Procedure, as one bestowing skill to be used in the construction of the building. In view of the finding of the trial court that the services of the plaintiff were actually used in the construction of the building and the plain language of the Code, it seems clear to us that plaintiff was entitled to a lien.

[2] The judgment, in so far as it orders that a writ of execution issue against the owner, Bohlig, as to any moneys in his possession payable to Hladik & Thayer, must be modified. Evidently that phase of the judgment is based upon the finding that plaintiff served upon Bohlig a notice to withhold moneys in his hands payable to Hladik & Thayer at a time when Bohlig had in his hands more than $400 payable to them. Section 1184, Code of Civil Procedure, as amended in 1911, does not, save at the option of the owner, secure unto persons giving the requisite notice an equitable garnishment upon the moneys due or to become due to the contractor (Hubbard v. Jurian, 170 Pac. 1093), and therefore plaintiff is not entitled to a personal judgment against the owner, but must rely upon his lien.

[3] Lotta Bohlig was sued and made a party defendant in the action under a fictitious name, and it is conceded that she was never served with summons, and that she in no wise appeared or participated in the defense of the action. This being so, the trial court was without jurisdiction to render judgment foreclosing the lien against that portion of the property in which she had an interest. Gray v. Hawes, 8 Cal. 562; Ford v. Doyle, 37 Cal. 346; People v. Harrison, 107 Cal. 541, 40 Pac. 956.

Modified in accordance with these views, the judgment stands affirmed.

---

37 Cal. App. 610

## HOLLAND–MEISELL CO. v. KELLY.

(Civ. 2349.)

(District Court of Appeal, First District, California. June 22, 1918. Rehearing Denied July 22, 1918.)

1. ESTOPPEL ⊂⊃77—DEALING WITH AGENT—CAPACITY TO SUE.
Defendant, in action on account for goods sold by plaintiff as agent, is estopped to assert absence of right in plaintiff to sue, having bought with knowledge that by plaintiff's agency contract he guaranteed payment within a certain time.

2. SALES ⊂⊃23(1)—SALE OR ORDER SUBJECT TO CONFIRMATION—EVIDENCE.
Correspondence *held* to show only the placing of an order with an agent subject to approval of principal, and not a sale.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the Holland-Meisell Company, a corporation, against J. A. Kelly, doing business under name and style of Valley Paper Company. Judgment for plaintiff, and defendant appeals. Affirmed.

U. Grant Hayden, of Fresno, for appellant. Short & Sutherland, of Fresno, for respondent.

BEASLY, Judge pro tem. The Holland-Meisell Company had judgment against Kelly for $635.25 on October 1, 1917, from which Kelly appeals. The plaintiff was the agent of the Grand Lake Company, a paper manufacturing concern of the state of Maine, under an agreement—the terms of which were known to Kelly—by which the Holland-Meisell Company was held responsible for the solvency of all credit extended by it in the state of California upon sales of goods of the Grand Lake Company. By the terms of this contract the plaintiff guaranteed the payment of all accounts for goods of the Grand Lake Company sold by it within 75 days from the date of sale, and agreed to pay for all goods taken from consigned stock of the Grand Lake Company within 75 days whether or not it had received payment therefor from the customer. Kelly had been a member of the Holland-Meisell Company when this contract was entered into, and, as we have said, was familiar with the obligations of the Hol-

land-Meisell Company to the Grand Lake Company under the contract. The complaint was upon an account for paper sold and delivered from stock in the possession of the plaintiff under its contract with the Grand Lake Company. Kelly answered the complaint with a cross-complaint, in which he set up that the plaintiff was the agent of the Grand Lake Company in all the transactions set forth in the complaint, and that as such agent it had sold to him a carload of paper, which the Grand Lake Company had refused to deliver to his damage in a sum considerably larger than the amount of the judgment afterwards given against him.

The defense may be treated as an answer to the plaintiff's claim, upon the ground that the Holland-Meisell Company is not the true party in interest, and that the action should have been begun in the name of the Grand Lake Company, and, upon the cross-complaint, as an assertion of a claim for damages to offset the demand sued upon.

[1] Upon the first phase of the defense it may be said that as Kelly was thoroughly informed as to the obligations assumed by the Holland-Meisell Company upon the sale to him of the goods declared upon in the complaint, and knew that when that company sold him these goods it became obligated to the Grand Lake Company to pay for the same whether he paid the Holland-Meisell Company or not, he is clearly estopped from asserting that the plaintiff had not the right to sue him on this claim.

[2] The carload sale was first discussed between Kelly and the plaintiff on or about the 16th day of November, 1915, and a verbal understanding seems to have been reached between them at that time that a carload of paper should be purchased by Kelly from the Grand Lake Company, to be delivered some time in February of the following year. The price of the carload was such that a verbal agreement to purchase the same, in the absence of delivery of a part thereof or part payment of the purchase price, would have been invalid under the statute of frauds. The trial court was therefore placed in the position where it was necessary for it to deduce the contract, if one was entered into, from the correspondence of the parties embraced in a great many letters which were introduced in evidence. It would be necessary, in order to understand the position in which the trial court was placed in construing these letters, to embrace practically the whole series in this opinion, and in the interest of brevity we do not feel justified in so doing. It seems sufficient for us to say on this point that, reading the letters as a whole, it was evident that Mr. Kelly and Mr. Holland undertook to secure a carload of paper for Kelly from the Grand Lake Company for delivery in February at the price of the goods as it existed at the time of their conversation in November. This is shown sufficiently for present purposes by four or five quotations from letters that passed between the parties. On November 15, 1915, Kelly wrote to the plaintiff cautioning it to be sure to protect him against the bag prices as they existed at that time. In answer to this letter the plaintiff informed Kelly: "We are placing with the Grand Lake Company a car of bags at present price, to be delivered to you in February." On December 2, 1915, the plaintiff again wrote to Kelly, saying:

"The writer placed your order with the Grand Lake Company something over a week ago with the old price. I say old price because we received an advance of 10.5 per cent. Monday. As to their acceptance we will advise you as soon as we get word if the car of bags are accepted by the Grand Lake Company," etc.

On December 15, 1915, the plaintiff also wrote to the defendant, saying that they did not believe there would be any question but that Kelly would be protected on the price, as the order was placed before the advance, and the Holland-Meisell Company did not see any chance of the Grand Lake Company repudiating it.

In the agreement between Holland and Kelly there had been no exact specification of the varieties of paper ordered by Kelly, and in response to a suggestion made by the plaintiff in a letter dated December 6, 1915, Kelly sent to the plaintiff a blanket order for a 40,000-pound car of grocers' bags. This order specified that Kelly confirmed the verbal order given to Holland on November 16th, and said that specifications for the car would follow in a week or so.

Practically this illustrates the character of the correspondence between these parties. The Holland-Meisell Company now contends that it had no authority to sell a carload of paper except subject to confirmation of the manufacturers, and that all they undertook to do was to order the goods from the Grand Lake Company subject to confirmation by the latter. It appears from the contract that carload orders were to be taken by the Holland-Meisell Company subject to credit regulations of the Grand Lake Company. We have read all this correspondence with care, and are unable to say that the construction placed thereon by the trial court was not correct. It seems to us indeed that Mr. Holland, a former partner of Mr. Kelly, was endeavoring to secure for the latter a carload of paper at the prices as they existed in November, when the prices were gradually rising, and that Mr. Kelly, having found that the Holland-Meisell Company was unable to do this, laid the foundation for his cross-complaint in this action. Indeed, the verity of this view seems apparent from one of his letters to plaintiff, a portion of which is as follows:

"It seems taking quite an unfair advantage of your firm, but it will put you in a much better shape to go to the Grand Lake Company and insist upon them filling this order when you can show them that we are withholding practically $500 from your firm as a guaranty that you will live up to your contract. We, of course, ex-

pect that you will deduct this from your report to the Grand Lake Company so it will not seriously interfere with your own affairs."

This last quotation seems to us conclusive as to the intention of the parties, and it does not appear to us that the plaintiff ever undertook to make to Kelly, or that he ever understood that it was making to him, an outright sale of the carload of goods, but rather that it was simply placing an order subject to confirmation by the Grand Lake Company.

The judgment is affirmed.

We concur: KERRIGAN, J.; ZOOK, Judge pro tem.

37 Cal. App. 754

FASSIO v. WOOLFREY et al. (Civ. 2437.)

(District Court of Appeal, First District, California. July 9, 1918.)

1. HUSBAND AND WIFE ⟸224 — ACTIONS — JOINDER—SERVICE.

Under Code Civ. Proc. § 370, it is not sufficient to merely name the husband as a party defendant in an action against his wife, but he must also be served with summons.

2. APPEAL AND ERROR ⟸913 — ACTIONS — JUDGMENT.

The rule that every reasonable presumption is to be indulged in favor of a judgment does not justify the presumption on appeal that a wife was sued separately from her husband within one of the exceptions of Code Civ. Proc. § 370, subds. 2, 3, where the complaint states the relation of defendants as husband and wife.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by V. Fassio, doing business as the Mission Concrete & Mosaic Company, against John B. Woolfrey, Esther Nathan, and others. From a judgment by default against her, the defendant Esther Nathan appeals. Reversed.

George A. Connolly and W. W. Sanderson, both of San Francisco, for appellant. I. M. Peckham and Edwin H. Williams, both of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from the judgment taken upon the judgment roll alone. The appellant, Esther Nathan, is one of the defendants in the action. Her husband is also joined as a defendant under the name of John Doe Nathan "for the reason," as stated in the complaint, "that he is the husband of Esther Nathan." A judgment by default was entered against her. Her husband was never served with summons.

[1] It is clear that under the provisions of section 370 of the Code of Civil Procedure it is not sufficient to merely name the husband as a party defendant in an action against his wife, but he must also be served with summons. It was so held in the case of McDonald v. Porsh, 136 Cal. 301, 68 Pac. 817. There, as here, the status or relation of the defendants as husband and wife was set forth in the complaint, and upon the appeal, it appearing that the husband had not been served with summons, the court said:

"Under the express provision of the statute, the husband is a necessary party defendant in all cases where the wife is sued; and this implies that he must not only be named in the complaint, but served."

[2] The respondent does not seriously dispute that this is the settled rule. He argues, however, that, as every reasonable presumption is to be indulged in favor of a judgment, it must be presumed on this appeal that the case falls within one of the exceptions enumerated in subdivisions 2 and 3 of section 370 of the Code of Civil Procedure, in which a wife may be sued alone. But here the complaint itself alleging, as it does, that the husband is joined because he is the husband of appellant, negatives the idea that the case falls within either of those exceptions to the rule requiring the husband to be joined; hence the presumption mentioned cannot be entertained.

The judgment is reversed.

We concur: ZOOK, Judge pro tem.; BEASLY, Judge pro tem.

37 Cal. App. 768

MUELLER v. MOUREN. (Civ. 2545.)

(District Court of Appeal, Second District, California. July 11, 1918.)

TRIAL ⟸395(1)—FINDING—SUFFICIENCY.

In action for $983.90, the reasonable value of nursing defendant's intestate at his special request, where the answer denied that that amount was the reasonable value, and that anything was unpaid, a finding that plaintiff nursed intestate at $35 a week, without any finding as to full payment, did not sustain a judgment for plaintiff.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Ottilie C. Mueller against Neavas Mouren, as administratrix of the estate of Peter Mouren, deceased. Judgment for plaintiff, and defendant appeals. Reversed.

A. G. Ritter, of Los Angeles, and Sarau & Thompson, of Riverside, for appellant. John Munro and H. S. Laughlin, both of Los Angeles, for respondent.

SHAW, J. Appeal by defendant from a judgment rendered in favor of plaintiff who sought to recover for services alleged to have been rendered by her as a trained nurse for defendant's intestate at his special instance and request, the reasonable value of which services she alleged to be $983.90, all of which it is alleged remained unpaid. The answer, among other things, denied that the reasonable value of the services alleged to have been performed by plaintiff was $983.90, or of any value whatsoever, and denied that the same or any part thereof remained unpaid.

Upon the pleadings the reasonable value

of the services rendered plaintiff was one of the chief issues which the court was called upon to determine. No finding, however, was made thereon, other than that she "worked * * * nursing * * * at the rate of $35.00 a week." Hence we are left without information as to the "reasonable value" of her services. Neither is there any finding as to whether plaintiff had been fully paid, as alleged in the answer. Since, in our opinion, the findings do not support the judgment, it is unnecessary to discuss the sufficiency of the evidence to justify the findings, as to which there seems to be some merit in the contention made by appellant.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

178 Cal. 752

## MANWELL et al. v. DURST BROS. et al.
(Sac. 2369.)

(Supreme Court of California. Aug. 14, 1918. Rehearing Denied Sept. 13, 1918.)

1. NEGLIGENCE ⊂=108(2)—PLEADING.
A complaint for negligence must allege what was done, and that the same contributed to the injury; but, to show that there was negligence in what was done, it is sufficient to allege that it was negligently done.

2. MASTER AND SERVANT ⊂=258(3)—PLEADING — UNDERTAKING DANGEROUS WORK — MOBS.
Negligence in the matter of employment of one murdered while assisting in clearing premises of a dangerous mob is not shown by a complaint showing no responsibility for the existence of the mob, and no omission to disclose the situation, or failure to protect the deceased in the service.

3. MASTER AND SERVANT ⊂=137(1)—INJURIES TO SERVANT—DANGEROUS WORK.
Employers have the right to employ persons to assist them in clearing their premises of a dangerous mob, though the service to be rendered is a dangerous one.

In Bank. Appeal from Superior Court, Yuba County; E. P. McDaniel, Judge.

Action by Ellen Gertrude Manwell and others against Durst Bros. and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

F. H. Dam, of San Francisco, for appellants. W. H. Carlin, of Marysville, for respondents.

ANGELLOTTI, C. J. This action is by the surviving wife and children of Edmund T. Manwell, deceased, to recover from the defendants the sum of $150,000 damages alleged to have accrued to plaintiffs from the death of said Manwell; the claim being that the complaint shows that such death was caused by the negligence of defendants. The lower court sustained a demurrer which was interposed, with leave to plaintiffs to amend. Plaintiffs having failed to file an amended complaint within the time allowed therefor, judgment of dismissal was entered. We have here an appeal by plaintiffs from that judgment.

[1] It is claimed that the complaint fails to state a cause of action, in that it fails to allege any negligence on the part of defendants proximately contributing to the death of Mr. Manwell. Of course, allegation of such negligence was essential to the statement of a cause of action. The complaint is not assisted in this respect by the general allegation contained in paragraph 5 that "the death of said Edmund T. Manwell, on said 3d day of August, 1913, was caused by the gross negligence of the defendants." While it is true, under the rule in force in this state and in most jurisdictions, that negligence may be charged in general terms, that rule simply means, as has been stated many times, that, "what was done being stated, it is sufficient to say it was negligently done, without stating the particular omission which rendered the act negligent." See Stein v. United Railroads, 159 Cal. 370, 113 Pac. 663; Smith v. Buttner, 90 Cal. 99, 27 Pac. 29. And it must appear from the facts averred that the negligence caused or contributed to the injury. Smith v. Buttner, supra. The cases cited by counsel for appellants fully illustrate the meaning and application of this rule. What was done, with the charge that the same caused or contributed to the injury, must be alleged; but to show that there was negligence in what was done, which is likewise essential, it is sufficient to allege that it was negligently done, without stating more particularly what the matters constituting such negligence were. As said in Stephenson v. Southern Pacific Co., 102 Cal. 147, 34 Pac. 620, 36 Pac. 407: "Negligence is not the act itself, but the fact which defines the *character* of the act, and makes it a legal wrong." (Italics ours.)

No rule of which we have knowledge warrants a conclusion that this allegation assists the complaint in the slightest degree. This was apparently recognized by the pleader, for the allegation is immediately followed by the language, viz.: "And more particularly in the manner and form and under the circumstances hereinafter stated," and this is followed in paragraphs 6, 7, and 8 by the allegations upon which plaintiffs must rely for a showing of negligence.

[2] So far as material, these paragraphs allege the following facts: On August 3, 1913, what was known as the Durst Ranch in Yuba county was in the possession and under the control of defendants, who were using the same for growing hops. They had thereon in their employment as hop pickers some 2,500 or more persons, men, women, and children, of different nationalities, who were living on said premises. Through a committee of 12 these employés presented certain written demands to defendants on said premises for a higher rate for picking hops, and for certain specific improvements in the sanitary conditions of the premises and in the conditions under which the employés were living and working. The defendants refused the demand for a higher wage, but promised to make some improvement in the sanitary, living, and working conditions. These promises were not satisfactory to said employés. Thereupon defendant Ralph Durst, who was the general manager of the business, in the presence of the committee of 12, stated to one Ford, the spokesman of the committee, that he (Ford) was discharged and must leave the premises immediately, and, without justification, struck Ford in the face with a pair of gloves in such a way that the committee understood the act to be intended as an affront to the committee and to Ford. Thereupon said Durst, in the presence

of said employés, caused an attempt to arrest Ford to be made by an officer, without first having procured a warrant for such arrest, and Ford, with the assistance of others of said employés, resisted the attempt and prevented the arrest. Thereupon the employés were embittered and incensed "because the defendants refused to grant certain of their demands," and "because" the premises were in an unsanitary condition, and "because" defendants "negligently had omitted" to take such measures as would have prevented such conditions, and "because" the promises for the improvement of the conditions were not satisfactory to them, and "because" of the conduct of said Ralph Durst toward Ford. They thereupon threatened they would go "on a strike" until all their demands were granted. Thereupon 1,000 or thereabouts of the employés held a meeting on the premises at which addresses were made by certain of their number. The employés then and there resolved to insist upon their demands, making open expressions and demonstrations of opposition and hostility against defendants. They "then and there became and were in a bad temper and in a state of excitement and agitation, and then and there became and were in such an angry frame of mind" that they "were indifferent to and heedless and reckless of the personal safety of any one acting in aid and assistance of defendants in opposition to" their will and wishes. By reason of these things, it was unsafe and dangerous and hazardous for any one to act in aid and assistance of defendants in opposition to the will and wishes of said employés. All of this said Ralph Durst well knew, nevertheless he thereupon "requested and solicited and employed said Edmund T. Manwell * * * to accompany the said defendant, Ralph H. Durst, and the sheriff and certain deputy sheriffs of said county of Yuba, from the said town of Wheatland to the said meeting of said employés of defendants, * * * and then and there to act in the lawful aid and assistance of said defendants in any matter which should then and there arise." The service so requested of Manwell was, "under the circumstances of the case as aforesaid," unsafe and dangerous and hazardous to Manwell, and "said defendants then and there had reason to believe, and by the exercise of reasonable care might have anticipated and foreseen, that such employment" might result in serious injury to the person of Manwell. Thereupon Manwell, pursuant to such request and employment, accompanied said Ralph H. Durst and said sheriff and five deputy sheriffs to said meeting of said employés on said premises, and while he was there so engaged in such service, "without fault or misconduct on his part, and negligently solicited and induced thereunto by the defendants, as aforesaid," he was then and there willfully, wantonly, and tortiously shot and wounded with a revolver in the hands of one of said employés of defendants, and thereby instantly killed.

It seems clear to us that the only possible basis for a claim that these allegations show any negligence contributing to the murder of Mr. Manwell is in the matters charged as to the employment by Durst of Manwell for a service known to the former to be dangerous and hazardous to the latter, or which by the exercise of reasonable care might have been so known to the former. As to the allegations relative to the causes that operated to make the employés on the Durst property a dangerous mob, "indifferent to and heedless and reckless of the personal safety of any one acting in aid and assistance of defendants in opposition to its will and wishes," there is no sufficient allegation of negligence on the part of the defendants, or of facts consistent only with the theory of such negligence. A demand for a higher rate for hop picking was made, and the defendants refused to grant it. There is nothing to show that the demand was not properly refused. Certain specific improvements in sanitary and other conditions were demanded, and some improvement in these conditions was promised, and there is nothing to show that every proper concession in this respect was not made. That the concessions made "were not satisfactory to said employés" establishes nothing in this regard. In so far as the complaint shows, Durst was entirely justified in discharging Ford and directing him to leave the premises. It is not even affirmatively made to appear that Durst was not justified in striking Ford. The allegation that he did so "without justification" is the statement of a mere conclusion of law. Nor is it affirmatively made to appear that there was anything negligent or improper in causing "an attempt to arrest said Ford to be made by an officer without first having procured a warrant for such arrest." Under certain circumstances either a peace officer or a private person may arrest a person without a warrant. Pen. Code, §§ 836 and 837. The subsequent statement that thereupon the employés "became and were embittered," etc., "because" of certain (reasons specified, is not an allegation that defendants were in fact negligent in any of the matters specified as reasons for the feeling of bitterness. In other words, there is no issuable allegation therein that the premises were in fact in an unsanitary condition, or that defendants negligently had omitted to make such provision as would have removed an unsanitary condition, etc. The thing alleged is that the employés then and there became and were embittered and incensed against defendants, and all the rest is a mere recital of their reasons for so becoming embittered and incensed, and not an allegation of any act or omission on the part of defendants. In so far as the complaint shows, therefore, it

does not appear that the defendants were legally responsible, by negligence or otherwise, for the existence of the mob on their premises. It is therefore unnecessary to discuss the question presented by counsel for appellants as to the effect of such responsibility in this case, had the same been shown by the complaint.

We come, then, to a consideration of the facts alleged as to the employment of Mr. Manwell. The allegations as to the dangerous nature of the employment are full and complete, as are those as to the knowledge or imputed knowledge of the defendants thereof. But it is not suggested, even by implication, that Durst concealed anything pertaining to the conditions from Manwell, or did not inform him fully in regard thereto, or that Manwell was not cognizant of the entire situation and the danger incident to the employment. Indeed, in so far as the complaint shows anything in this regard, it indicates from the very terms of the employment notice to Manwell of the possible danger. He was employed to accompany Durst "and the sheriff and certain deputy sheriffs * * * to the said meeting of said employés," then and there to act in aid and assistance of the defendants "in any matter which should then and there arise," and he went with the defendant and the sheriff and five deputy sheriffs. [3] It must, we think, be conceded that defendants had an absolute right to solicit and employ these people to assist them in clearing their premises of this dangerous mob, the existence of which is so specifically alleged, even though the service to be rendered was one dangerous to those rendering it. Many necessary employments are notoriously hazardous in the very nature of things, and certainly it is not the law that the mere fact of employing one to render such a service constitutes negligence. Of course, in such a case, the employer must use what is reasonable care under the circumstances to protect his employé from injury in the rendition of his service; but there is no allegation of any omission in this regard, as there was in McCalman v. Illinois Central R. Co., 215 Fed. 465, 132 C. C. A. 15, cited by appellants. And where the danger is not obvious from the very terms of the employment and the nature of the service prescribed, it may freely be conceded that it is the duty of the employer to acquaint the employé with the facts of which he has actual or imputed knowledge, and that if he fails to do this he is guilty of negligence. In such a case it is the employment without informing the employé of the danger that constitutes the negligence. This is clearly shown in one of the cases cited by appellants (Baxter v. Roberts, 44 Cal. 187, 13 Am. Rep. 160), where the charge was that the defendant employed the plaintiff to perform a service which he knew to be perilous, without giving the employé any notice of its perilous character. The conclusion that the defendant was liable was based upon the fact, impliedly found by the jury, that the knowledge of the defendant as to the perilous nature of the employment, due to special circumstances of which the employé was ignorant, was not communicated to, but was withheld by him from the employé. In Pigeon v. Fuller, 156 Cal. 691, 105 Pac. 976, the allegation was that:

"Defendant negligently failed at the time it employed this plaintiff to warn him or inform him in any way of the danger of said employment, and defendant at all times herein mentioned negligently omitted to warn plaintiff of said danger."

In Holshouser v. Denver Gas & Electric Co., 18 Colo. App. 431, 72 Pac. 290, cited by appellants, the negligence charged was the failure to disclose the situation to the employé. In the case at bar, as we have seen, there is no allegation whatever in this regard, and without such an allegation we cannot see that the complaint stated negligence in the matter of the employment of Manwell. Some force in this regard is sought to be attributed by appellants to the statement that "while he (Manwell) was there so engaged in such service, without fault or misconduct on his part, and negligently solicited and induced thereunto by the defendants, as aforesaid," he was murdered by one of said mob; but obviously this cannot be construed as an allegation, general or specific, of any negligence on the part of defendants in the matter of the employment. It is purely by way of recital rather than allegation, and is, even as a recital, limited in its effect by the facts theretofore alleged, and to which it refers by the words "as aforesaid," which facts, as we have seen, are barren of any showing of negligence.

From what we have said, it follows that the complaint did not state a cause of action against defendants, and it is unnecessary to notice the points made in support of other grounds of demurrer.

The judgment is affirmed.

We concur: SLOSS, J.; SHAW, J.; LORIGAN, J.; MELVIN, J.; WILBUR, J.; RICHARDS, Judge pro tem.

---

178 Cal. 623

STENIAN v. TASHJIAN. (Sac. 2622.)

(Supreme Court of California. Aug. 1, 1918.)

1. PARTNERSHIP ⊂⊃97—PURCHASE OF LAND—MEMBER OF ASSOCIATION—SECRET PROFITS.

One who negotiates a purchase of land for the benefit of himself and others is the agent of his associates, and as such bound to the utmost good faith with them, and can make no secret profit for himself.

2. PARTNERSHIP ⊂⊃18—EXISTENCE — AGREEMENT.

The question of whether there is a partnership is one of fact, depending on an agreement to that effect.

3. PARTNERSHIP ⊂⊃12—AGREEMENT — SHARING PROFITS AND LOSSES.

To constitute a partnership, there must be a joint undertaking to share in the profits and losses.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Partnership.]

4. PARTNERSHIP ⊂⊃47 — EXISTENCE — EVIDENCE.

Evidence *held* to warrant a finding of the existence of a partnership in the purchase of land.

5. PARTNERSHIP ⊂⊃125—MEMBER AS AGENT OF PARTNERSHIP.

Each partner is the agent of the partnership as to all others coming within the scope of the relationship.

6. PRINCIPAL AND AGENT ⊂⊃69(1)—RIGHT OF AGENT TO PROFIT.

An agent may not make any profit for himself.

7. PARTNERSHIP ⊂⊃97—PURCHASE OF PROPERTY—SECRET PROFITS—ACCOUNTABILITY OF ACTING MEMBER.

When parties enter into an agreement of partnership or association for purchase of property for the common benefit, each partner or associate occupies a fiduciary relationship to the others in all matters pertaining thereto, and is precluded from making any secret separate profit, and if he does so, is accountable therefor in law or equity.

8. PARTNERSHIP ⊂⊃97—PURCHASE OF LAND—NEGOTIATION BY PARTNER — ACCOUNTING FOR PROFITS.

A partner who negotiates a purchase of land for the benefit of himself and his copartner, concealing from the latter the commissions he is to receive for making a sale, is accountable for one-half the secret profits thus made, Civ. Code, § 2330, providing that an agent represents his principal within the scope of actual or ostensible authority, and that rights accruing to him from transactions within such limits, entered into on his own account, accrue to the principal.

Department 2. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Manoug M. Stenian against Harry Tashjian. From a decree for plaintiff, defendant appeals. Affirmed.

J. S. Clack, of Visalia, for appellant. A. P. Michael Narlian, H. H. Rose, and Arekalian M. Astor, all of Los Angeles, for respondent.

LORIGAN, J. The court found, in accordance with the allegations of the complaint, that plaintiff and defendant in 1912 by verbal agreement became partners in the purchase of a tract of land in Tulare county; that prior to the purchase, which was made by the partnership at the solicitation of the defendant, he had entered into a written agreement with the owners of said land to pay him $2,000 as a commission in case he made a sale of the property, which fact, however, defendant, for the purpose of deceiving plaintiff, concealed from him; that plaintiff did not discover the fact of such agreement for a commission till a couple of years subsequent to the purchase of the property by plaintiff and defendant as such partners and subsequent to the termination of the partnership and division of the property between them. The decree of the court was that plaintiff recover from defendant one-half of the money already paid to him under the contract for commissions by the prior owners of the property and half of all moneys to be paid defendant thereunder in the future when a mortgage on the property executed by plaintiff and defendant was paid. Defendant appeals from the decree.

[1-4] Appellant, as grounds for a reversal, makes but two points which have any appearance of merit. He insists, first, that the evidence does not sustain the finding that a partnership was entered into between plaintiff and defendant for the purchase of the land, but that the evidence simply shows that defendant, who had the land for sale as agent for the owners, approached the plaintiff and one Ogaspian with the proposition that the three of them purchase the land for the sum of $15,000, of which they would pay cash $2,000 (one-third by each) and give a note and mortgage for the balance of $13,000. The negotiations for the purchase by them was conducted by the defendant and a conveyance made to the three of them of the tract of land undivided as tenants in common, so the defendant contends. Plaintiff and Ogaspian testified that the parties formed a partnership preliminary to the purchase of the land to make such purchase; that the understanding was that they were to purchase the property together, improve it together, put one half of it in grapes and the other half yearly in barley. Subsequently Ogaspian became dissatisfied with his purchase, and his interest was bought out by plaintiff and defendant. Defendant testified that there was nothing said about the partnership when the purchase was made; that each simply took an equal undivided interest. It appears, as all the parties testified, that defendant took charge and management of the land from the beginning, leasing portions of it, and had other portions sown to barley. No crops, however, matured, and his share of the loss of the venture, consisting of the expense of cultivation and the purchase of seed—some $500—was paid defendant by plaintiff. It is the claim of appellant that this evidence does not show a partnership, but at most a tenancy in common in the purchase of the property. As far as the alleged deceit of the defendant, as found by the court, is concerned (assuming it was proven) in concealing from his associates the fact that he was obtaining a secret advantage over them through commissions to be paid him for the sale and purchase of the property, it would be immaterial whether such sale and purchase was made for a partnership embracing the defendant as a member thereof or as a tenancy in common with defendant as one of the cotenants. In either event the

defendant in negotiating the purchase for the benefit of his associates would be the agent of such associates, and as such bound to the utmost good faith with them, and could make no secret profit for himself at their expense. Now, while this rule of the liability of the agent for deceit practiced upon his associates is no different either in law or equity whether the sale or purchase of the property is for a partnership or whether as a tenancy in common, appellant claims that the distinction is quite material here because plaintiff in his complaint relies solely on a partnership, and must recover, if at all, by proof of the partnership and nothing else. Conceding this point of appellant as well taken, we are not so certain that if necessary we could not hold that the complaint, aside from its allegations of partnership, was also so framed that relief might be given to plaintiff upon the theory of defendant that the proof established simply a purchase by tenants in common. But this is unnecessary. The question of whether there is a partnership is one of fact. In order to constitute it there must be an agreement to that effect—a joint undertaking to share in the profits and losses. There was evidence tending to show that this was the intention of the parties in their transaction in reference to their purchase of the property. The partnership did not last for more than a couple of years, nor did it involve many transactions. But that was not essential. What little was done with the property was in line with a partnership, as the plaintiff and Ogaspian declared was the intention when the purchase was made. It was managed by the defendant for the benefit of all. That there were no profits is of no consequence. There was an endeavor to make them, but the effort resulted only in a loss of which plaintiff, in line with his partnership obligation, paid his share. Under this evidence we think the court was warranted in finding the existence of a partnership in the purchase of the land.

[5-8] It is next insisted by appellant that there is no averment or proof of fraud perpetrated by defendant on plaintiff in the sale to the partnership of the property. Taking the attitude of appellant seriously, he must be understood as claiming that there is no sufficient evidence to establish that he was to be paid a commission for making a sale to the partnership, and not that the facts as alleged and found by the court, if supported by the evidence, do not show fraud towards his partners in obtaining a commission for making the sale and purchase. The evidence shows that at the time the defendant entered into negotiations with plaintiff and Ogaspian for the purchase by the partnership of the property he then had a written contract with the owners to pay him $2,000 if he made a sale of it. Both plaintiff and Ogaspian testified that, while discussing with the others the subject of the contemplated purchase, both asked him pointedly if he was to get a commission, and he said that he was not, declaring that partners could not make a commission in selling to each other. After the sale defendant made another contract with the former owner of the property, whereby he was to be paid his commission in installments as certain payments on the purchase price were made. Opposed to this was the testimony solely of defendant, who testified that, while the others asked him if he was to get a commission, he simply answered them that it was none of their business. The court accepted the evidence on the part of plaintiff.

The law as applied to such a situation is well settled, and no extended discussion of it is necessary. Each partner is the agent of the partnership as to all matters coming within the scope of the relationship, and it is an elementary principle of equity that an agent may not make any profit for himself in a transaction in behalf of his principal. Where parties enter into an agreement of partnership or association for the purchase of property for the common benefit, each partner or associate occupies a fiduciary relationship to the others in all matters pertaining to the partnership enterprise. In the purchase of the property for the partnership or association each one of the partners or associates is precluded from making any secret separate profit out of the transaction, and, when one of them does make such a secret profit, it constitutes a fraud upon the others, and he is accountable in a suit at law or in equity, as the transaction requires, for such profits. The facts as found by the court here show just such conduct on the part of defendant as these rules apply to, and he was properly held accountable by the court for one-half of the secret profits made by him in the transaction. Section 2330, Civ. Code; King v. Wise, 43 Cal. 628; Barry v. Bennett, 45 Cal. 80; Calmon v. Sarraille, 142 Cal. 638, 76 Pac. 486; Lomita Land & Water Co. v. Robinson, 154 Cal. 37, 38, 97 Pac. 10, 18 L. R. A. (N. S.) 1106; California-Calaveras Min. Co. v. Walls, 170 Cal. 285, 149 Pac. 595.

The judgment appealed from is affirmed.

We concur: WILBUR, J.; MELVIN, J.

---

178 Cal. 722

## PEOPLE v. LAWSON. (Cr. 2117.)

(Supreme Court of California. Aug. 10, 1918.)

1. CRIMINAL LAW ⊂=1023(13)—APPEAL ORDER DENYING NEW TRIAL.
No appeal lies from orders denying motion for new trial.

2. CRIMINAL LAW ⊂=1023(8)—APPEAL ORDER DENYING MOTION IN ARREST.
No appeal lies from order denying motion in arrest of judgment.

3. CRIMINAL LAW ⊜1159(2) — WEIGHT OF EVIDENCE—REVIEW.
Evidence which furnishes sufficient legal support for the conclusion of the jury cannot be rejected by an appellate tribunal as being untrue, the question of its weight being solely for the jury and the trial judge.

4. CRIMINAL LAW ⊜1034 — NEW TRIAL — TIME FOR PREPARING AFFIDAVITS.
Although defendant at time of making a motion for new trial asked for 10 days in which to prepare and present affidavits, he cannot be heard to complain that court allowed him only 6 days, where court stated that any further application for continuance would receive consideration at time set for hearing, and defendant made no further request for a continuance.

5. CRIMINAL LAW ⊜956(2) — MOTION FOR NEW TRIAL—AFFIDAVIT.
Suggestion of defendant's counsel after court made order denying motion for new trial that he could produce newly discovered evidence was properly disregarded, it not being accompanied by any affidavit.

6. CRIMINAL LAW ⊜981(2) — PRONOUNCEMENT OF JUDGMENT—INSANITY OF DEFENDANT—DETERMINATION.
The sole object of a proceeding under Pen. Code, §§ 1191, 1367, et seq., is to determine, not whether defendant was insane at the time of the commission of the crime, but whether he was insane when arraigned for judgment.

7. CRIMINAL LAW ⊜981(2) — INSANITY OF DEFENDANT—DETERMINATION.
Defendant *held* to have been allowed sufficient opportunity to procure evidence as to his mental condition in proceeding under Pen. Code, §§ 1191, 1367, et seq., for determination of question of sanity after verdict of guilty, but before judgment.

8. CRIMINAL LAW ⊜981(2)—SANITY OF DEFENDANT—BURDEN OF PROOF.
In proceeding under Pen. Code, §§ 1191, 1367, et seq., to determine defendant's sanity after verdict of guilty, but before judgment, defense had burden of showing that defendant's mind was in such condition that he did not rightly comprehend his own condition with reference to the proceedings against him, and that he was then unable to present in a rational manner any defense.

9. CRIMINAL LAW ⊜1177 — ERRONEOUS INSTRUCTION—HARMLESS ERROR.
Whether court, in proceeding to determine sanity of defendant after verdict, erred in instructing that three-fourths of the jury might render a verdict as to sanity will not be determined; it affirmatively appearing that all 12 jurors concurred.

10. JURY ⊜136(2)—PEREMPTORY CHALLENGES—NUMBER—SANITY OF DEFENDANT—"SPECIAL PROCEEDING."
Proceedings under Pen. Code, § 1367 et seq., and section 1221 et seq., to determine defendant's sanity, are "special proceedings" of a civil nature, to which Pen. Code, § 1070, relative to number of peremptory challenges, does not apply.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Special Proceeding.]

11. CRIMINAL LAW ⊜822(9) — ERRONEOUS CHARGE.
In proceeding to determine sanity of defendant, an instruction that verdict of guilty establishes beyond question defendant's sanity at time of commission of offense, while inapplicable, *held* without prejudice, when read with other instructions bearing on the subject.

12. CRIMINAL LAW ⊜981(2) — SANITY — INSTRUCTION.
Instruction that defense of insanity should be examined with great care was applicable in a proceeding to determine defendant's sanity after verdict, but before judgment.

13. CRIMINAL LAW ⊜1172(6)—ABSTRACT INSTRUCTION—HARMLESS ERROR.
Instruction that "it is a presumption of law that an unlawful act was done with an unlawful intent," although having no proper place in proceeding to determine defendant's sanity, was without prejudice; instruction being a mere abstract statement.

14. CRIMINAL LAW ⊜981(2)—INSANITY—DETERMINATION—EVIDENCE ADMISSIBLE.
In proceeding to determine sanity of defendant after verdict of guilty, but before judgment, evidence given by defendant on trial was admissible.

In Bank. Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Urban R. Lawson was convicted of murder in the first degree, and appeals from the judgment, the order denying his motion for a new trial, the order denying his motion in arrest of judgment, and the adjudication of sanity made before judgment. Judgment and order denying new trial affirmed, and other appeals dismissed.

Benjamin F. Wulff, of Oakland, and Karl F. Kennedy, of San Francisco, for appellant. U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., and Ezra W. Decoto, Dist. Atty., and F. P. Wittshen, Deputy Dist. Atty., both of Oakland, for the People.

ANGELLOTTI, C. J. [1, 2] The defendant was convicted of murder in the first degree. His motion for a new trial was subsequently denied, as also was a motion in arrest of judgment. Upon being arraigned for judgment it was suggested that he was then insane, and that judgment should therefore be deferred. The trial court ordered the question of his sanity tried (sections 1201 and 1368–1370, Pen. Code), and a trial by jury was had. The jury returned a verdict finding him to be sane, whereupon judgment of death was pronounced. Defendant appeals from the judgment, the order denying his motion for a new trial, the order denying his motion in arrest of judgment, and the adjudication of sanity made before judgment. No appeal lies from either of the last two orders.

[3] Upon the trial for murder, the defense of insanity was not interposed. Apparently there was no suggestion that defendant was not sane, and the defense was that the homicide was committed either in self-defense or under such circumstances as to be excusable as a homicide committed by accident and misfortune. The principal claim on this appeal in so far as the conviction is concerned is that the evidence was insufficient to support the verdict of guilty. A careful examination of the record forces us to the conclusion that this claim cannot be held to be well based, and that we have here simply the ordinary case of a conflict in the evidence which has been resolved against the defendant by jury

and trial judge. The evidence of Mrs. Margaret Wood is not of such a nature that it can be rejected by an appellate tribunal as being untrue. It furnishes sufficient legal support for the conclusion of the jury. The claim of appellant in this connection really is that her testimony was so thoroughly discredited as to certain parts, and was so inherently improbable as to other parts, that it should be disregarded. In the light of the record we cannot say that her testimony as to what occurred at the time of the fatal encounter was inherently improbable, and it should be needless to say that the question of the weight to be accorded this evidence was one solely for the jury and trial judge.

[4] The verdict was rendered October 3, 1917. At the request of defendant's counsel October 5, 1917, was fixed as the time for judgment. At this time defendant made a motion for a new trial on various grounds, including that of newly discovered evidence, and asked for 10 days in which to prepare and present affidavits as to this ground. After considerable discussion the court allowed defendant 6 days for this purpose, continuing the hearing to October 11th. In so doing the court substantially stated that any application for a further continuance would receive consideration at that time. On the last-named date, when the matter came on for further hearing, no request whatever for further continuance was made, and there was no suggestion that further time was desired to procure any affidavits. Neither on that day nor before was there any suggestion as to the name of any witness who would give newly discovered evidence, or the nature of any such evidence. Counsel for defendant stated that they had no affidavits to present, and the motion was submitted for decision. It is now claimed that the court erred to the prejudice of defendant in granting only 6 days instead of 10 within which to present his motion for a new trial. Under the circumstances it is clear that in the absence of any request for a further continuance on October 11, 1917, defendant cannot be heard to complain of the action of the trial court in this regard.

[5] On October 19, 1917, after the verdict of sanity, hereinafter discussed, was rendered, the trial court again made an order denying the motion for new trial. The suggestion of counsel, made after the making of this order, to the effect that he could produce, if given the opportunity, newly discovered evidence going to the question of the sanity of defendant at the time of the commission of the crime, was not accompanied by any affidavit whatever, and the trial court was not called upon to pay any attention whatever thereto.

On October 5, 1917, after the making of the motion for a new trial, on the mere suggestion of counsel for defendant that there was some doubt as to the present sanity of the defendant, the trial court ordered the question of his sanity to be submitted to a jury. Pen. Code, §§ 1191, 1368, et seq. The record is somewhat uncertain as to whether it was the opinion of the court that there was doubt as to defendant's sanity, but we will assume that this was so in view of its order. The court fixed October 8, 1917, for the commencement of the insanity hearing, and on that day the trial was commenced. On October 19, 1917, the trial was concluded, the jury rendering a verdict that defendant was sane. Thereupon the motion in arrest of judgment was denied, and judgment pronounced. Many errors are alleged in connection with this insanity investigation.

[6] It may properly be stated at the outset that the sole object of this proceeding, in view of our law, was to determine, not whether the defendant was insane at the time of the commission of the crime of which he had been convicted, but whether, when arraigned for judgment, he was then insane, within the meaning of our statute providing that "a person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane" (section 1367, Pen. Code), and further that, "if * * * when defendant is brought up for judgment on conviction a doubt arises as to the sanity of the defendant the court must order the question as to his sanity to be submitted to a jury; and the * * * pronouncing of the judgment must be suspended until the question is determined by their verdict." Section 1368, Pen. Code. By subsequent sections it is provided that if the jury finds him insane, the judgment must be suspended "until he becomes sane," the defendant committed to a state hospital until that time, and that when he becomes sane he shall be brought to judgment. Sections 1370, 1372, Pen. Code. If the jury finds him to be sane, judgment must be pronounced. Section 1371, Pen. Code. As is shown in Re Buchanan, 129 Cal. 330, 61 Pac. 1120, 50 L. R. A. 378, these provisions are simply a statutory affirmation of common-law rules forbidding proceedings against one who is mentally deranged to such an extent as to be incapable of appreciating his situation and making any legal defense that he may have. In the case just cited this court approved the test declared in Freeman v. People, 4 Denio (N. Y.) 9, 47 Am. Dec. 216, as follows:

"If, therefore, a person arraigned for a crime, is capable of understanding the nature and object of the proceedings * * * against him; if he rightly comprehends his own condition in reference to such proceedings, and can conduct his defense in a rational manner, he is, for the purpose of being tried (or, as here, for the purposes of judgment) to be deemed sane, although on some other subjects his mind may be deranged or unsound."

[7] Complaint is made that the trial court refused to allow counsel for defendant sufficient opportunity to procure evidence as to

defendant's mental condition. As we have said, on October 5th the court fixed October 8th for the commencement of the insanity trial, and the trial was not concluded until October 19th. We have read most carefully the record of this trial, and believe it plainly apparent therefrom that every reasonable opportunity was given counsel to make good by proof his suggestions that defendant was insane. It is perfectly apparent from the record that the attitude of the learned trial judge was such that at no time during the trial would he have refused to give counsel an opportunity to produce any substantial evidence bearing on the question of the defendant's then mental capacity, if a proper showing of the existence of such evidence was made. We say this notwithstanding a cursory remark of the judge in one of the numerous colloquies with counsel to the effect that "it is true, we cannot send East and get it" (evidence). At no time was there any proper showing of the existence of any such evidence on the part of any one outside of the state, which could be obtained. The full extent to which counsel went in this behalf was to exhibit a telegram received from the superintendent of the insane asylum at Madison, Ind., in response to an inquiry sent him by counsel on October 6th, saying:

"Lawson defective beyond doubt, unable to give full statement from memory. You consult prison authorities Michigan City."

This statement fell far short of being one to the effect that Lawson's mind was in such a condition that he could be held to be insane within the meaning of the laws declaring an insane person incapable of committing crime, and precluding the pronouncing of judgment upon an insane person. No formal application for the taking of the testimony of the superintendent was made to the court, nor was there at any time any application for a continuance based upon affidavit, upon the ground that if a continuance was granted any specified testimony could probably be obtained. It was quite apparent that counsel had no knowledge of any expert witness who would give evidence favorable to defendant upon the issue to be submitted, and that he was simply groping in the dark, hoping that something might some time be found to assist the defendant. We have no disposition to criticize counsel for his earnest effort to indefinitely postpone execution of the judgment, but we are satisfied that there was no error in the action of the trial court in this regard.

[8] The evidence on the question of insanity was amply sufficient to support the conclusion that the defendant was sane, within the meaning of the law applicable. That he was not perfectly poised mentally may be freely conceded. Such, however, is not the test. There was no substantial showing to the effect that his mind was in such a condition that he did not rightly comprehend his own condition with reference to the proceedings against him that he had been convicted of a crime punishable by death, and was before the court for the purposes of judgment on that conviction, or that he was then unable to present in a rational manner any defense that he might have, either on motion for new trial or to the pronouncing of judgment. Under the well-settled rule in this state it was incumbent on the defense to show this by a preponderance of evidence. The burden of proof was upon him.

[9] On the oral argument complaint was made of the instruction given to the jury, to the effect that three-fourths of the jury might render a verdict in such a proceeding as this. It is needless to determine as to the correctness of this instruction, in view of the fact that the record affirmatively shows that the verdict was concurred in by all of the 12 jurors.

[10] The trial court refused to allow defendant more than 4 peremptory challenges in impaneling a jury for the insanity investigation. Based upon the provision of the Penal Code relating to the formation of trial juries in criminal cases, it is claimed that the defendant was entitled to 20 peremptory challenges, section 1070 providing as follows:

"If the offense charged be punishable with death, or with imprisonment in the state prison for life, the defendant is entitled to twenty and the state to ten peremptory challenges. On a trial for any other offense the defendant is entitled to ten and the state to five peremptory challenges."

Manifestly these sections have reference solely to trials for criminal offenses, by which the question of the guilt or innocence of a party charged with a public offense is to be determined. The proceeding here did not in any way involve the question of the guilt or innocence of the defendant of a criminal offense. That question had been determined on the trial, which had resulted in a verdict of guilty. In this proceeding insanity could not be set up as a defense to the charge of murder, but could be urged solely as a reason why further proceedings on the verdict should be stayed pending a restoration to sanity. The proceedings provided by the Penal Code for the determination of the question of present sanity in order to determine whether a defendant possesses sufficient mental capacity to be tried, or having been tried and convicted, to be adjudged to punishment (section 1367 et seq.), or, having been adjudged to suffer death, is sane within the meaning of our law precluding execution of such a judgment upon an insane person (section 1221 et seq., Pen. Code), are special proceedings of a civil nature. They simply provide a lawful method by which it may be ascertained whether the defendant in a criminal cause is so afflicted mentally that the proceedings against him shall be suspended until he is in condition to be tried, or adjudged to punishment or executed. The sole object is to determine his present mental status. Is he now an insane person? Such

an investigation has none of the elements of a criminal proceeding. The Legislature has seen fit to provide that when such a question sufficiently arises with reference to a defendant in a criminal proceeding it shall be submitted to "a jury" for determination, and the criminal proceeding arrested until a determination is had. This investigation is entirely collateral to the criminal proceeding. There is nothing in the provisions relative thereto that makes applicable the provisions of the sections of the Penal Code relative to the formation of juries for the trial of persons on charges of having committed a crime, and we are satisfied that they have no application.

As to certain rulings of the trial court, counsel have contented themselves with simply stating in their brief that the court erred, without giving any reason whatever for the claim. We have examined the record as to these, and find no warrant for holding that prejudicial error was committed in any of these rulings. This observation refers to the alleged errors of law numbered 2, 3, 4 and 10.

[11] Having first clearly and at some length correctly instructed the jury that the issue before them was not whether the defendant was insane at the time of the commission of the alleged crime, but whether he was now insane, and as to what constituted the test of insanity by which they were to be governed, the court went on to tell them what the standard of responsibility would have been on the trial for murder, ending this portion of the charge by saying:

"When a verdict of guilty is rendered against a defendant charged with crime, such verdict establishes beyond question, so far as these proceedings are concerned, the sanity of the defendant at the time of the commission of the acts charged against him. And the test for your guidance here is as first above stated."

The statement as to what would have been the standard of responsibility on the trial for murder was, of course, inapplicable in the investigation then being had, but we cannot see that it could have been prejudicial. The jury were plainly enough told that such was not the test by which they were to be governed. The concluding sentence of the portion quoted clearly enough referred to the proper test fully, accurately, and emphatically stated, and there could have been no misunderstanding on the part of the jury as to that. The remainder of the quoted portion, if taken as meaning that in determining the question of present sanity the jury must accept it as established by the verdict that the defendant was in fact sane at the time of the commission of the alleged crime, was, of course, incorrect. The verdict of guilty proved nothing at all in so far as the issue of insanity to be determined by this jury was concerned. It is clear from the context that the court did not intend any such meaning, but that, having stated the standard of responsibility that would have existed on the trial for murder if the defense of insanity had been made, was simply explaining that this jury had nothing to do with that question, i. e., the question whether the defendant was not guilty of the offense of which he had been convicted by reason of insanity, as the question of his guilt or innocence was settled by the verdict on the murder trial. Consideration of the instructions bearing on this matter has satisfied us that the jury could not have been misled by the language we have quoted into failing to give due weight to evidence offered by defendant and admitted by the court to show insanity prior to the commission of the crime, or into regarding the verdict on the murder trial as evidence of defendant's sanity at that time.

[12] The instruction that a plea of insanity was sometimes resorted to in cases where aggravated crimes have been committed under circumstances which render hopeless all other means of evading punishment, and that while such a defense ought to be viewed as a full bar to punishment after conviction when satisfactorily established, it should be examined with great care lest an ingenious counterfeit of the malady furnish protection to guilt, is a cautionary instruction that has been constantly given on trials for criminal offenses in this state, and it has never been held to be cause for reversal. It was equally applicable in this proceeding.

[13] The instruction that "it is a presumption of law that an unlawful act was done with an unlawful intent" had no proper place in the charge, but it was a mere abstract statement of law that could not have been prejudicial to the defendant.

We are unable to attribute to the question asked by the trial judge of Mr. Murphy, a witness for the defendant, as to the apparent attitude of the defendant regarding the shooting, any prejudicial effect whatever. The same is true as to certain observations by the trial court in colloquies with counsel as to the manner in which counsel for defendant had conducted the case on the trial, and one that "There were times when he (defendant) would show animation in what was going on; put his elbows on the table and look at the jury; apparently be sane entirely." The jury were emphatically instructed that if the judge in colloquy with counsel had suggested that certain facts exist or have been proven, they should disregard such suggestions, and be governed solely by the evidence actually introduced, and there is nothing in the circumstances to warrant us in concluding that the jury may have been in any degree influenced by any statement by the trial judge to counsel.

[14] The evidence given by the defendant on the trial was admissible in evidence on this proceeding as tending to show his mental condition at the time of the trial, a matter material to the question of his present sanity. The objections made by defendant

to this go solely to the question of the weight to be accorded to the same.

There is no other matter requiring discussion. We have examined the whole record, and find nothing indicating that defendant did not have a fair trial on the question of his present sanity.

The judgment and order denying a new trial are affirmed. The other appeals are dismissed.

We concur: SHAW, J.; SLOSS, J.; WILBUR, J.; LORIGAN, J.; MELVIN, J.; RICHARDS, Judge pro tem.

---

178 Cal. 746

## PANAMA-PACIFIC INTERNATIONAL EXPOSITION CO. v. PANAMA-PACIFIC INTERNATIONAL EXPOSITION COMMISSION OF CALIFORNIA. (S. F. 8513.)

(Supreme Court of California. Aug. 12, 1918. Rehearing Denied Sept. 10, 1918.)

1. STATES ⊂=123—USE OF FUNDS.
The provision for a contribution by the state to the exposition made by proviso to Const. art. 4, § 22, as amended in 1910, and the statute and contract in pursuance thereof, must be construed most favorably to the state.
2. STATES ⊂=93—CONTRACTS.
The authority of the Exposition Commission created by the proviso to Const. art. 4, § 22, to make contracts securing to the state a proportionate share in the returns from the exposition, is a qualified power beyond which the commission cannot go in so far as such qualifications are favorable to the state.
3. STATES ⊂=93—CONTRACTS.
The Exposition Commission created by the proviso to Const. art. 4, § 22, did not have power to make a contract which does not entitle the state to share "proportionately with the contributors" to the exposition in the returns, or a contract which would give the state less than its proportionate share.
4. STATES ⊂=123—USE OF FUNDS.
The only contributors to be taken into account in determining the state's proportionate share in the returns from the exposition provided for by the proviso of Const. art. 4, § 22, are those who are themselves entitled to share, those who may lawfully share "with" the state and the exposition company in the returns.
5. STATES ⊂=100—CONTRACTS.
Clause in the contract between the state Exposition Commission and the exposition company requiring all contributions to be counted in ascertaining the proportion, and all of them to be excluded in the division except those of the state and of the company, is void as contrary to the proviso to Const. art. 4, § 22.

Angellotti, C. J., and Sloss, J., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Panama-Pacific International Exposition Company against the Panama-Pacific International Exposition Commission of the State of California. From judgment for plaintiff, defendant appeals. Reversed.

Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for appellant. Brittain & Kuhl, of San Francisco, for respondent.

SHAW, J. This is an agreed case submitted to the superior court for the purpose of obtaining a determination of the proportion to which the state is entitled of the surplus of assets remaining for distribution on the final settlement of the affairs of the Panama-Pacific International Exposition. The length of the names of the parties and their similarity tends to verbosity and confusion. For the sake of brevity and clearness, we will hereafter call the plaintiff the company and the defendant the commission. The company claims that the state's share of such surplus assets is only five-sixteenths thereof. The commission insists that the state is entitled to five-elevenths thereof. The court below decided that the state's share was only five-sixteenths and gave judgment accordingly. From this judgment the defendant appeals.

For the purpose of aiding in carrying on said exposition, the company, through the subscribers for its stock, contributed, or agreed to contribute, the sum of $6,122,450, of which the sum of $5,594,317.59 has been actually paid in; the state of California contributed out of the state Panama-Pacific International Exposition fund the sum of $4,941,556.26; and the city and county of San Francisco contributed $5,000,000. For the purposes of the decision as to the proportion, the agreement of submission states that the contributions of said parties may be deemed to be $6,000,000 by the company, $5,000,000 by the state, and $5,000,000 by San Francisco, making $16,000,000 in all. The solution of the case depends on the meaning of the Constitution relating to the state contribution, the statute passed in pursuance thereof, and the contract between the plaintiff and the defendant under which the contribution was made.

Section 22 of article 4 of the Constitution provides that:

"No money shall ever be appropriated or drawn from the state treasury for the purpose or benefit of any corporation, association, asylum, hospital, or any other institution not under the exclusive management and control of the state as a state institution, nor shall any grant or donation of property ever be made thereto by the state."

[1] The authority for the contribution of the state to the exposition is found in a proviso added to this section, by an amendment adopted in the year 1910. This proviso declares that a state tax should be levied to raise a fund of $5,000,000 to be used in establishing, maintaining, and supporting the Panama-Pacific International Exposition, to be given over for that purpose to a commission consisting of the Governor and four other persons to be appointed by him, who should have the exclusive charge and control of the fund. It further declared that the Legislature should pass all laws necessary to carry out its provisions, including the times, manner, terms, and conditions at and upon which such moneys could be drawn

and the disposition to be made of any of the fund or property obtained therewith, remaining at the close of the exposition. The proviso concluded as follows:

"The commission herein created is authorized and directed to make such proper contracts with the Panama-Pacific International Exposition Company, a corporation organized under the laws of the state of California on the 22d day of March, 1910, as will entitle the state of California to share proportionately with the contributors to the said Panama-Pacific International Exposition in the returns from the holding of said exposition at the city and county of San Francisco."

In matters of this character all intendments are in favor of the sovereign power. The rule of interpretation is that if any ambiguity exist in the language of the proviso or of the laws or contracts enacted and entered into in pursuance thereof, because of uncertainty in the language or of conflicting provisions in the different parts thereof, and two or more interpretations equally reasonable are deducible therefrom, that one is to be taken which is favorable to the state, rather than either of those which are against it.

[2] Where a public commission is granted power over property of the state, and the language of the grant contains terms which qualify the power, the qualifications are to be construed as conditions beyond which the grantee of the power cannot go, in so far as such qualifications are favorable to the state. The last clause of the proviso must be interpreted by the application of these rules.

[3] The commission is directed to make "proper contracts" for a certain purpose; that is, such contracts "as will entitle the state of California to share proportionately with the contributors to the said Panama-Pacific International Exposition in the returns from the holding of said exposition." This language is mandatory (see article 4, § 22), and it requires that such contracts shall be of a character which will secure the object expressed. It limits the power of the commission to that extent. The commission did not have power to make a contract which does not entitle the state to share "proportionately with the contributors," or a contract which would give to the state less than its proportionate share of the return. The company is, of course, entitled to all the returns from the exposition, except so far as the law or its own contracts may have otherwise provided. It is agreed that San Francisco donated its $5,000,000 outright, without exacting the condition that it should have any share of the returns. It was a contributor, but it was not a contributor entitled to a share or interest in the returns. Hence, neither the state nor the company is required to share the surplus with San Francisco. The proviso above quoted makes it necessary as a condition of the proposed donation by the state that the state should share "proportionately with the other contributors" in the surplus. If one person shares "with" another in a fund, both must receive a part of it; otherwise there is no sharing between them, or of one with the other. One cannot share with another when the other neither takes, nor is entitled to take, any part whatever thereof.

[4] If one contributor is not entitled to any share and all the contributions are counted, in ascertaining the proportion, and all the returns except those due to the state by that proportion are paid over to the one other contributor who is entitled to share, the state would be sharing with a part of the contributors, but it would not be sharing with those contributors, "proportionately," and would not be sharing at all with the excluded contributor. It seems necessarily to follow that the only contributors to be taken into account, in determining the proportionate share of the state, are those who are themselves entitled to share, those who may lawfully share "with" the state and the company in the returns. This conclusion is also indicated by a consideration of other attending facts and circumstances. The company was a stock company with an authorized capital of $10,000,000. Its contribution was to be made wholly with money obtained by sales of its capital stock. Its stockholders were the real contributors. When the constitutional amendment was framed and adopted, it was expected that many persons would subscribe and pay for stock of the company, and that by that means a large part of the fund needed for carrying on the exposition would be raised, as, in fact, it was. These subscribers, and they alone of all contributors, would be entitled by law to the surplus returns as dividends. It is reasonable to suppose that, in framing the clause in the Constitution securing to the state a proportionate share in the returns, these things were in mind, and that the only object was to place the state on an equal footing with the stockholders, in the event that there should be a surplus to divide, and that it was these contributors that were referred to as those with whom the state should share.

[5] The statute passed by the Legislature in pursuance of this proviso is not substantially different from the provision of the Constitution. It empowers the commission to make contracts to insure to the state its proportionate share in the returns from the exposition, and to do all things deemed advisable to enable the state to receive such proportionate share. Stats. 1911, p. 273. The contract executed by the commission with the company also provides, substantially in the language of the Constitution, that the state of California shall be entitled to share proportionately with the contributors to the exposition in the returns from the holding of said exposition. But it concludes with the specific provision that:

The state "shall receive in any distribution of property, dividends or surplus and out of any remaining property or assets of said exposition, an amount bearing the same proportion to the total amount of said assets, property, divi-

dends or surplus as the total contributions of the state of California to the exposition shall bear to the sum total of all contributions from all sources to said exposition."

This passage, of course, would require all the contributions to be counted in ascertaining the proportion, and all of them to be excluded in the division except those of the state and of the company. The state would be entitled, in that event, to only five-sixteenths of the total surplus; and, as the company is entitled by law to all the remainder, it would follow that the state would receive five-sixteenths, while the company would receive eleven-sixteenths. The company and the state would not by this method "share proportionately" in the returns, according to their contributions, nor proportionately according to all the contributions. The state would not be sharing with all the contributors, proportionately or otherwise, nor would the company. The effect of this clause of the contract was directly contrary to the provisions of the Constitution as we have interpreted them, and the consequence is that it must be declared void, on the ground that the commission exceeded its power in making it. Our conclusion is that the state is entitled to only five-elevenths of the net returns.

The judgment is reversed.

We concur: WILBUR, J.; LORIGAN, J.; MELVIN, J.; RICHARDS, Judge pro tem.

We dissent: ANGELLOTTI, C. J.; SLOSS, J.

178 Cal. 657

## PEOPLE v. FOWLER. (Cr. 2136.)

(Supreme Court of California. Aug. 3, 1918.)

1. INDICTMENT AND INFORMATION ⊂=110(17) —MURDER—STATUTORY LANGUAGE.

An indictment for murder is sufficient if it charges the crime in the language of the statute, and it need not set forth the manner and means by which the alleged murder was committed.

2. HOMICIDE ⊂=130—SUFFICIENCY OF INDICTMENT—MURDER IN FIRST DEGREE.

An indictment for murder in the first degree, alleging that defendant did "of his malice aforethought" kill and murder, etc., sufficiently stated that crime was committed with deliberation and premeditation.

3. JURY ⊂=131(15)—EXAMINATION OF JURORS —SCOPE.

An objection to a question by defendant of a juror on voir dire, "Could you give the same credit to his testimony (defendant's) were he to go upon the stand, his interest in the result being taken into consideration, that you could give to any other witness?" was properly sustained.

4. CRIMINAL LAW ⊂=532(1) — CONFESSIONS — ADMISSION IN EVIDENCE.

When the question is raised whether confession was voluntarily made, it is duty of judge to hear evidence on the subject before allowing proof of such confession, and to admit the proof only in the event he finds it to have been voluntary.

5. CRIMINAL LAW ⊂=1158(4) — ADMITTING CONFESSION IN EVIDENCE — QUESTION FOR COURT.

Where evidence was conflicting on whether confession was voluntarily made, reviewing court will uphold decision of trial judge in admitting confession in evidence.

6. CRIMINAL LAW ⊂=781(5)—CONFESSIONS—INSTRUCTIONS.

In criminal case, where evidence as to whether confession was voluntarily made is not positive and certain, it is error to refuse to instruct jury that they have a right to reconsider evidence given upon the question; the court having admitted the confession.

7. CRIMINAL LAW ⊂=824(5)—INSTRUCTIONS—REQUEST—CONFESSION.

Where evidence on question of whether a confession was voluntarily made was not positive and certain, failure to instruct jury that they might reconsider evidence on that point was not reversible error, in the absence of a request.

8. CRIMINAL LAW ⊂=406(1), 516—"CONFESSION" DISTINGUISHED FROM "ADMISSION"—PRELIMINARY PROOF.

An admission is distinguished from a confession, whose admission depends upon preliminary proof that it was voluntarily made, by fact that the term "admission" relates to matters of fact that do not involve a criminal intent, and a "confession" is an acknowledgment of actual guilt.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Admission; Confession.]

9. HOMICIDE ⊂=151(3)—BURDEN OF PROOF—JUSTIFICATION.

Pen. Code, § 1105, providing that, when in murder case commission of homicide is proved, burden of proving circumstances of mitigation, justification or excuse, devolves upon defendant, does not by reason of an admission that he killed deceased, but did so in self-defense, throw burden upon defendant of proving justification by additional evidence; such admission not being a confession.

10. WITNESSES ⊂=226 — THREATS — SCOPE OF EXAMINATION.

In homicide case, scope of an examination concerning a previous altercation, wherein defendant made a threat, rests largely in the discretion of trial court, as enough of the circumstances must be given to enable the jury to understand the purport and purpose of the threat.

11. CRIMINAL LAW ⊂=822(6)—INSTRUCTIONS.

In a homicide case, an instruction as to premeditation to constitute murder in the first degree which omitted to state that killing must "be the result of" a concurrence of the will was cured by a statement in another part of the instruction that "the intent to kill must be the result of deliberate premeditation, and must be founded upon a pre-existent reflection, and not upon a sudden heat of passion sufficient to preclude the idea of deliberation."

12. CRIMINAL LAW ⊂=767—INSTRUCTIONS.

Under Const. art. 6, § 19, prohibiting charge with respect to matters of fact, court was authorized to state the testimony, if uncontradicted, and declare the law on any subject involved in the case.

13. HOMICIDE ⊂=5 — DEATH — INTERVENING CAUSES.

Where defendant struck deceased with intent to kill him, and left him lying in a public road in the night, the claim that death might possibly have been caused by an automobile running over the unconscious body was not sufficient to exonerate defendant.

14. Criminal Law ⊜825(3)—Instructions —Request.

In a homicide case, where Pen. Code, § 197, was read to the jury on the subject of self-defense, even though the word "mortal" in subdivision 3, is a misprint for "mutual," it cannot be contended that it was erroneous as misleading, where no request was made to explain the meaning of the subdivision.

15. Criminal Law ⊜822(8)—Instructions as a Whole.

An instruction, "In order to justify homicide on the ground of self-defense, the danger * * * must be * * * so urgent that there is no reasonable mode of escape or of preventing the death or injury except to take life, or the slayer must have reasonable grounds to believe that such is the case," was not misleading, where the other instructions relating to same subject did not require defendant, at his peril, to correctly decide that danger was urgent.

16. Criminal Law ⊜822(1)—Instructions.

All instructions relating to same subject must be considered together in determining effect of each.

17. Homicide ⊜156 — Deliberation and Premeditation—Flight.

In a homicide case where defendant was charged with first degree murder, a requested instruction "that the flight of accused does not tend to prove deliberation or premeditation" did not correctly state the law.

In Bank. Appeal from Superior Court, San Joaquin County; John Hancock, Judge.

A. O. Fowler was convicted of murder in the first degree, and, from the judgment and an order denying his motion for new trial, he appealed to the District Court of Appeals. Such court being unable to agree, cause was transferred to Supreme Court for decision. Affirmed.

Walter F. Lynch, of Stockton, for appellant. U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., and C. P. Rendon, Asst. Dist. Atty., of Stockton, for the People.

SHAW, J. The defendant appealed to the District Court of Appeal of the Third District from a judgment of conviction of the crime of murder of the first degree, the verdict fixing his punishment at imprisonment for life, and from an order denying his motion for a new trial. The justices of that court were unable to agree, and the cause was thereupon transferred to this court for decision.

[1] 1. The information charges that at a time and place stated, the defendant did "willfully, unlawfully, and feloniously, and of his malice aforethought, kill and murder one Albert Duree, a human being, then and there being, contrary," etc. The appellant claims that the information is defective for the reason that it does not set forth the manner and means by which the alleged murder was committed. We had supposed that this objection had been so completely disposed of that it never would be raised again. Ever since the decision of People v. Cronin, 34 Cal. 200, 208, it has been the established law of this state that an indictment for murder is sufficient in this respect if it charges the crime in the language of the statute. See, also, People v. Alviso, 55 Cal. 230; People v. Hyndman, 99 Cal. 3, 33 Pac. 782; People v. Witt, 170 Cal. 107, 148 Pac. 928. There are many other cases, but it is unnecessary to cite them.

[2] Objection is also made to the form of the information on the ground that it does not state that the crime was committed with deliberation and premeditation. The statement in the information that the defendant did "of his malice aforethought" kill and murder Duree is equivalent to an averment that the act was committed with deliberation and premeditation.

[3] 2. Upon the examination of jurors on their voir dire, counsel for defendant asked a juror this question:

"Could you give the same credit to his testimony (referring to the defendant), were he to go upon the stand, his interest in the result being taken into consideration, that you could give to any other witness?"

The objection that this was not a proper question was sustained. This ruling is assigned as error. The defendant had no right to ask this question of the proposed juror. The defendant's interest in the result was only one of the things to be taken into consideration. His demeanor on the stand, his manner of testifying, the character of his testimony, his appearance and possibly other circumstances were all to be considered in determining the weight of his testimony. The juror could not answer the question properly upon the premises laid in the question. If the defendant wished to ascertain whether or not the juror had any bias against him which would prevent him from giving the defendant a fair trial, he should have gone about it in some other way.

[4, 5] 3. A statement concerning the homicide, made by the defendant in the presence of the sheriff, district attorney, and others, soon after his arrest, was taken down by a shorthand reporter, and was introduced in evidence at the trial. The defendant, assuming that it was a confession, insists that the evidence was not sufficient to show that the statement was voluntary. The claim is that the evidence shows that he was induced to make the statement by a promise that it would be better for him, and by an intimation that he would not be so severely punished, if he would make a statement of his connection with the homicide and clear it up. It is the duty of the judge of the trial court, when the question is raised whether or not a confession of the defendant was voluntarily made, to hear evidence on the subject, before allowing proof of such confession; and to admit the proof only in the event that he finds it to have been voluntary. He had the right to determine the fact from the evidence and to make a ruling accordingly. His decision of the question, where the evidence is conflicting, is subject

to the universal rule, applicable to cases on appeal, that the reviewing court will uphold the decision if there is substantial evidence to support it. Here the evidence on the subject was conflicting, and there was substantial evidence to support the conclusion that no inducements were held out to the defendant to elicit the statement that he made, and that it was a voluntary statement. Hence we cannot say that the ruling was erroneous.

[6] 4. The appellant claims that the trial court erred in failing to instruct the jury that they had the right to reconsider the evidence given upon the question whether the statement of the defendant introduced in evidence was voluntary or not. The evidence was not so positive and certain on this question that it should not have been left to the jury to reconsider the same, upon their final consideration of the case. If the defendant has properly preserved the question, and the instructions are deficient in that respect, unquestionably there was error in the proceedings below in this particular, if the statement was a confession.

[7] When the court made its ruling admitting the statement in evidence, nothing was said which could have been understood by the jury as a direction that they could not in their final deliberations reconsider the question. Nor was there anything in the instructions given at the close of the trial which purported to take this question from the jury. They were instructed that they were the judges of the value and effect of evidence and of the credibility of the witnesses. So far as the instructions were concerned the matter was left open for their consideration, but there was no instruction explicitly directing them that they could reconsider the question. A complete answer to the objection, however, assuming that the statement was a confession, is that the defendant did not request any instruction on the subject. If he was relying on such reconsideration by the jury and desired an explicit direction to them that they had the power to redetermine the same and reject the statement of the defendant as evidence, if from the evidence on the subject they believed that it was not voluntarily made, he should have asked an instruction to that effect. There are numerous decisions on similar questions holding that, where such an instruction is not asked, the defendant cannot assign the mere failure of the court to give such instruction as error sufficient for reversal. Such decisions have been made with regard to an instruction informing the jury as to the limited purpose for which a particular item of evidence was admitted (People v. Gray, 66 Cal. 276, 5 Pac. 240; People v. Collins, 48 Cal. 278; People v. Northey, 77 Cal. 631, 19 Pac. 865, 20 Pac. 129); the failure to instruct the jury that the venue must be proven (People v. Marks, 72 Cal. 46, 13 Pac. 149); the failure to instruct the jury that they could not consider the defendant's failure to testify, in arriving at a verdict (People v. Flynn, 73 Cal. 513, 15 Pac. 102); a failure to instruct that if the jury found the defendant guilty of murder of the first degree they might relieve him from the death penalty (People v. Olsen, 80 Cal. 128, 22 Pac. 125); the failure of the court to instruct the jury that they should not consider evidence which had been admitted but which, on motion of the defendant, had been stricken out (People v. McLean, 84 Cal. 482, 24 Pac. 32); the failure to give an instruction defining the meaning of the term "reasonable doubt" (People v. Christensen, 85 Cal. 570, 24 Pac. 888; People v. Ahern, 93 Cal. 518, 29 Pac. 49); the failure to inform the jury that they could find the defendant guilty of the lesser degree of a crime, when the crime includes two degrees (People v. Hite, 135 Cal. 76, 67 Pac. 57; People v. Arnold, 116 Cal. 687, 48 Pac. 803; People v. Bailey, 142 Cal. 434, 76 Pac. 49); and the failure to define the crime of larceny from the person as distinguished from larceny in general (People v. Appleton, 120 Cal. 252, 52 Pac. 582). We find no ground upon which to distinguish the case at bar from the foregoing decisions, and we think the same rule applies.

[8] A confession, in criminal law, is an admission or statement, by a person accused of a crime, to the effect that he is guilty thereof. "An admission is distinguished from a confession by the fact that the term 'admission,' in criminal matters, relates to matters of fact that do not involve a criminal intent, and a 'confession' is an acknowledgment of guilt." 2 Wharton on Crim. Ev. (10th Ed.) § 622a. The author goes on to show that the term "confession" does not include admissions of mere acts of guilty conduct, or of subordinate facts that do not constitute guilt of the offense in question, the reason being that a "confession" is an "acknowledgment, in express terms, by a party in a criminal case, of the truth of the crime charged," and that it is only with respect to confessions, thus defined, that the rule prevails that preliminary proof that they were voluntary must be made before they can be admitted in evidence. Id., § 622b. This doctrine has often been declared and enforced in this state. People v. Strong, 30 Cal. 157; People v. Dennis, 39 Cal. 637; People v. Le Roy, 65 Cal. 614, 4 Pac. 649; People v. Hickman, 113 Cal. 86, 45 Pac. 175; People v. Ammerman, 118 Cal. 32, 50 Pac. 15; People v. Miller, 122 Cal. 87, 54 Pac. 523; People v. John, 144 Cal. 286, 77 Pac. 950; People v. Weber, 149 Cal. 339, 86 Pac. 671; People v. Wilkins, 158 Cal. 534, 111 Pac. 612. The matter is well illustrated by the decision in State v. Knowles, 48 Iowa, 598. Defendant was charged with forgery of a promissory note. Evidence was given that he had admitted that he wrote the

name constituting the signature thereon. The court said:

"A confession implies that the matter confessed is a crime, and unless the defendant admitted that he wrote the name of Daniel Slack to the note with a fraudulent intent, his statement is not a confession, because he may have intended by such confession to imply that the act was done rightfully."

Also, in State v. Thomas, 135 Iowa, 735, 109 N. W. 900, where the defendant was charged with the murder of another by means of poison and had stated that he had given too much of the poison by mistake—the poison being also a medicine—the court said:

"Defendant's statement was not that he had unlawfully or wrongfully or with bad motive administered poison. The statement itself negatives any unlawful intent, and what is said in regard to the act cannot be separated from the accompanying declaration as to intent, so as to make the admission of the act itself a confession of crime."

See, also, State v. Abrams, 131 Iowa, 484, 108 N. W. 1041. The present case is almost identical with that of Owens v. State, 120 Ga. 298, 48 S. E. 21. The defendants were charged with murder, and, being confronted with the dead body of deceased, one of them said the deceased was himself to blame, and that, "We had to do it to save ourselves." It was held that this was not a confession, the court saying:

"Unless the statement of the defendant is broad enough to comprehend every essential element necessary to make out the case against him, it cannot be said to be an admission of guilt. * * * If the main fact is admitted with a qualifying exclusion of a necessary ingredient of the crime charged, the crime is not confessed. The qualification is a part of the admission, and both must be considered in interpreting the meaning of the statement. It would be manifestly unfair to hold a person criminally bound by a statement which admits the commission of an act and in the same breath legally justifies or excuses the same."

[9] On behalf of the defendant it is claimed that this rule is changed by the provisions of section 1105 of the Penal Code. This section is to the effect that when in a murder case the commission of the homicide by the defendant is proved, the burden of proving circumstances of mitigation, justification, or excuse devolves upon him, unless the proof of the prosecution tends to show that the defendant was justifiable or excusable, or that the crime only amounts to manslaughter. The section does not help the defendant. Here the admission introduced in evidence constituted the proof offered by the prosecution, and it included a statement that the killing was done in self-defense; that is, that the defendant was justifiable. It did not throw the burden upon the defendant of proving the justification by additional evidence, and no inference of guilt could be drawn from the admission as made.

The so-called confession, as set forth in the brief for the defendant, is in substance an admission of the fact that defendant killed Duree by one or more blows on his head with a club, coupled with the declaration that Duree, at the time, threatened to kill defendant; that the defendant then "thought," that is, believed, that Duree had a pistol in his hands with which he was about to shoot defendant; and that with that belief defendant struck the fatal blow. Thus the statement itself would show that the killing was done by defendant in his lawful self-defense. Such an admission, as we have shown, is not a confession of the crime, or an acknowledgment of guilt thereof. It is a declaration of innocence; that no crime was committed; that the killing of Duree was a justifiable homicide and not murder or manslaughter.

[10] 5. Evidence was given that a short time prior to the homicide the defendant and Duree had a physical altercation, during which, or immediately afterwards, the defendant made a threat of physical violence against Duree. The objection was made that the witness who related the circumstance was allowed to describe too much of the details of the fight which preceded the declaration. In matters of this sort a very large discretion is vested in the trial court. Enough of the circumstances must always be given to enable the jury to understand the purport of the threat and the purpose of the defendant in making it. Witnesses cannot always be restrained to the exact proposition sought to be elicited, especially in describing the circumstances under which a threat was made, where they consist of a preceding fight. We do not think the court below transgressed its discretion in the present case.

[11] 6. Defendant complains of an instruction which he claims violates the rule stated in People v. Maughs, 149 Cal. 263, 86 Pac. 187. The part of the instruction containing the objectionable clause is as follows:

"To constitute murder of the first degree * * * the killing must be the result of a deliberate premeditation. It must be formed upon a pre-existing reflection, and not upon a sudden heat of passion sufficient to preclude the idea of deliberation. There need be no appreciable space of time between the intent and the act of killing, and they must be as instantaneous as the successive thoughts of the mind. It is only necessary that the act of killing be preceded by a concurrence of the will, deliberation, and premeditation on the part of the slayer, and, if such is the case, the killing is murder of the first degree, no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing."

In People v. Maughs, referring to the last sentence above quoted, the court said that it should have been amended so as to read:

"It is only necessary that the act of killing be preceded by, *and be the result of*, a concurrence of the will," etc.

—and that without the italicized words the instruction was erroneous. This case was considered in People v. Ye Foo, 4 Cal. App. 739, 89 Pac. 450. The instruction there considered contained the same statement that is in the instruction here involved, that "the intent to kill must be the result of deliberate premeditation, and must be founded upon a

pre-existent reflection, and not upon a sudden heat of passion sufficient to preclude the idea of deliberation." It was there held that this cured the supposed error in the omission of the italicized words. This construction of People v. Maughs received the approval of this court upon a petition for rehearing, and it sufficiently disposes of the objection here made.

[12] 7. The court gave an instruction as follows:

"In this case it is not denied that the defendant struck the blow by which the deceased received the wound in the head, but it is claimed in his behalf that he was justified in so doing, and that the act was committed in defense of his own life, or to prevent infliction upon him, by the deceased, of great bodily injury."

The claim that the statement that "the defendant struck the blow by which the deceased received the wound in the head" is an instruction on a question of fact upon which the evidence was in conflict is not sustained by the record. The defendant himself testified that he struck Duree a blow on the head with a heavy club; that it felled him to the ground; that he then left him there unconscious, supposing that he was dead. Duree was found shortly afterwards lying as he fell, with the pistol near his hand, as the defendant had arranged it to make it appear that Duree had a pistol at the time he was struck. There was no controversy or dispute at the trial over these facts. The court was authorized to state the testimony, if it was uncontradicted, and declare the law, on any subject involved in the case. Const. art. 6, § 19. The statement was appropriate as an introduction to the instructions on the law of self-defense which immediately followed it. The argument on the point really is that it was an instruction concerning the immediate cause of the death, or one which might have been so understood by the jury. The persons who discovered the body were passing along the public road in an automobile. The body, when found, lay with the head on the grass at the roadside and the feet extending out into the macadamized portion of the roadway. The driver of the automobile, Albert Due, who lived in that neighborhood, testified that the automobile wheel ran over the shoes or feet of the body, as he passed along, and at the time he at first thought it was only a wet spot in the road. It was in the nighttime, cloudy and dark. As he proceeded, it occurred to him that it might have been a man lying there, so he turned back and found him, as above stated. There was no other direct evidence on the subject. The evidence which suggested the automobile wheel theory was that of the physician who performed the autopsy on the body. He testified that there were two severe wounds on the head, caused by the impact of some blunt instrument, and that one of them was, in his opinion, broader than would be caused with the club wielded by the defendant, and that it might have been made by the wheel of an automobile. From this it is argued that the larger wound was probably caused by the wheel of the automobile of Due, or some other person, passing over Duree's head as he lay in the public road, that this wound, and not the blow of the defendant, was the immediate cause of the death, and that the court should not have said to the jury that "the defendant had struck *the* blow by which the deceased received the wound in the head."

[13] This, of course, would have no bearing on the question of the propriety of the statement as an introduction to the subject of the law of self-defense. The question whether or not the blow was given in self-defense must be determined by a consideration of the circumstances as they existed at the time the blow was struck, without regard to any subsequent injury as the cause of death. To the suggestion that the statement in the instruction may have been understood by the jury to indicate that the court believed that the blow of the defendant was the cause of the death and not the injury, if any, from the wheel of the automobile, the answer is that in that aspect the instruction is not injurious to the defendant. There is no evidence, and no claim, that the automobile was purposely driven over the body. If it was the cause of the death, it was not a felonious cause. If it were, the defendant might not have been responsible for the homicide. It was the natural and probable result of the defendant's conduct in leaving Duree lying helpless and unconscious in a public road, exposed to that danger. This conduct of the defendant would then be criminal or not, according to the character of the blow he gave Duree. If it was done in self-defense, it would be justifiable. If it was felonious, it would be murder or manslaughter, according to the intent and the kind of malice with which it was inflicted. This, as we have said, would depend upon the circumstances attending and preceding the blow, and not on the subsequent passing of the automobile over the body. The case in that event would be similar to many that are given in the books, where the defendant was held responsible for the natural and probable result of his unlawful acts. Thus we have the case of the woman who with homicidal intent left her new-born child in an orchard covered only with leaves, in which condition it was struck by a kite and died thereof. 2 Bish. Crim. Law, § 635; Hawkins Pleas of the Crown, Curwen's Ed. p. 92. Bishop further says on this subject:

"When an injury was inflicted by a blow which in competent medical judgment rendered an operation advisable, preliminarily to which chloroform was administered, and during its administration the patient died, and but for it would not have died, it was ruled that the blow should be deemed the cause of the death within the law of felonious homicide." 2 Bish. Cr. Law, § 638, subd. 2.

On this subject Mr. Wharton says:

"Even if an injury be given by A. which puts B. in a position in which he receives a fatal wound, this is not homicide in A., unless the wound was the natural and probable result of the act." 1 Whar. Cr. Law, § 340.

And further:

"He who exposes a helpless person on a cold night when a storm intervenes cannot set up as a defense that it was a storm that did the hurt." Id., § 169.

There are numerous cases to the effect that where one with felonious intent inflicts a wound upon another, not necessarily fatal, but by reason of the poor treatment given in in good faith in the attempt to heal it death results, the person who inflicted the wound is responsible for the death, in a criminal prosecution. We cite a few of them: State v. Bantley, 44 Conn. 537, 26 Am. Rep. 486; Commonwealth v. Hackett, 2 Allen (84 Mass.) 136; Denman v. State, 15 Neb. 138, 17 N. W. 347; Kelley v. State, 53 Ind. 311; People v. Lewis, 124 Cal. 557, 57 Pac. 470, 45 L. R. A. 783.

For these reasons we conclude that the instruction was not erroneous, and that the claim that the death might possibly have been caused by the wheel of an automobile was not sufficient to exonerate the defendant from the charge.

[14] 8. On the subject of self-defense the court read the whole of section 197 of the Penal Code. Defendant claims that subdivision 3 thereof, when given without qualification, is misleading. It is there said of a person who commits homicide in defense of himself, or of some of the other persons named in that section under the circumstances there stated, that the person committing the homicide, or the person in whose behalf the defense was made, "if he was the assailant, or engaged in *mortal* combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed."

It is suggested that if one assaults another with a deadly weapon, and in such a manner as to indicate an intent to kill, and the other party resists the assault and uses a deadly weapon in his defense, the two would then be "engaged in mortal combat," and yet the assaulted party would not be required to endeavor to decline further struggle, but could rightfully stand his ground and take his adversary's life if it appeared reasonably necessary to do so in order to save his own. This doctrine has been laid down by this court in many decisions. It is necessary to cite but one, in which the law is summarized. People v. Hecker, 109 Cal. 462, 42 Pac. 307, 30 L. R. A. 403. From this it is argued that the instruction must be condemned as erroneous. But the Legislature has the power to declare what the law shall be on this subject. It has done so by this section. If our decisions have laid down a different rule, it is the decisions which must give way, and not the statute. However this may be, it cannot be disputed that error cannot be predicated upon an instruction which states the law as the Legislature has fixed it by statute and which is applicable to the case.

In explanation of the peculiar phrase, it may be observed that the word "mortal" was probably a misprint for the word "mutual." It has long been established that one who voluntarily engages in mutual combat with another must have endeavored to withdraw therefrom before he can be justified in killing his adversary to save his own life. This section was enacted in 1872, and it has remained unchanged to this time. Both before and since that time the phrase "mutual combat" has been in general use to designate the branch of the law of self-defense relating to homicides committed in the course of a duel or other fight begun or continued by mutual consent or agreement, express or implied. 3 Russell on Cri. Int. (Ed. of 1896) p. 57; 1 Michie on Hom. § 118; 1 Bishop's Cr. Law, § 870; People v. Sanchez, 24 Cal. 27; People v. Hecker, supra. Mr. Bishop laconically states the rule thus:

"Cases of mutual combat are those in which this duty of retreating to the wall oftenest appears. Two men being in the wrong, neither can right himself except by 'retreating to the wall.'"

The clause may have been intended to be limited to cases where both parties voluntarily engage in mortal combat, not to cases where one is the assailant and forces the combat on the other. That such a combat was voluntary might be implied from the word "mutual," but it is somewhat difficult to infer the fact from the word "mortal," considered by itself. In connection with the context and in view of the previously well-established rule above mentioned, perhaps the section may be construed to refer solely to voluntary combats. The court below, however, was authorized to give the instruction in the language of the statute. If the defendant desired the jury to have an exposition of its meaning so as to harmonize it with the above-stated rule, he should have asked an instruction on the subject. If it was refused, we should then be under the necessity of determining whether or not the proposed exposition was correct, but, as none was proposed, the question is not presented, and we express no opinion thereon.

[15, 16] 9. The court below gave the following instruction:

"In order to justify homicide on the ground of self-defense, or the defense of others, the danger of death or great bodily harm must be imminent, present at the time, real or apparent, and so urgent that there is no reasonable mode of escape, or of preventing the death or injury except to take life, or the slayer must have reasonable grounds to believe that such is the case."

The defendant complains of the phrase "and so urgent that there is no reasonable mode of escape." He insists that a rule so arbitrary abridges the right of self-defense

by a person unlawfully attacked. The instruction as a whole does not require that the defendant should, at his peril, correctly decide that the danger was so urgent as to afford no reasonable mode of escape other than by killing his adversary. It only requires that he have reasonable grounds to believe that such is the case. The preceding instructions directed the jury that in judging the conduct of the defendant in such circumstances they must consider the circumstances as they appeared to him when he acted on them, and judge him by what a reasonable man, so situated, would do, or might reasonably have done; that the defendant had the right to determine the necessity to kill from the appearances and the actual state of the things apparent to him, and could not be held criminally responsible for a mistake made in good faith, if the occasion was such that other judicious men would have been alike mistaken; that "if the appearances were such as to induce in him a reasonable and well-grounded belief that he was actually in danger of losing his life, or suffering great bodily harm, he was justified in defending himself, whether the danger was real or only apparent."

All the instructions relating to the same subject must be considered together in determining the effect of each. The preceding instructions qualify the one complained of, and in connection with them it means only this: That if the circumstances as they appeared to the defendant would have induced a reasonable man, so situated to believe that there was a reasonable mode available to him to escape from danger of death or great bodily harm, the danger thereof would not be then "imminent," and the killing of Duree at that moment would not be justifiable. So understood, the instruction is correct.

[17] 10. The court refused to give the following instruction asked by the defendant:

"The jury are instructed that the flight of the accused does not tend to prove deliberation or premeditation on his part in killing the decedent, Albert Duree."

In support of his claim that this instruction is correct, appellant cites State v. Foster, 130 N. C. 666, 41 S. E. 284, 89 Am. St. Rep. 876, and Commonwealth v. De Fellippis, 245 Pa. 612, 91 Atl. 1059. In the Foster Case the defendant admitted guilt of murder of the second degree. The court there held that flight did not tend to prove deliberation or premeditation, and could not be considered in determining whether or not the defendant was guilty of murder of the first degree. The case was not by any means a well-considered case, and it seems to be contrary to all other authority on the general subject. In the De Fellippis Case the court held the contrary, and approved an instruction to the effect that flight was a circumstance to be considered, in connection with other evidence, in determining the degree of guilt, on a charge of murder of the first degree. And see State v. Smith, 106 Ga. 673, 32 S. E. 851, 71 Am. St. Rep. 286, where it is said that flight is a circumstance to be considered in determining the guilt of the defendant of a charge of murder, though not of itself sufficient to establish guilt. In People v. Ngow, 54 Cal. 151, 35 Am. Rep. 69, the defendant was convicted of murder of the first degree. It was held that the fact that the defendant fled was a circumstance to be considered as tending to show guilt of the crime, though not of itself sufficient to create a presumption of guilt. These authorities show that the instruction did not state the law correctly, and that the court below did not err in refusing it.

Other points are urged in the defendant's brief, but they are not of sufficient merit to deserve notice. We find no substantial error in the record.

The judgment and order are affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; WILBUR, J.; MELVIN, J.; LORIGAN, J.; RICHARDS, Judge pro tem.

---

178 Cal. 644

## McGUIRE v. MILLER & LUX, Inc.

(L. A. 4604.)

(Supreme Court of California. Aug. 2, 1918. Rehearing Denied Aug. 29, 1918.)

1. MASTER AND SERVANT ⟹408 — INJURIES TO SERVANT — NEGLIGENCE — QUESTION FOR JURY.

Though defendant's tractor oiler was negligent in inserting his hands among moving parts to clean oil nipples, in view of his want of experience, his duty to oil machine, and direction of engineer, his superior, to go ahead and do best he could, question of degree of his negligence, within the meaning of the Roseberry Act, was for jury.

2. MASTER AND SERVANT ⟹286(25) — INJURIES TO SERVANT—QUESTIONS FOR JURY.

Whether defect in oil nipples of tractor was one which company should have discovered in exercise of reasonable care, even before engineer's attention was called to it by oiler, who was injured while attempting to clean nipples, *held* for jury.

3. MASTER AND SERVANT ⟹286(26)—INJURY TO SERVANT—REPAIRS.

Whether employer should have repaired defect in oil nipples of tractor before intrusting the cleaning of such nipples to plaintiff, an oiler, *held*, a question of fact for the jury.

4. MASTER AND SERVANT ⟹258(6)—INJURIES TO SERVANT—SUFFICIENCY OF COMPLAINT.

A servant's compliant for injuries, alleging negligence on part of defendant company's engineer, and inferentially and by way of recital averring company's negligence caused injuries, sufficiently alleged company's negligence as against general demurrer.

5. APPEAL AND ERROR ⟹882(7) — HARMLESS ERROR—RULING ON CROSS-EXAMINATION IN DEPOSITION.

In servant's action for injuries, errors in admitting over employer's objection answers to in-

terrogatories in deposition of employer's engineer on cross-examination by counsel for employer *held* not sufficiently prejudicial to employer to justify reversal of judgment for servant; form of interrogatory which employer itself had propounded leading to error.

Department 1. Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Action by Fremont McGuire against Miller & Lux, Incorporated. From judgment for plaintiff, and an order denying its motion for new trial, defendant appeals. Affirmed.

Edward F. Treadwell, of San Francisco, for appellant. Thomas Scott and J. R. Dorsey, both of Bakersfield, for respondent.

RICHARDS, Judge pro tem. This is an appeal from a judgment in plaintiff's favor in an action for damages for personal injuries and from an order denying the defendant's motion for a new trial. The action was originally commenced in the superior court of the county of Kern. It was removed to the United States District Court upon application of the defendant, Miller & Lux, Incorporated, a Nevada corporation, but was subsequently remanded to the court and county in which it had been commenced for trial. The defendant Livingston, joined with Miller & Lux, Incorporated, as a defendant, for the reason that he was a coemployé of the latter with plaintiff, and as such was in charge of the tractor in connection with which the plaintiff received his injuries, was never served with process and did not appear. The defendant Miller & Lux, Incorporated, answered, denying negligence and pleading contributory negligence on the part of the plaintiff. The cause was tried before a jury. At the conclusion of the plaintiff's case the defendant moved for a nonsuit, which motion was denied. The defendant offered no evidence, and the case went to the jury upon the plaintiff's proof; whereupon the jury returned a verdict in plaintiff's favor, fixing his damages at the sum of $5,000, for which judgment was entered. From this judgment, and from the order denying its motion for a new trial, said defendant prosecutes this appeal.

The facts essential to a determination of the main questions presented upon this appeal are as follows: The accident out of which the plaintiff's injuries arose happened on January 15, 1912, and the case therefore comes within the provisions of the Roseberry Act (Stats. 1911, p. 796). The plaintiff had entered the employ of the appellant about 2 months before the accident. He had been raised on a cattle ranch, was about 24 years old, and prior to the time of his said employment by the defendant had little experience with machinery. He was assigned to work as an oiler on a caterpillar tractor, which was being used by the defendant at the time of the plaintiff's injuries in transporting products from place to place. Its machinery was rather intricate, and its operation required the services of a mechanical engineer and of an oiler when in use. The codefendant Livingston was the engineer in charge of the machine, from whom the plaintiff was instructed to take his orders. The duties of the plaintiff required him to keep all portions of the machine properly lubricated, and in order to do this it was necessary at times for him to walk by the side of the tractor when it was in motion, applying the oil to its parts as required. On the day before the accident the plaintiff noticed that certain oil nipples through which it was his duty to lubricate the machine had become loose and defective, and informed the engineer in charge of this fact, and that by reason thereof they were failing to supply the machine with oil. The plaintiff was told by the engineer:

"That he would fix them as soon as he could get around to it, it might be a day or so, and to go ahead and do the best he could."

It appears to have been essential that these oil nipples should be kept in place and condition to constantly feed oil to the working parts of the moving machine. On the following day, while the tractor was in action hauling grain from Buttonwillow, the oil nipples again got out of place and order; and the plaintiff, noticing that they were out of place and so clogged as not to be feeding their oil to the moving tractor, undertook to clean them temporarily so that they would function, and to do this while he was walking alongside of the moving machine. In order to clean these nipples he had to reach in a foot or so among the moving parts of the machine, and was in the act of doing this, holding the nipple with his right hand and the wire with which he was trying to open it up with his left, when his jumper sleeve was caught by a moving key, and his hand dragged in between moving parts of the machine and injured as alleged in the complaint. The engineer knew that the plaintiff was accustomed to oil the machine walking along beside it while it was in motion, but is not shown to have known that the plaintiff was doing or attempting to do the particular acts which caused his injuries.

[1] The first contention on the part of the appellant is that the plaintiff upon his own case has shown himself to have been guilty of such gross negligence that as a matter of law he was not entitled to recover, notwithstanding the provisions of the Roseberry Act. We cannot give our concurrence to this contention. It was the duty of the plaintiff to see to it that the working parts of this ponderous and somewhat intricate machine were kept at all times, while it was in action, properly supplied with oil. It is sufficiently shown that it was customary, if not compulsory, that this duty should be done while the oiler was walking alongside of the machine and while it was in motion. He had become aware of the defective oil nipples, which,

when they got out of position and became clogged with dust, prevented the oil from being properly fed to the moving parts of the machine. He had called the attention of his superior to these defects, and was directed by him "to go ahead and do the best he could." He was endeavoring to obey that direction when his injuries occurred. Conceding that it may have been an act of negligence on his part to have inserted his hands among the moving parts of the machinery in the manner he did, still in view of his past experience, or rather want of experience, in respect to intricate machinery, and in view of his particular duties and the usual manner of their performance, and in view of the direction of his superior "to go ahead and do the best he could," we think the question of the degree of the plaintiff's negligence, if any, was a question of fact for the jury. This view is fully supported by the following authorities: Anderson v. Seropian, 147 Cal. 201, 81 Pac. 521; Lonnergan v. Stansbury, 164 Cal. 488, 129 Pac. 770; Diehl v. Swett, etc., Co., 14 Cal. App. 495, 112 Pac. 561; Great Northern R. Co. v. McDermid, 177 Fed. 105, 100 C. C. A. 525.

[2, 3] A like observation applies to the second contention of the appellant, to the effect that the plaintiff had not made out a case of negligence which as a matter of law entitled him to go to the jury. The machine was admittedly defective in the parts with which the plaintiff was immediately dealing at the time of his injuries. Whether the defect was one which the defendant, through its engineer in charge of its operation, should have discovered in the exercise of reasonable care even before the latter's attention was called to it by the plaintiff, and should have remedied before intrusting the plaintiff with duties which required him to deal directly with the defective parts of the machine, and whether, after the plaintiff had informed the engineer of the defect, it was or was not the duty of the latter to have cured it before again taking the tractor out upon the road, and whether or not his direction to the plaintiff "to go ahead and do the best he could" did not amount to an assumption on behalf of his principal of full responsibility for the further use of a defective appliance are essentially questions of fact, which the trial court correctly determined should be passed upon by the jury, in denying the defendant's motion for a nonsuit.

[4] The appellant urges that the complaint fails to state a cause of action, in that, while it alleges negligence on the part of the appellant's engineer and codefendant in respect to the failure of the latter to repair and keep in repair the tractor, it does not directly aver that the appellant was negligent in these respects. While the complaint is not a model of pleading, it does inferentially and by way of recital aver that the appellant's negligence caused the plaintiff's injuries, and we think does this sufficiently to escape a general demurrer; and as to the defendant's special demurrer it does not direct attention to this specific defect.

[5] The next contention of the appellant is that the court committed certain errors in admitting over the defendant's objection the answers to certain interrogatories contained in the deposition of its codefendant Livingston. This deposition was taken at the instance of the plaintiff, and the interrogatories in question occurred therein in the cross-examination of the deponent by counsel for appellant. Upon the trial the plaintiff read in evidence the direct interrogatories and their answers contained in said deposition. The defendant and appellant herein then announced that it would not introduce its cross-examination; thereupon the plaintiff, over the objection of said defendant, read in evidence the cross-interrogatories and answers contained in said cross-examination. Among these latter interrogatories was one to which the defendant urged the specific objection that the question called for the conclusion of the witness, and this being overruled, and the answer read, moved to strike out such answer, which motion was denied. The rulings of the court in both respects are now assigned as error.

Conceding, for the sake of argument, that the question and answer were improper, and the rulings of the court thereon error, it must be admitted that these were errors into which both the plaintiff and the court had been led by the form of the interrogatory which the appellant itself had propounded. This being so, it should be made very clear that the errors were so gravely prejudicial as to have materially affected the verdict; but no such degree of prejudice appears. The matter involved in the question was one which the jury itself could have determined as well as the witness, with all of the physical facts of the case before it, and which doubtless it did determine from such facts, regardless of the conclusion of the particular witness. We think, therefore, that the error, if any, was not sufficiently prejudicial to justify a reversal of the case.

As to the appellant's criticisms of certain of the instructions of the court, neither argument nor authority are offered in their support, but upon an examination of the record we are satisfied that the jury was fairly and fully instructed as to the law of the case.

Judgment and order affirmed.

We concur: SLOSS, J.; SHAW, J.

178 Cal. 584

SHERMAN v. HARLEY et al. (L. A. 4575.)

(Supreme Court of California. July 30, 1918.)

1. CORPORATIONS ⊂=232(1)—SUIT BY CREDITORS—LIABILITY OF STOCKHOLDERS.
When at the inception of its enterprise a corporation issues its stock for a consideration in money or property of admitted value less than the par value of such stock, the subscribers are liable for the unpaid portion of the subscription.

2. CORPORATIONS ⊂=232(1) — SUIT BY CREDITORS—LIABILITY OF STOCKHOLDERS.
One who extends credit to a corporation with full knowledge of the difference between the par value of stock sold and the value of the property received for it cannot charge the stockholders with any such difference.

3. CORPORATIONS ⊂=274—SUIT BY CREDITORS—LIABILITY OF STOCKHOLDERS.
Plaintiff, holder of two judgments against a corporation, was bound to apply any sums received from stockholders for the unpaid portion of their subscriptions to stock, to the payment of judgment for which they were liable.

Department 1. Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by W. H. A. Sherman against Percy L. Harley and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Stutsman & Stutsman and Maurice F. Enderle, all of Los Angeles, for appellant. William Ellis Lady, G. F. McCulloch, Geo. E. Harpham, and T. R. Wallace, all of Los Angeles, for respondents.

RICHARDS, Judge pro tem. This is an appeal from a judgment in the defendants' favor, in an action brought by plaintiff as the holder of two judgments against a corporation known as the Oleum Development Company, to recover from said defendants the several amounts claimed to be due upon their stockholders' liability for the unpaid portion of their subscription to the stock of the said corporation. The facts of the case, as embodied in the findings of the court, may be summarized as follows:

The Oleum Development Company was originally incorporated under the name of the Clark Copper Company and under the laws of the state of Arizona, but for the purpose of doing business in the state of California, with a capital stock of $1,250,000, divided into that number of shares with a par value of $1 per share. Shortly after its organization the corporation purchased six undeveloped mining claims in the county of Inyo, Cal., and as the purchase price thereof issued in one certificate the entire amount of its said capital stock as fully paid up stock, delivering the same to one H. L. Percy, as one of the owners and as trustee for the other owners of said mining claims. The court finds that the actual value of the mining claims was never in excess of $29,333, and that the directors of the corporation knew this fact at the time of their acquisition, but believed in good faith that they could be developed in a value equal to the capitalization of the corporation. Upon their attempted development this did not prove to be the case, as a result of which said Percy returned the certificate of stock, which he had received as the purchase price of said mining claims, to the treasury of the corporation, and they thereafter issued to said Percy and his associates 775,000 shares of said stock to be used as promotion stock. A little later Percy and his associates returned to the treasury 695,000 shares of this issue in order to set at rest some dissatisfaction, and there was presently issued to Percy and his associates 295,000 of these shares, for which they paid into the treasury of the corporation the sum of $40,000. Not long thereafter the corporation sold 165,000 shares of its capital stock then in its treasury to other persons, receiving therefor the sum of 10 cents per share. Out of this somewhat confused series of transactions the court finds that the corporation emerged with an issued capital stock of 460,000 shares. For 295,000 shares it had received in property and money from said Percy and his associates an amount not exceeding 37.5 cents per share, and for the remaining 165,000 shares of stock it had received the sum of 10 cents per share. All of this stock was issued as fully paid up stock by the corporation, and the defendants in this action became the owners thereof, either directly by purchase from the corporation or from Percy and his associates, or mediately through purchase in the open market. In the meantime the name of the corporation was changed to the Oleum Development Company, and under this latter name the corporation, after the above transactions had been consummated, executed and delivered two promissory notes for value received, each approximately for the sum of $10,000, one of said notes being made and delivered to a corporation known as Fairbanks, Morse & Co., and the other being made and delivered to a corporation known as the Fielding J. Stilson Company. Fielding J. Stilson himself was, it appears, the vice president and general manager of the Oleum Development Company. Subsequent to the making and issue of the said last-named note, he caused the said Fielding J. Stilson Company to transfer it to the Fairbanks-Morse Company as collateral security for the first-named note. Neither of these notes was paid, in consequence of which the Fairbanks-Morse Company assigned them to the plaintiff in this action for collection. The plaintiff thereupon brought separate actions upon each of these notes against their maker, and recovered two separate judgments thereon. Judgment upon the note given to the Fairbanks-Morse Company being for the sum of $10,269.17 and judgment upon the note given to the Fielding J. Stilson Company being for the sum of $9,785.70. Executions upon each

of these judgments being returned unsatisfied, the plaintiff commenced this action against the stockholders of the Oleum Development Company to recover the amounts alleged to be due from each upon the amount of his unpaid subscription to the capital stock of the said corporation. After the commencement of this action, and before the trial thereof, the plaintiff collected from a considerable number of the stockholders joined as defendants herein, other than the respondents herein, various sums of money upon their liability as stockholders, under section 322 of the Civil Code. Said sums of money so collected aggregated the sum of $6,970.83. The plaintiff, also during the pendency of this suit, collected from various other stockholders other than respondents herein sums aggregating $11,676.95 upon their alleged liability for the balance of their unpaid subscriptions. In making these payments to the plaintiff these stockholders did not make any direction as to how the money so paid by them should be applied upon the two judgments held by plaintiff against this corporation, nor did the corporation itself make any direction as to the application of these payments by its stockholders on account of its obligations, nor did the Fielding J. Stilson Company make any direction or request that the moneys collected on account of the judgment which was based upon the note which it had assigned to the Fairbanks-Morse Company as collateral security for the note, made directly to the corporation, be applied to the payment and satisfaction of the Fairbanks-Morse Company judgment. Accordingly the plaintiff, as these several amounts were collected from the stockholders with whom he settled, applied the same equally on account of the two judgments held by him. The foregoing facts were all found by the court upon the trial of this action, and were based upon sufficient proofs. In addition thereto, evidence was offered on behalf of the defendants, from which the court made a further finding to the effect that at the time the Fielding J. Stilson Company extended the credit to the Oleum Development Company for which the note to it was given, it was fully aware of the transactions regarding the original issue of the capital stock of the Clark Copper Company, as above set forth, and knew that the stock issued by it in the course of said transaction was issued as fully paid up stock, and knew that at the time of its issuance in payment for said unpatented mining claims they were not worth in excess of $29,333, and "that said Fielding J. Stilson Company did not give credit to the Oleum Development Company upon the assumption that its stock issued as fully paid up stock had been paid for in property equal in cash value to the par value of the stock issued therefor, or upon the assumption that said Oleum Development Company had received for the whole issue of its capital stock aught other than six undeveloped unpatented mining claims of a value not exceeding $29,333; that said Fielding J. Stilson Company knew that the defendants bought said Oleum Development Company stock as fully paid up stock." As a conclusion of law from the foregoing findings of fact the court found:

"That plaintiff herein is not entitled to recover from the defendants any sum or sums upon their liability as such stockholders to the said Oleum Development Company, under his said judgment recovered in cause No. 92740, for the reason that the said Fielding J. Stilson Company, a corporation, did not extend credit to the said Oleum Development Company, a corporation, in reliance upon the assumption that full par value had been received by the said last-named corporation for the stock it had issued as fully paid.

"That plaintiff herein, as judgment creditor under causes No. 92740 and 92741, did not have the right to apply any portion of said sum of $11,676.95, collected as above stated, upon the amount due under the judgment obtained in cause No. 92740, and that said plaintiff did not have the right to direct his said attorneys to make application of any portion of said sum so collected in satisfaction of the judgment obtained in said cause No. 92740, for the reason, firstly, that he was not entitled to recover against the stockholders under said judgment; and, secondly, that the relation of debtor and creditor does not exist between defendant stockholders of a corporation and a judgment creditor thereof in an action to enforce the payment by such creditor of the unpaid balance due upon the par value of the capital stock from such stockholders to such corporation, the right to make application by a creditor existing only where such relation exists. And the court further concludes that, because the amount so collected as above exceeds the amount due to plaintiff under his judgment in cause No. 92741, plaintiff is not entitled to recover anything in this action from said defendants, and judgment is accordingly ordered to be entered herein in favor of said defendants and against plaintiff for their costs."

Upon the basis of these findings and conclusions of law the court rendered judgment in favor of the defendants.

The appellant makes two points upon appeal from this judgment, neither of which, we think, can be sustained. The first of these is that as to the so-called Stilson note and judgment the fact that the Fielding J. Stilson Company, at the time it extended credit to and took the note of the Oleum Development Company, was fully aware of the transactions through which the corporation had caused to be issued the large portion of its capital stock as fully paid up stock for a consideration in property and value amounting to less than one-third in value of the par value of its stock heretofore issued, was insufficient to justify a conclusion of law that the plaintiff was not entitled to recover, on the Stilson note and judgment, anything from these defendants upon their stockholders' liability for the unpaid portion of their subscription.

[1] It may not be questioned that as a general rule the law is well settled in this state that, when at the inception of its enterprise a corporation issues its stock for a

consideration in money or property of admitted value less than the par value of such stock, the subscribers to such stock giving such consideration are liable to the corporation and to its creditors for the unpaid portion of the subscription. Vermont Marble Co. v. Declez, etc., Co., 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143; Herron v. Shaw, 165 Cal. 668, 133 Pac. 488, Ann. Cas. 1915a, 1265; Lucey v. McMullen, 173 Pac. 1000. The basis of this doctrine, as is well stated in the case of Herron v. Shaw, supra, is that credit is given in reliance on the presumption that full par value has been received by the corporation for the stock it has issued as fully paid.

[2] Where, however, it appears, as it does in this case, from the pleadings, the uncontradicted proofs, and the clear and positive findings of the court, that the particular creditor at the time the credit was given extended the credit with full knowledge of the difference between the par value of the stock and the value of the property received for it, an exception to the rule exists. This exception and the reason for it is well stated in 4 Thompson on Corporations (2d Ed.) § 3983, as follows:

"On principle and authority, a creditor who deals with the corporation with full knowledge of the manner in which its shares have been paid for is not defrauded by the taking of overvalued property as payment of stock, and is estopped to raise that question."

And in Morawetz on Private Corp., § 829, the rule is stated as follows:

"So if the capital of a corporation was declared to be fully paid up in consideration of specific property of less value than the amount of the capital, a person who should voluntarily deal with the company knowing the character and value of the property so transferred to the company would have no claim upon the shareholders for any further contribution of capital. By voluntarily dealing with the company under the circumstances he must be deemed to have consented to the existing arrangement; the company and its shareholders have offered to contract only upon these terms."

In 10 Cyc. 478, title Corporations, the author, in discussing this matter, says:

"On whatever theory the conclusion is based, the rule seems to be that those who extend credit to the corporation with full knowledge of the manner in which its shares have been paid for, if at all, cannot charge its shareholders with any such difference between real value and fictitious value in case of payment in property."

See, also, Finletter v. Appleton, 195 Pa. 349, 45 Atl. 1063; Deadwood, etc., Bank v. Gustin Minerva Con., 42 Minn. 327, 44 N. W. 198, 6 L. R. A. 676, 18 Am. St. Rep. 510; Easton Natl. Bank v. American Brick & Tile Co., 70 N. J. Eq. 732, 64 Atl. 917, 8 L. R. A. (N. S.) 271, 10 Ann. Cas. 84; Adamant Mfg. Co. v. Wallace, 16 Wash. 614, 48 Pac. 415; Lea v. Iron, etc., Co., 119 Ala. 271, 24 South. 28. It would thus seem that the foregoing exception to the general rule regarding the liability of stockholders for their unpaid subscriptions must be given full application to the case at bar. It follows that the Fielding J. Stilson Company had no right of recourse upon the stockholders of the Oleum Development Company; therefore, that the plaintiff, as the transferee of their note after maturity, had no such right of recovery.

[3] This brings us to the second point made by appellant, wherein it is contended that the trial court erred in refusing to approve the plaintiff's effort to apply the moneys received by him from those stockholders who settled with him on account of their alleged liability for unpaid subscriptions, equally to both of the judgments upon which this action was predicated. The total amount so received by plaintiff on account of his claim against said stockholders for their unpaid subscriptions was the sum of $11,676.95, which would have more than sufficed, had it all been applied to the Fairbanks-Morse judgment, to have fully satisfied the same; that it should have been so applied seems incontrovertible in view of our above conclusion that the holders of the Stilson note and of the judgment based thereon had no right of recovery against any of the stockholders of the Oleum Development Company on account of their unpaid subscriptions. Having no such right of action, the plaintiff could have had no right of direction of any sums paid by such stockholders to the payment of an obligation for which they were not liable, but was bound to apply the whole of such sums so received to the settlement of the obligation and judgment upon which they were liable, namely, upon the Fairbanks-Morse judgment. The court, therefore, rightly directed that such application of all of the sums so received by the plaintiff should be made; and since the effect of such application would be to fully pay the amount of said last-named judgment, and since, as we have already seen, the respondents herein were not liable upon the indebtedness of the corporation evidenced by the Stilson judgment, it follows that the conclusion of the trial court that the plaintiff was not entitled to recover upon either judgment was correct.

Judgment affirmed.

We concur: SHAW, J.; SLOSS, J.

---

37 Cal. App. 556

## MYERS v. CANEPA et al.

(Civ. 1493.)

(District Court of Appeal, Third District, California. June 17, 1918. Rehearing Denied by Supreme Court Aug. 15, 1918.)

1. APPEAL AND ERROR ⇐907(3)—APPEAL ON JUDGMENT ROLL—PRESUMPTIONS.

In an appeal on the judgment roll alone, every intendment possible is in favor of the judgment or order appealed from, and, if error does not affirmatively appear, it will be sustained, if possible.

2. APPEAL AND ERROR ⇐901 — REVIEW — PRESUMPTIONS.

Under Const. art. 6, § 4½, providing that no judgment shall be set aside for errors as to

pleading or procedure, unless after an examination of the entire case the court shall be of opinion that error has resulted in a miscarriage of justice, injury will not be presumed from error, but it must be affirmatively shown.

3. APPEAL AND ERROR ⊜917(2)—REVIEW — PRESUMPTION.

On appeal because of a failure to sustain a demurrer to a complaint which improperly united several causes of action, but in itself stated a good cause as far as plaintiff was concerned, a judgment in favor of plaintiff will be affirmed under the presumption that the case was tried on its merits, regardless of the imperfections of the complaint, which will be deemed waived.

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by George R. B. Myers against D. Canepa and another. Judgment for plaintiff, and defendants appeal. Affirmed, and rehearing denied by Supreme Court.

For opinion of Supreme Court on application for rehearing, see 174 Pac. 906.

Devoto, Richardson & Devoto, of San Francisco, and Percy S. King, of Napa, for appellants. Clarence N. Riggins, of Napa, and W. W. Kaufman and Wm. P. Hubbard, both of San Francisco, for respondent.

CHIPMAN, P. J. The cause is before us on rehearing. The following statement of the case is taken from the original opinion, written by Justice Hart, affirming the judgment:

"The action was brought to recover judgment against the defendants for medical services rendered and for goods, wares, and merchandise furnished to them. After a jury trial and verdict, judgment was entered in favor of plaintiff for the sum of $300, from which defendants prosecute this appeal on the judgment roll alone.

"The fourth amended complaint is in two counts. In the first count it is alleged: 'That on the 19th day of December, 1914, said defendants were indebted to the plaintiff in the sum of $477.50 on account for medical and surgical services rendered to and for said defendants at their special instance and request by the plaintiff, and by Dr. Laurence Welti and Dr. C. H. Bulson, who performed services for plaintiff therein, for and with the consent of the defendants. By way of explanation of the foregoing allegation and to make the complaint more certain, plaintiff further alleges that during the time in which plaintiff was rendering the services sued for herein and with defendants' knowledge and consent, and upon defendants' request, the plaintiff called in said Dr. Laurence Welti and Dr. C. H. Bulson, for consultation and advice therein, and for assistance in the performance of said surgical services, and that the charges of said Dr. Laurence Welti and Dr. C. H. Bulson therefor were made against the plaintiff personally, and not against the defendants, or either of them, and are included by plaintiff in his account, and form part of said account against said defendants, and that of the $477.50 sued for herein as above alleged $100 is on account of the services so rendered by Dr. Laurence Welti, and $2.50 is on account of the services so rendered by Dr. C. H. Bulson, and $375 is on account of the services rendered by plaintiff personally.'

"In the second count it is alleged that, on December 19, 1914, defendants were indebted to D. H. Williams in the sum of $23.05 on account of goods, wares, and merchandise (stated in the briefs to have been medicines) sold and delivered to defendants at their special instance and request, and that said Williams has assigned said claim to plaintiff.

"Defendants demurred to said fourth amended complaint, and also moved for an order striking it from the files. The demurrer was overruled, and the motion denied, and the action of the court in these respects is assigned as error.

"Respondent has filed a notice of suggestion of diminution of the record, setting forth the minute order made on October 18, 1915, at which time a motion for a new trial was denied, said minute order reading as follows: 'The above motion for new trial came on regularly. * * * Motion argued and submitted, and the court orders that the motion for a new trial is granted unless the plaintiff produce within ten days satisfactory vouchers of the payment and release of demands of Drs. Laurence Welti and C. H. Bulson, and if such vouchers are produced to the satisfaction of the court, then, and in that event, the motion for new trial will stand denied. Said release having been produced and approved by the court and filed, the motion for a new trial is hereby denied.'

"A copy of the release signed by said Drs. Welti and Bulson is also contained in said notice of suggestion of diminution of the record.

"The application to have incorporated in the record, upon a suggestion of a diminution of the record, the minutes of the court on the motion for a new trial should be and is denied for the reason that said proceedings are not authenticated by incorporating the same in a bill of exceptions. Code Civ. Proc. § 950; rule 29, Supreme Court. Moreover, the appeal here is from the judgment on the judgment roll alone, and the motion for a new trial and an order denying the motion are no part of the judgment roll. Code Civ. Proc. §§ 670, 963; the amendment of the latter section by the Legislature of 1915—see Stats. 1915, p. 209—so as to destroy the right of appeal from an order denying a new trial, having gone into effect before the appeal here was taken."

In the petition for rehearing much stress is laid upon the erroneously assumed fact that in upholding the judgment "this court in its opinion, considers matters entirely outside of the record." Appellants wholly misconceive the grounds on which the decision is rested. While error was declared in overruling the demurrer, the decision was placed entirely upon well-settled rules of procedure where presumptions and intendments come into play in support of the judgment on appeals on the judgment roll alone. It is with these presumptions and intendments in support of the judgment we are alone concerned, for appellants insist that no presumptions or intendments can deprive them of a right to a reversal of the judgment for the obvious imperfections of the complaint pointed out in their demurrer.

Referring to the demurrer interposed to the complaint: It may be conceded that the effect of the averments of the fourth amended complaint is improperly to unite a cause of action in favor of plaintiff personally with a cause of action in favor of Dr. Laurence Welti and Dr. C. H. Bulson. Neither of the two latter was a party to the action, and neither of them assigned his claim to plaintiff. It is alleged that their "serv-

ices were rendered to and for defendants at their special instance and request" and this averment is in no wise qualified by the further averment that they "performed services for plaintiff therein." Notwithstanding this improperly uniting of the claims of Drs. Welti and Bulson with that of plaintiff for his personal services, there remained sufficient, after disregarding the averments as to Drs. Welti and Bulson, to constitute a cause of action in favor of plaintiff, and the general demurrer was properly overruled. The demurrer "that several causes of action have been improperly united" should have been sustained. So, also, the demurrer "that several causes of action are not separately stated, namely, a cause of action in favor of plaintiff against said defendants is not separately stated from causes of action in favor of Dr. Laurence Welti and Dr. C. H. Bulson against said defendants," should have been sustained.

There was also a special demurrer interposed, for uncertainty, ambiguity, and unintelligibility on nine different grounds, some of which, if not all, would have justified the court in sustaining the demurrer. Despite its imperfections, however, there was enough in the complaint to confer jurisdiction of the parties and the subject-matter. Defendants answered, denying specifically the averments of the complaint and by way of cross-complaint, set out what is intended as a cause of action for damages resulting from alleged improper and unskillful treatment of the patient for whom plaintiff was called to prescribe.

The parties went to trial, the result of which was a general verdict by a jury in favor of plaintiff for $300, which was $98.05 less than the amount of plaintiff's individual claim. Upon what theory the case was tried; to what issues the evidence was addressed; whether the jury allowed anything for the services of Drs. Welti and Bulson, or either of them, or allowed anything on the assigned claims; or based their verdict wholly on the claim of plaintiff, which was for $375—we do not know. The record is silent. The case is here on the judgment roll. In such case, certain presumptions and intendments are indulged and come to the relief of the prevailing party, who might otherwise find himself much embarrassed by his failure to observe the rules governing good pleading in bringing his action. The position taken by appellants is thus stated in their petition for rehearing:

"It was not obligatory upon us in an appeal from the judgment upon the judgment roll alone, to incorporate in the record evidence which was taken at the trial. Section 670, C. C. P., and section 950, C. C. P. Having presented the papers necessary upon this appeal, the question is simply one of law; whether the fourth amended complaint was a proper pleading in the face of the demurrer filed by the defendants, and whether or not the order of the court overruling said demurrer affected the substantial rights of the defendants."

[1] The general rule, affirmed in a multitude of cases, is this:

"On appeal all intendments are in favor of the regularity of the action of the court. Error will never be presumed, and the burden is upon the appellant to show that it exists." 2 Hayne's New Trial, p. 1576.

In an appeal on the judgment roll alone every intendment possible is in favor of the judgment or order appealed from, and if error does not affirmatively appear, it will be sustained, if there is any possible ground on which it can be sustained. Id. But, say appellants: The error here is patent and conceded, i. e., the complaint on its face is amenable to the demurrer, and the order overruling it was therefore error which the rule of presumptions and intendments cannot cure or overcome. In short, whatever may be the scope of the rule, admittedly very sweeping, it does not reach an error committed in passing upon the sufficiency of a complaint when the question is raised by demurrer.

[2] Whatever may have been the interpretation put upon section 475 of the Code of Civil Procedure prior to the adoption of section 4½, article 6, of the Constitution, it is settled that injury is no longer presumed from error, but must be affirmatively shown. Vallejo, etc., R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238. The provision is:

"No judgment shall be set aside * * * for any error as to any matter of pleading, or for any error as to any matter of procedure, unless after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

How can the court determine that defendants were injured by overruling the demurrer in this case in the absence of the record showing what occurred at the trial? It may have been that appellants consented to the trial upon its merits without objection to the evidence in support of the complaint, notwithstanding its defects. There may be presumptive waiver, which is a species of consent. As was said by Judge Hart in the original opinion:

"In considering an appeal supported by the judgment roll only, all presumptions and intendments are to be indulged favorably to and in support of the judgment. It must, in other words, be presumed that there was evidence sufficient to support the findings or the verdict, and that, whatever might have properly occurred at the trial to cure the defects of the complaint in any vital particular, did actually occur."

As to alleged uncertainty in a complaint challenged by a demurrer, the court said, in Rooney v. Gray Bros., 145 Cal. 753, 758, 79 Pac. 523, 524:

"When a case has been tried and a judgment rendered on the facts, in order to warrant a reversal upon the ground of error in overruling a demurrer interposed on the ground of uncertainty in the complaint, it must appear that some substantial right of the demurrant has been affected, some prejudicial error, as distinguished from abstract error, suffered by him, or he has no room for complaint."

See Dennis v. Crocker-Huffman, etc., Co., 6 Cal. App. 58, 61, 91 Pac. 425.

[3] The answer, as we have seen, put in issue every averment of the complaint. The complaint was sufficient as against a general demurrer. It was entirely proper for the parties to try the case on its merits, if they chose to do so, even though the complaint was ambiguous and uncertain, and there were several causes of action improperly united. In support of the judgment we must presume that the case was tried on its merits regardless of the imperfection of the complaint, which must be deemed to have been waived.

Bearing in mind that the issues were tried on complaint and answer, we think the following statement by Judge Hayne, in his New Trial, page 1576, is true in the present case:

"If the judgment roll does not itself disclose the error complained of, it is incumbent upon the appellant to make a showing dehors such judgment roll. This can be done in no other way than by bill of exceptions, or, in case of a new trial order, a statement. This is the record of which it is said error must be affirmatively shown therein, and it must contain everything necessary to make the error apparent; for if anything should be wanting, the omission would be fatal. The rule of presumption supplies what is necessary to the validity and the correctness of the action of the trial court, but supplies nothing indicative of error."

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

---

37 Cal. App. 556

## MYERS v. CANEPA et al. (Sac. 2482.)

(Supreme Court of California. Aug. 15, 1918.)

ACTION ⊜38(6)—SINGLE CAUSE OF ACTION.

A complaint, in an action by a physician for services and for medicine furnished, including an alleged indebtedness to two other physicians, who had performed services for plaintiff with defendants' consent, *held* to state a single cause of action in favor of plaintiff alone.

On application for rehearing. Denied. For opinion in District Court of Appeal, see 174 Pac. 903.

Devoto, Richardson & Devoto, of San Francisco, and Percy S. King, of Napa, for appellants. Clarence N. Riggins, of Napa, and W. W. Kaufman and Wm. P. Hubbard, both of San Francisco, for respondents.

PER CURIAM. In denying the application for a hearing in this court after decision by the District Court of Appeal of the Third Appellate District, we deem it proper to say that, in our opinion, the allegation in the first count of the fourth amended complaint, as set forth in the opinion, substantially states only a single cause of action in favor of plaintiff alone.

The application for a hearing in this court is denied.

37 Cal. App. 755

## GORDON v. RANSOME-CRUMMEY CO. (Civ. 2420.)

(District Court of Appeal, First District, California. July 10, 1918. Rehearing Denied by Supreme Court Sept. 5, 1918.)

1. MUNICIPAL CORPORATIONS ⊜485(5) — STREET IMPROVEMENTS—POSTING NOTICES.

Street Improvement Act 1911, § 66, providing that issue of bonds is conclusive evidence of the regularity of proceedings leading thereto, at least cures a trifling defect in posting several notices of the resolution of intention along an improvement 309 feet apart, instead of 300 feet, as required by section 5.

2. MUNICIPAL CORPORATIONS ⊜294(8) — STREET IMPROVEMENTS—SUFFICIENCY OF AFFIDAVIT—POSTING NOTICES.

An affidavit as to completion of posting of notice of resolution of intention required by Street Improvement Act 1911, § 5, *held* to sufficiently describe the location of a certain street improvement and notices.

3. MUNICIPAL CORPORATIONS ⊜294(8) — STREET IMPROVEMENTS—POSTING OF NOTICES —COMPLETED.

An affidavit "that affiant posted said notices as herein specified on the 25th day of May, A. D. 1911," was a sufficient statement that the posting was "completed" on such date, under Street Improvement Act 1911, § 5.

4. MUNICIPAL CORPORATIONS ⊜289(1) — STREET IMPROVEMENTS—STATUTES.

Street Improvement Act 1911, § 82, by its own provisions is to be liberally construed to the end that its purposes may be effected, and provisions regarding the posting of notices, and the like, are to be read in the light of the purposes to be accomplished.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action to quiet title by W. R. Gordon against the Ransome-Crummey Company. Judgment for plaintiff, and defendant appeals. Reversed.

R. M. F. Soto, of San Francisco, for appellant. Frank J. Gordon, of Oakland, and Welles Whitmore, of San Francisco, for respondent.

BEASLY, Judge pro tem. The questions in this case arise out of the sale of certain property of the plaintiff to pay certain street assessment bonds which were issued by the city of Oakland in a proceeding taken by it under the Improvement Act of 1911 (Stats. 1911, p. 730). The plaintiff brought an action to quiet title against the defendant, and the defendant answered, admitting that it asserted an interest in the real estate described in the complaint, and filed a cross-complaint, in which it set up all the proceedings leading up to the issuance of the bonds mentioned. Without going further into the pleadings in this case it may be said that the correctness of the lower court's judgment quieting the plaintiff's title to the land depends upon the validity of the street improvement proceedings.

The first point made by plaintiff against these proceedings is that the notice of the passage of the resolution of intention, requir-

ed by section 5 of the Street Improvement Act of 1911 to be posted at intervals of not more than 300 feet in distance apart along the line of the contemplated improvement, was not so posted, in this, that two of these notices had an interval of 309 feet 4 inches instead of 300 feet between them. Section 66 of the improvement act of 1911 provides that bonds issued under the act, shall by their issuance be conclusive evidence of the regularity of all proceedings leading thereto under the act. It is contended by the attorney for the defendant that the defect in the posting of the notices above referred to is cured by the issuance of the bonds in pursuance of section 66 of the act just quoted. On the other hand, the respondent contends that the defect is jurisdictional, and that a strict compliance with the statute as to posting was necessary to give the council authority to take further steps in the proceeding, and that, being jurisdictional, the defect could not be cured by the issuance of the bonds, or affected in any way by the so-called "conclusive evidence" provisions of section 66 of the act. The whole question of the construction to be placed on such curative provisions as section 66 was discussed and, the profession of the law hoped, finally settled, so that no question thereon could ever thereafter be made, by the decision in the case of Chase v. Trout, 146 Cal. 350, 80 Pac. 81, but it seems that the carelessness of city officials and the ingenuity of counsel will, in spite of the very clear and definite language of that case, still raise plausible objections to the jurisdictional steps taken by city councils in street improvement proceedings; and such has happened in this case. The Supreme Court, in Chase v. Trout, said that:

"The resolution of intention is the first step in the proceeding. It is to be published, and it is by means of such publication, and the notice thereafter given, which refers to it for particulars, that the council acquires jurisdiction. It is a part of the 'due process of law,' required by the Constitution, the want of which cannot be cured or waived by the Legislature."

To this statement of the law, which must be held to apply to the posting of this notice as well as the publication of the resolution of intention, Mr. Justice Shaw, in the opinion of the court, added this significant sentence:

"There must be a substantial compliance with the provisions of the act in regard to this preliminary process."

[1] From that case and the case of Ramish v. Hartwell, 126 Cal. 443, 58 Pac. 920, we understand that where, as here, there is an evident attempt in good faith to comply with the statute, and such substantial compliance therewith that no one has suffered from lack of strict compliance, the issuance of the bonds is conclusive evidence of the regularity of the jurisdictional proceedings. In other words, it cures such a trifling and inconsequential defect in the posting as here appears. This is within the spirit, and, indeed, the letter, of the rule in Chase v. Trout. We will not attempt to formulate a general rule as to what will constitute substantial compliance with the statute upon this matter; but in this case it would be trifling with justice to say that this proceeding, covering as it did a lengthy street improvement, and upon the validity of which thousands of dollars' worth of street improvement bonds may perchance depend, should be set aside because one of the notices was posted 9 feet 4 inches farther away from the next one than it should have been.

[2] The next attack on the proceeding is based on the insufficiency of the affidavit of the completion of posting of the notice of improvement. The law provides that:

"Upon the completion of the posting of the notice of the improvement the superintendent of streets shall forthwith cause to be filed in the office of the city clerk an affidavit stating the fact of the completion of the posting of such notice and the date of such completion, and thereafter all persons shall be deemed to have notice of the date of the completion of the posting."

The affidavit filed in the present case stated that the affiant had actually posted the notice of improvement mentioned in the resolution of intention on Congress avenue, the street to be improved, "from the southeastern line of High street to a line parallel to and distant 70 feet northwesterly from the southeastern line of Cortland avenue, all as described in and in compliance with resolution of intention No. 38,146." The work on Congress avenue was to be done not only to the line thus described 70 feet from Cortland avenue, but also upon other parts of Congress avenue, so that if the foregoing statement in the affidavit were all that it contained, there would be no showing that the notices were posted along the entire line of the contemplated work; but following the above-quoted portion of the affidavit was the statement that affiant "posted said notices conspicuously along the line of said contemplated work or improvement, at not more than 300 feet in distance apart and not less than 3 in all, and when the work was to be done upon an entire crossing or any part thereof, in front of each quarter block liable to be assessed." This latter quoted statement is in the exact language of the statute providing for the posting of the notice. The statements are not inconsistent with the posting on that part of Congress avenue southeasterly from the line of Cortland avenue; both statements may be true; and it seems to us that that part of the affidavit which describes the posting of the notices as having been done to the line 70 feet northwesterly of Cortland avenue must be read in the light of the further statement in the affidavit which, if it stood alone, would be sufficient to show the posting of the notices along the line of the contemplated work as provided in section 5 of the act. This is particularly true in view of the fact that it was

the duty of the council, before proceeding further with this work, to find the fact of the posting of these notices, and that it found this fact apparently from this affidavit, thus putting a construction thereon. It seems to us that this finding of the council is by parity of reasoning within the principle laid down in Tilton v. Russek, 171 Cal. 731, 154 Pac. 860, in regard to an affidavit of diligence, in which the Supreme Court held that the sufficiency of such an affidavit being a subject for the determination of the court in which the validity of the proceedings was in issue, the court's conclusion would not be overturned, where it had ruled upon the affidavit and held it to be sufficient.

[3] A further criticism is made of this affidavit. The statute provides that this affidavit must state the fact of the completion of the posting of the notices, and the date of such completion, and that thereafter all persons shall be deemed to have notice of the date of the completion of such posting. The statement in the affidavit bearing upon this subject is "that affiant posted said notices as herein specified on the 25th day of May, A. D. 1911." It will be noted that the affidavit does not state categorically and in the language of the statute that the 25th day of May, 1911, was the date of the completion of the posting, nor does it use the word "completed" in relation to the posting of the notices at all. Counsel for the respondent contends with much earnestness that the property owners, having the right to protest at any time within 15 days after the date of the completion of the posting of these notices against the proposed work, could ascertain the time within which they were to protest in only one way, namely, by an examination of this affidavit, and claims that the information required to enable them to know the time within which they could protest, namely, the date of the completion of the posting, is not contained in the affidavit, so that the time for protest has not yet run, or, in any event, that the council acquired no jurisdiction to proceed further with the work. Construction of documents such as this affidavit must be reasonable and sensible; and it seems to us that no persons reading this affidavit, in which it is stated that these notices were posted on the 25th day of May, 1911, could come to any other conclusion or construe the affidavit as meaning anything else than that the work of posting these notices was completed on that day. The language of the affidavit is equivalent to a statement that the notices were all posted on the 25th day of May, 1911, which could only mean that the posting was completed on that day. It seems to us that the fact of completion appears sufficiently from this. If, then, it be so conceded, it seems to us that the defect, if defect it is, falls within the rule of Chase v. Trout, supra, that a substantial compliance with the statute confers jurisdiction upon the council.

[4] It may be said in passing that this proceeding involving the improvement of a long street, an expensive public work, which has been completed, should not be overturned on account of these defects in the proceeding. The improvement act of 1911 by its own provisions is to be liberally construed, to the end that its purposes may be effected (Stats. 1911, p. 768, § 82); and as with the Vrooman Act (St. 1885, p. 147), so with this act, "the provisions regarding the posting of notices and the like are to be read in the light of the purposes to be accomplished." Haughawout v. Percival, 161 Cal. 491, 119 Pac. 649, Ann. Cas. 1913D, 115. No person can doubt that any property owner who may have read the affidavit of posting knew therefrom that his time for protesting began to run at the time stated in that affidavit, namely, on the 25th day of May, 1911; nor can we be persuaded that any property owner was injured by the extra distance of 9 feet 4 inches between two of the notices that were posted along the line of this work.

The judgment is reversed.

We concur: KERRIGAN, J.; ZOOK, Judge, pro tem.

---

37 Cal. App. 789

## TUCKER v. HAGERTY, Constable.

(Civ. 1820.)

(District Court of Appeal, Third District, California. July 23, 1918.)

1. REPLEVIN ⊂⊃76—DETENTION OF PROPERTY—INTEREST.

Interest is ordinary measure of damages for wrongful detention of property, but, where property has usable value exceeding lawful rate, such rule has no application, but successful party is entitled to recover value of use of which he has been wrongfully deprived, and value is to be estimated by market price of use.

2. APPEAL AND ERROR ⊂⊃934(2) — PRESUMPTION FAVORING COURT BELOW — EVIDENCE AS SUPPORTING JUDGMENT.

Appellate court must assume there was evidence to support judgment in action of claim and delivery on issue of rental value of property as being damages for detention, though rental value allowed amounts to more than value of property.

3. REPLEVIN ⊂⊃76—RENTAL VALUE AS DAMAGES—STATUTE.

In action of claim and delivery for automobile against constable, under Code Civ. Proc. § 667, trial court was authorized to fix damages for detention on basis of rental value, though exceeding value of machine.

Appeal from Superior Court, Sacramento County; Chas. O. Busick, Judge.

Action by J. H. Tucker against T. B. Hagerty, as constable of Sacramento township, county of Sacramento, state of California. From judgment for plaintiff, and from an order that defendant's motion for new trial would be granted unless plaintiff filed writ-

ten consent to reduce damages, defendant appeals. Affirmed.

Shelley & Johnston (J. A. McGilvray, of counsel), for appellant. Frank A. Prior, of Sacramento, for respondent.

CHIPMAN, P. J. Plaintiff brings the action in claim and delivery. In his amended complaint he alleges that defendant is the duly elected, qualified, and acting constable of Sacramento township, Sacramento county, and that on the 20th day of July, 1917, as such constable, defendant wrongfully took possession of a certain automobile under a writ of attachment in a certain action pending in said township, wherein Vina Hall is plaintiff and P. A. Smittcamp and Sadie M. Smittcamp are defendants; that on July 21, 1917, plaintiff "made a verified demand upon said constable for the release of said automobile from the lien of said attachment, and of the said automobile so attached aforesaid by defendant, but defendant then and there failed, refused, and neglected, and ever since has failed, refused, and neglected, to release said attachment or said automobile, and the possession of said automobile is wrongfully held by said defendant"; that plaintiff at all the times mentioned in said complaint has been and still is the owner and entitled to the possession of said automobile; that the value of said automobile is $650, and that "plaintiff purchased said automobile from Sadie N. Smittcamp and Alice Tanner on the 19th day of June, 1917, and paid therefor the sum of "$350"; that plaintiff paid one Mrs. Hall the sum of $125 to discharge a lien held by her on said automobile; that plaintiff has expended the sum of $153.75 for necessary tires and other equipment of said automobile; that the rental value of said automobile is $10 per day. The prayer is for possession, "or for its value if delivery cannot be had, with damages for the detention of said automobile, and for costs of suit." The complaint is duly verified.

Defendant, in his answer, justifies under the attachment referred to in the complaint; denies plaintiff's alleged ownership or right of possession; denies that plaintiff made demand for the release of said attachment; "denies that the value of said automobile is the sum of six hundred and fifty dollars," but does not aver the value; denies that plaintiff purchased the automobile from the persons as alleged or for the sum as alleged "or any other sum"; admits the payment of $125 to Mrs. Hall as alleged, but denies that it was secured by lien on said automobile; denies that plaintiff has expended the sum of $153.75 for repairs or otherwise on said machine, or any sum whatever; denies that the rental value of said automobile was $10 per day "or any other or greater sum than four dollars per day."

The cause was tried by the court without a jury. By a minute order the court ordered judgment in favor of plaintiff for the return of the automobile, "or, in lieu thereof, plaintiff is to receive the sum of $450 from defendant as the price of said automobile; and it is further ordered that plaintiff do have and recover from defendant damages for the detention of said automobile at the rate of $5 per day from the 21st day of July, 1917, to the date hereof, amounting to the sum of $585." Findings were waived and judgment was entered in accordance with said minute order.

Notice of motion for a new trial was served and filed, and at the hearing the court, on December 3, 1917, ordered that the "motion will be granted unless plaintiff files in court his written consent within five days to accept $4 per day, as damages in lieu of the damages heretofore ordered." Such consent was duly filed, December 8, 1917, but the motion for a new trial was not denied until December 31, 1917. Defendant served notice of appeal, December 12, 1917, from the order made on December 3, 1917, and from the judgment, but did not appeal from the order of December 31, 1917, denying motion for a new trial. There is no bill of exceptions or statement in support of the motion. The case is here on the judgment roll alone and without findings of fact, which were waived.

The only question presented by appellant relates to the measure of damages. His contention is that damages for the detention of the property, in the absence of circumstances of aggravation or malice, "is legal interest on the value of the property detained, within a reasonable time after the property was taken."

The judgment is "that plaintiff have and recover of said defendant the sum of $450, the value thereof; and that plaintiff do have and recover of said defendant damages for the detention of said automobile at the rate of $5 per day from the 21st day of July, 1917, to the date hereof (November 15, 1917), amounting to the sum of $585, together with plaintiff's costs."

Respondent's contention is that appellant is seeking to apply the rule in conversion, whereas "in an action for claim and delivery the rule is different, the plaintiff is entitled to judgment for possession of the personal property, or the value thereof, and damages for the detention, which damages for the wrongful detention may be fixed by the court in a certain sum."

It is quite clear that the court fixed the damages on the basis of the rental value per day of the automobile. The admission of defendant justifies the fixing of this value at $4 per day, but it does not necessarily admit that it was the proper measure of damages in the case.

[1] The ordinary measure of damages for the wrongful detention of property is interest. Where, however, the property has a usable value which exceeds the lawful rate of interest this rule has no application. In such a case the successful party is entitled to recover, as damages for the detention, the value of such use during the period that he was wrongfully deprived thereof. And this value is to be estimated by the ordinary market price of the use of such property. 34 Cyc. 1562–1564. There are exceptions to this rule, but, as there is neither evidence nor findings from which it may be ascertained whether or not the case falls within any of the exceptions, we must apply the rule as above stated.

It is to be observed that we have a statute specifically defining the measure of damages in actions for the conversion of personal property, viz.:

"The value of the property at the time of the conversion, with the interest from that time, or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party." Civ. Code, § 3336.

The rule in claim and delivery (or replevin) is as follows:

"In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had, and damages for the detention." Code Civ. Proc. § 667.

The reason for the rule in replevin is that interest or the value of the property does not furnish adequate compensation for the wrongful detention. In some of the cases it is correctly said that the wrongdoer who had had the use of the property would make a profit out of his own wrong, which the law does not tolerate, and that it would deny to a plaintiff damages which naturally and certainly follow from a wrongful invasion of his rights. In the notes to the text (34 Cyc. 1563) the rule as above given is shown to have been applied in the case of household furniture, to buggies, boats, milk cows, threshing machines, in the latter case holding that "the measure of damages for such detention is the fair rental value of the machine, less the damages which would result to it from the extra wear and tear caused by the use of it while so rented." Peerless Machine Co. v. Gates, 61 Minn. 124, 63 N. W. 260.

The reason for the distinction between trover or conversion and replevin is well stated in Farrar v. Eash, 5 Ind. App. 238, 31 N. E. 1125:

"In replevin the plaintiff never ceases to claim the property as his own, but seeks to obtain it rather than its value. In such case the plaintiff, being entitled to the use of the property of which he has been unlawfully deprived, and not having waived the title thereof, has a right to recover the value of such use in damages. In trover, on the other hand, plaintiff concedes a change of title by the act of conversion and recognizes ownership in the defendant. In that case damages for detention are waived, and it would be absurd to give the plaintiff compensation for the use of the property." 34 Cyc. supra.

[2] It may be that damages which cannot be ascertained with reasonable certainty, or which are contingent or speculative, cannot be allowed in an action of replevin. But here we have a distinct claim in the complaint for the rental value, $10 per day, for the machine, and a denial that the rental value was any greater than $4 per day. We must assume that there was sufficient evidence to support the judgment upon this issue of rental value as being the damages for the detention. There is nothing so startling in the fact that the rental value allowed by the court amounts to more than the value of the machine as to compel a reversal of the judgment.

We have examined the cases cited by appellant in support of his contention. He cites also section 3336 of the Civil Code, which, as we have seen, by its terms is made applicable to cases of conversion. Some of the cases cited by appellant were in conversion; others were in trespass. Phelps v. Owen, 11 Cal. 25, grew out of an attachment and subsequent sale of the property (stock of goods). The complaint in the action claimed no other damages than for the taking and conversion. The rule in that case was held to be that which governs in trespass where the levy by the sheriff was made without any motive of oppression, or wanton disregard of the duties of his office or the rights of the owner. The rule there was the value of the property with interest. Dorsey v. Manlove, 14 Cal. 553, was a case where the sheriff seized certain three horses and sold them to satisfy an assessment for state and county taxes. The action was in trespass. The plaintiffs were allowed to prove that they sustained, in addition to the loss of the property taken, certain injuries resulting consequentially and witnesses were allowed to testify to the amount of the damages. The defendant justified as sheriff, but the trial court excluded from the jury all evidence relating to the assessment on the ground that the assessment was illegal. This placed the defendant before the jury in the position of a naked trespasser, and the result was a verdict for plaintiff for $2,000 in damages. The value of the horses taken was $350. On appeal the judgment was reversed, and the rule in Phelps v. Owen, supra, was held applicable. Obviously these cases do not govern the present case. Page v. Fowler, 39 Cal. 412, 2 Am. Rep. 462, was an action in claim and delivery for certain hay which plaintiff sold after getting possession under the writ. He failed in the action to establish his right to the hay, and, of course, defendants were entitled to recover the value of the hay taken and disposed of by plaintiff. It was sold in San

Francisco, in 1863, at $12.50 per ton, the highest price that could have been obtained. The market value of the hay was $2,500. Defendants were allowed to prove that hay had sold during the year 1864 for $40 per ton, and the trial court instructed the jury that they might find the highest market value since the hay was taken by the plaintiff, with interest. The jury brought in a verdict for $25,763.23. The trial was in November, 1869, six years after the taking. The judgment was reversed. The opinion is by Mr. Justice Temple and presents a very full analysis of the cases. The rule deduced was "that in cases affecting property of fluctuating value, where exemplary damages are not allowed, the correct measure of damages is the highest market value within a reasonable time after the property was taken, with interest compounded from the time such value was estimated." The opinion states: "We are not called upon to inquire whether a different measure of damages should be adopted where the property has been retained and can be returned in specie."

Freeborn v. Norcross, 49 Cal. 313, was claim and delivery and the appeal was on the judgment roll alone. The jury rendered a verdict for the value of the property, with "legal interest" thereon from the time of the seizure by the sheriff to the date of the verdict, and damages in the sum of $50. At that time section 200 of the Practice Act authorized the recovery of damages for the detention of personal property, as section 667 of the Code of Civil Procedure now does. It was held that plaintiff could not recover both interest and damages; that interest is given in such case as damages, and, if allowed in addition to a gross sum for damages, it would amount to double damages. The cause was remanded, with directions to modify the judgment "so that plaintiff shall recover the sum of $375, with interest thereon (the rate specified in section 1920 of the Civil Code) from the date of the judgment." Why the court allowed interest instead of the $50 as the damages does not appear. Nor does the case decide that damages other than interest, if proven, may not be allowed. The evidence was not brought up. The report of the case is brief and it does not appear whether the interest allowed was more or less than the gross damages of $50.

In Kelly v. McKibben, 54 Cal. 192, interest was allowed in the judgment upon the value of the property from the time it was taken from the possession of defendant. The court said: "As no other damages for the detention are found or included in the judgment, we think that such interest may be regarded as damages for said detention. Freeborn v. Norcross, 49 Cal. 313." Upon rehearing the court pointed out the distinction between common-law actions of detinue and trover, holding that in replevin damages were given under section 667 of the Code of Civil Procedure and not under section 3336 of the Civil Code. See Harris v. Smith, 132 Cal. 316, 64 Pac. 409; Hickey v. Coschina, 133 Cal. 81, 65 Pac. 313; Morris v. Allen, 17 Cal. App. 684, 64 Pac. 409, 121 Pac. 690.

Livestock Co. v. Union, etc., Co., 114 Cal. 447, 46 Pac. 286, was an action in replevin. The trial court found that "the plaintiff has not suffered any damages by reason of the detention of said personal property * * * nor have the defendants been guilty of oppression or fraud or malice." Plaintiff was allowed the value of the property with costs of suit. Plaintiff moved for a new trial, which was granted, and defendant appealed. The record showed without conflict that plaintiff had been damaged in a very considerable sum. The motion was granted on the ground that the evidence was insufficient to justify the decision. The Supreme Court, in affirming the order, said:

"Under such proof (oppression, fraud, or malice) plaintiff might have been awarded exemplary damages (Civ. Code, § 3294), but without it was entitled to such damages as would compensate him for all the detriment proximately caused by the wrong complained of (Civ. Code, § 3333)."

[3] We think the trial court was authorized to fix the damages for the detention of the property, under section 667 of the Code of Civil Procedure, on the basis of the rental value.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

---

37 Cal. App. 785

## BAKEMAN v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (Civ. 2699.)

(District Court of Appeal, Second District, California. July 22, 1918.)

1. CONTEMPT ⇐57—RESPONSE TO ORDER TO APPEAR AND SHOW CAUSE—PERSONAL APPEARANCE.

In response to order to appear and show cause why she should not be adjudged in contempt for disobedience of order to deliver notes and stock certificates to clerk of superior court, party was not required to appear personally; appearance by attorney being sufficient.

2. CONTEMPT ⇐63(4) — ORDER AS BASIS FOR PUNISHMENT—INSUFFICIENCY.

Order of superior court adjudging a defendant in contempt for failure to deliver to clerk notes and stock certificates was void as basis to impose punishment, where it did not appear that it was within defendant's power to deliver them.

3. PROHIBITION ⇐5(3)—CONTEMPT PROCEEDINGS.

Superior court, on application for writ of prohibition to the appellate court, should be prohibited from further proceedings, in relation to alleged contempt in civil cause, which must necessarily be based on void orders.

Petition for writ of prohibition by Jean H. Bakeman against the Superior Court of the

State of California in and for the county of Los Angeles and Hon. Grant Jackson, Judge thereof. Alternative writ made peremptory.

H. S. Laughlin and Muhleman & Crump, all of Los Angeles, for petitioner. L. B. Stanton, of Los Angeles, for respondents.

SHAW, J. Prohibition. It appears from the petition, and the return made in response to the alternative writ issued herein, that in an action wherein J. F. Brumund was plaintiff and petitioner and others were defendants the court made an order requiring petitioner, within the time therein specified after service of the same, to deliver to the clerk of the court certain promissory notes and stock certificates, the right to the possession of which was claimed by plaintiff, the same to be held by the clerk pending further orders of the court. Upon an affidavit filed, setting forth the fact of the making of the order, due service thereof, and petitioner's neglect to comply therewith, she was, by an order of court made on February 9, 1918, cited to appear on the 11th day of March, 1918, and show cause why she should not be adjudged guilty of contempt for disobedience of the order, which citation was duly served on February 15, 1918. On March 11, 1918, the matter coming on for hearing, petitioner, in obedience to the order, appeared, not in person, but by attorney, and filed an affidavit wherein she averred that prior to the commencement of the action she had transferred the notes and stock to a resident of San Francisco, since which time she had had no control thereof, and that petitioner was and at all times had been without power to comply with the order of the court. At this hearing no evidence, other than petitioner's affidavit showing her inability to comply with the order, was received. Nevertheless, the court made an order as follows:

"In matter of order of Jean H. Bakeman to appear and show cause in re contempt, which comes on now to be heard, said defendant not being present in court is adjudged in contempt and a bench warrant is ordered to issue returnable forthwith."

Thereafter, on April 10th, petitioner appeared in court personally with her counsel, whereupon the court continued the hearing of said contempt proceedings to the 12th day of April, 1918, at which time the court made an order as follows:

"In the matter of order to show cause in re contempt, which comes on now for hearing, L. B. Stanton appearing as attorney for plaintiff, and H. H. Laughlin appearing for defendant, Jean H. Bakeman is sworn and examined, and Plaintiff's Exhibit No. 1 is filed. Thereupon the hearing is continued to April 29, 1918, and defendant is ordered to produce at that time the stock described in the complaint."

At the hearing on the 29th of April the court made an order as follows:

"The defendant having failed to obey the order, hereinbefore made, directing her to bring into court certain certificates of stock in her possession, and at her request in open court the matter having been continued to this time, and she not appearing, she is now adjudged guilty of contempt of court; a bench warrant is ordered to issue for her arrest, but the service thereof is withheld until May 28, 1918, to which date this matter is continued."

It is alleged in the petition that Hon. Grant Jackson, as judge of said superior court, has announced his intention to, and will, unless prohibited from so doing, punish petitioner for her disobedience of said order and for her nonappearance in person upon the hearings of the orders to show cause hereinbefore set forth; and in its return the court asks to have the alternative writ discharged, "to the end that respondent may further proceed in the said cause of Grumund v. Bakeman," which further proceeding we assume is the pronouncing of judgment based upon and in accordance with the orders wherein petitioner was adjudged guilty of contempt.

[1] In response to the order made February 9, 1918, to show cause, petitioner was not required to appear personally. Ex parte Gordan, 92 Cal. 478, 28 Pac. 489, 27 Am. St. Rep. 154; Gordan v. Buckles, 92 Cal. 481, 28 Pac. 490. A sufficient appearance was made by her attorney, who, in response to the order to show cause, presented her affidavit showing that she was then, and since prior to the commencement of the action had been, unable to comply with the order, which fact, as to the notes, is shown by the complaint in the action wherein it is specifically alleged:

"That said Jean H. Bakeman has transferred to a party or parties unknown to this plaintiff, but well known to said Jean H. Bakeman, said and each and all of said notes so executed by said plaintiff as aforesaid. * * * Said transferee has and had at the time of said transfer full knowledge of the transactions between said plaintiff and said Jean H. Bakeman."

Hence the first order made on March 11th, adjudging petitioner guilty of contempt for failing to appear in person, was, upon the authorities cited, unwarranted and in excess of the jurisdiction of the court.

[2] The order made April 29th purports to adjudge petitioner guilty of contempt for failure to produce and deliver the certificates of stock in accordance with the direction made on April 12th requiring her so to do, and for such failure it was further ordered that a warrant issue for her arrest upon which, as admittedly appears, judgment would be pronounced, committing her to jail or subjecting her to a fine. The question, therefore, is whether this last order, made on April 29th, is sufficient to warrant the imposition of the threatened punishment. In our opinion it is not, for the reason that petitioner could not, upon the showing of cause made by her affidavit, be in contempt, in the absence of a finding or adjudication to the effect that she was then able to comply therewith. There is an absence of any recital or finding, in the order or elsewhere, that the petitioner had the ability to comply with the order of court referred to therein. An order

adjudging one guilty of contempt for failure to perform an act directed by the court is void as a basis for the imposition of punishment, unless it appears therefrom that it is within the power of such person to perform the act. Ex parte Silvia, 123 Cal. 293, 55 Pac. 988, 69 Am. St. Rep. 58; In re Cowden, 139 Cal. 244, 73 Pac. 156; Egilbert v. Superior Court, 6 Cal. App. 190, 91 Pac. 748; Ex parte Cohen, 6 Cal. 319; Galland v. Galland, 44 Cal. 475, 13 Am. Rep. 167.

[3] Had petitioner sought a review of these orders adjudging her guilty of contempt, it would have been the duty of this court to annul the same for want of recital or finding that she was able to comply with the orders. This being true, it follows that the court upon this application should be prohibited from further proceedings which must necessarily be based upon orders which, for the reasons stated, are void.

The alternative writ of prohibition, heretofore issued, is made peremptory.

We concur: CONREY, P. J.; JAMES, J.

---

37 Cal. App. 508

BUICK et al. v. BOYD et al. (Civ. 1834.)

(District Court of Appeal, Third District, California. June 13, 1918.)

JUDGMENT ⟸590(5)—RES JUDICATA.

Husband and wife having, pending divorce suit, by agreement withdrawn adjustment of property rights from court, decree determining nothing more than that property be awarded to the respective parties in accordance with such agreement would not be res judicata within Code Civ. Proc. § 1911, so as to bar an action by the wife to reform description in agreement.

Appeal from Superior Court, Shasta County; James G. Estep, Judge.

Action by Mary Isabelle Buick and others against Benjamin F. Boyd and others. Judgment for plaintiffs, and defendant named appeals. Affirmed.

Braynard & Kimball, of Redding, for appellant. Orr M. Chenowith, of Redding, for respondents.

CHIPMAN, P. J. Defendant Benjamin F. Boyd appeals from a judgment reforming the description of real property in a written contract. Plaintiff Mary Isabelle Buick was formerly Mary Isabelle Boyd, wife of defendant Benjamin F. Boyd, and the mother of plaintiffs Alfreida Elinor and Malcolm Glenn Boyd, infant children of the marriage. Defendants Eugene Boyd and Edna Boyd are also children of the said marriage and are made defendants because their consent to be joined as plaintiffs could not be obtained and because united in interest with plaintiffs. Plaintiff John H. Buick is joined with plaintiff Mary Isabelle Buick, being her husband at the commencement of the action. On February 11, 1909, plaintiff, Mary Isabelle Buick, then Mary Isabelle Boyd, commenced an action for a divorce in the superior court of Shasta county on the ground of extreme cruelty. Pending the action, on March 4, 1909, she and her then husband entered into a written agreement settling their property rights, her claims for alimony, counsel fees, and costs. Final decree in the action was granted the plaintiff, May 3, 1910. The concluding paragraph of the interlocutory decree reads as follows:

"And it further appearing that the rights of the respective parties in and to the property described in said complaint have been equitably adjusted by an agreement between the parties, it is determined that the said property be awarded to the respective parties in accordance with said agreement, dated the 4th day of March, A. D. 1909."

This agreement was intended to make disposition of all the property which either of the parties claimed to own, some belonging to each being separate property and some the property of the community. It not only purports to adjust all claims to property, but it adjusts all matters of alimony, counsel fees, and the support and maintenance of the minor children. Reciting the pendency of the action, it declares that:

"The parties hereto are desirous of settling said dispute of claims to the property in controversy and withdrawing the same from the consideration of the court, and whereas, the parties hereto are desirous of making provision for the support of the said minor children and for the son and daughter of the party of the first part herein (Benjamin F. Boyd), Eugene Boyd and Edna Boyd: Now, therefore, it is hereby mutually covenanted," etc.

The contract then awards to the second party (Mrs. Boyd) the ownership and possession of the homestead (describing the lot) theretofore declared. "Also a certain tract of land adjoining said lot, piece or parcel of land being the W. ½ of the N. W. ¼ of the N. E. ¼ and the N. E. ¼ of the N. W. ¼ of the N. W. ¼ of section 11, township 30 north, range 7 west; also the water ditch and water right belonging to said premises" (describing the ditch). The alleged mistake was in the call "N. E. ¼ of N. W. ¼ of N. W. ¼, section 11," which should have read "N. E. ¼ of N. W. ¼, section 11." It is further provided that second party "may continue to own, hold, occupy, possess and use" (a certain lot in the town of Redding, describing it, and declared by the agreement to be her separate property), "to have and hold the same, together with the rents, * * * during her lifetime or so long as she shall remain single and unmarried, for the better maintenance, support, care and education of herself and the two said minor children," and to go to said four children, Eugene, Edna, Alfreida, and Malcolm should she remarry. Then follows a clause by which the first party "does hereby grant all of his right, title and interest in and to said land

and premises unto the said party of the second part to her use and to the use of said four children, * * * upon the conditions mentioned herein." Certain live stock, the separate property of second party, "shall continue to be and remain the property of the party of the second part herein as her separate and individual estate; and in consideration of the waiver of her right to alimony the said party of the first part hereby agrees to pay to the said party of the second part the sum of $53.50 for costs and attorney's fees herein." It is then provided that certain real property (describing it) "shall continue to be and remain" the separate property of first party. Follows also a provision that, in consideration of the grant to her as provided in the agreement, the second party "waives any claim for maintenance and support against the party of the first part, and hereby waives any right or title in and to any of the property of the party of the first part, except as expressed in this agreement." The instrument was duly acknowledged by the parties on the day of its date before Francis Carr, a justice of the peace in and for Redding township, Shasta county.

By appropriate averments in his answer, appellant claims:

"That plaintiffs are and each of them is precluded or estopped from suing upon the alleged cause of action set forth in said amended complaint herein for the following reasons": that the said court, on May 3, 1910, "made and rendered its final decree of divorce" dissolving the marriage which had theretofore existed between said Mary Isabelle and Benjamin F. Boyd, and "that no motion for a new trial was made or appeal taken from said final decree and said decree is now in full force and effect"; that said written agreement "was and now is merged in the said final judgment of divorce, and the said plaintiffs in the above-entitled action are and each of them is precluded or estopped from suing upon the alleged cause of action set forth in the said amended complaint."

Appellant's contention is stated as follows:

"The title to the property involved having been adjudicated in the divorce action, the final decree of divorce is res adjudicata and is a bar to the present action."

The court found as facts, among others:

"That the said plaintiff and the said defendant intended to set forth and describe in said agreement the west half of the northwest quarter of the northeast quarter, and the northeast quarter of the northwest quarter of section 11, township 30 north, range 7 west, M. D., M., in the county of Shasta, state of California, but by mutual mistake in drawing and writing said agreement, said property intended to be described was incorrectly and by mistake described by the persons employed to draft and write said agreement, as the west half of the northwest quarter of the northeast quarter, and the northeast quarter of the northwest quarter of the northwest quarter, of section 11, township 30 north, range 7 west, M. D. M. That said mistake in description was and is a clerical mistake made in writing and drafting said agreement. * * * That said mistake was not discovered by plaintiff Mary Isabelle Buick, formerly Mary Isabelle Boyd, until the month of June, 1912, in the following manner: That on or about December, 1910, plaintiff Mary Isabelle Buick, formerly Mary Isabelle Boyd, rented the real property described in said declaration of homestead, which included the west half of the northwest quarter of the northeast quarter, and the northeast quarter of the northwest quarter of section 11, township 30 north, range 7 west, M. D. M., in the county of Shasta, state of California, to one W. W. Sublett, and the said W. W. Sublett thereafter paid rent for the same to said plaintiff; that in the month of June, 1912, the said defendant Benjamin F. Boyd, notified the said W. W. Sublett that he, the said defendant, was entitled to the rent for the said northeast quarter of the northwest quarter of said section 11; that said W. W. Sublett immediately thereafter informed said plaintiff that said defendant claimed the rent for the said northeast quarter of the northwest quarter of said section 11, and claimed title to the same; that immediately thereafter said plaintiff examined said agreement, and discovered that the mistake in description hereinabove set forth had been made in said agreement. That prior to the said month of June, 1912, said plaintiff was not aware, and had no knowledge, that the aforesaid mistake in description had been made in said agreement."

It is not seriously contended that the evidence was insufficient to support these findings. If there was any evidence to the contrary, it was appellant's duty to point it out in his brief, which he has not done. Section 953c, Code Civ. Proc. We have read the record of the evidence and find it amply sufficient to sustain the findings.

It appeared that the parcel of land misdescribed did not, when the agreement was entered into, belong to either of the parties, while the parcel which the court found was intended to be described was a part of the homestead declared by defendant in 1902 while the northwest one-quarter of the northwest one-quarter of said section, which included the misdescribed parcel awarded to defendant, was deeded to him by the Central Pacific Railroad Company in July, 1909. The evidence showed that the intention of the parties was that the property described in the homestead should go to plaintiff in the divorce action.

The only controverted question in the case is presented in appellant's proposition above quoted.

The rule, as stated in the Code of Civil Procedure, § 1911, is as follows:

"That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

It was competent for the parties in the divorce action to adjust their property rights without the intervention of the court, and in doing so they expressly declared their object to be the settlement of "disputed claims to the property in controversy, and withdrawing the same from the consideration of the court." The court in its decree determined nothing more than that the "property be awarded to the respective parties in accordance with said agreement." There was no longer any issue as to the property, nor was it necessary for the court to make any deter-

mination of the matter. The action of the court did not, in our opinion, amount to such an adjudication as in contemplated by the statute; nor did it constitute a bar to the present action. It added nothing to the validity or force of the agreement. There were in fact but two questions remaining for the court to determine, to wit: Whether plaintiff was entitled to the decree of divorce, and to whom the custody of the minor children should be awarded. "A former verdict is conclusive only as to facts directly and distinctly put in issue and the finding on which is necessary to uphold the judgment." 1 Freeman on Judgments, § 257. Where the record on its face shows that an issue before the court was withdrawn from consideration, the presumption that it was adjudicated no longer applies. Coburn v. Goodall, 72 Cal. 498, 506, 14 Pac. 190, 1 Am. St. Rep. 75. If a question is not in issue, it is immaterial that it is passed upon in the opinion of the court rendering the judgment. 15 R. C. L. p. 919.

That the court and the parties treated the agreement as withdrawing the property rights from the court is shown by the fact that the agreement disposed of certain cattle to the plaintiff in the action and certain real property to the defendant of which no mention is made in the decree. This issue of property rights having been withdrawn, the present action cannot fairly be said to be an attack upon the judgment of divorce. "The rule undoubtedly is," as said by Mr. Justice Lorigan in Southern Pacific Co. v. Edmunds, 168 Cal. 415, 418, 143 Pac. 597, 598, "that a former judgment between the parties to an action is conclusive in all subsequent actions involving the same question, not only as to the matters actually decided in the former controversy, but as to all matters belonging to the subject of the controversy and properly within the scope of the issues which also might have been raised and determined." But as to matters which might have been litigated and decided as within the scope of a former suit, but which were not actually or expressly in issue and adjudicated, the learned justice said, "only a presumption is indulged in that they were decided. This presumption is, however, a disputable one and may be overcome by showing that, although a particular matter was involved in the former action, it was by consent of the parties withdrawn from consideration at the trial and did not at all enter into or constitute any part of the verdict of the jury or final determination of that action." In point of fact, and it so appears from the face of the record, the property described in the complaint in the divorce action, and in the agreement and referred to in the decree, did not include the parcel now involved, and the disposition of the latter was therefore not an issue in the original action, and, on the face of the record, the judgment would appear not to be a bar, for there was no adjudication as to it. If the rule be invoked that this parcel was a matter "belonging to the subject of the controversy and properly within the scope of the issues which also might have been raised and determined," the answer is that neither party discovered the mistake in the description of the property and both parties by mutual mistake assumed the description to be correct. The present action is different from the original action, and the rule is that in such case the judgment in the first action operates as an estoppel only as to those matters actually litigated and determined and not as to matters which might have been litigated. In Freeman v. Barnum, 131 Cal. 386, 389, 63 Pac. 691, 692 (82 Am. St. Rep. 355), Mr. Justice Temple stated the rule to be that:

"If the point or matter of fact has by them (the parties) or those to whom they are privy in estate been once distinctly put in issue and solemnly found against them, they are precluded from contending to the contrary. But this estoppel in actions upon a different cause of action only extends to matters actually litigated and determined, and not to questions involved and defenses which might have been, but were not made."

In the case of More v. More, 133 Cal. 489, 65 Pac. 1044, 66 Pac. 76, plaintiff Wallace More executed a deed purporting to convey to Thos. More all the interest of the former in the estate of A. P. More, deceased, and he also addressed a letter to the judge sitting in probate and to the administrator of said estate authorizing the distribution of said interest to said grantee. Accordingly, the court determined the rights of the parties under section 1664, Code of Civil Procedure. The suit was brought to annul the deed from Wallace to Thomas More. The judgment in the superior court was pleaded as an estoppel. Said the court:

"Assuming the court to have jurisdiction, its judgment would be conclusive only as to the matter actually litigated. (Citing cases.) In the case at bar the matter now involved was not before the court." (Fraud in obtaining the deed from Wallace More was the issue.) "The judgment was entered on the written order or stipulation of Wallace More, obtained along with the deed of April 27, 1894, and tainted with the same fraud. It added nothing to the force of that document and the accompanying deed. Hence it is immaterial whether the court had or had not jurisdiction to determine the questions now under consideration. It is sufficient that those questions were not submitted to it."

We can see no reason why the rule should not apply in a case of mutual mistake as well as where the issue is fraud. Relief in both cases addresses itself to the equity side of the court. It is very clear that in the present case the question of the alleged mistake was not before the court in the divorce action and was not litigated. Speaking of the identity of causes of action, Mr. Freeman says:

"The cause is the same when the same evidence will support both actions, or rather, the judgment in the former action will be a bar, provided the evidence necessary to sustain the judgment for plaintiff in the present action

would have authorized a judgment for him in the former." Freeman on Judgments, § 257.

Had the evidence of the mistake been before the court, or had it been known when the agreement was made, it is quite clear that a correct description of the land would have found its way into both the decree and the agreement. It would, to our minds, work a miscarriage of justice to allow the rule of res adjudicata to step in here and defeat the action. Neither the facts nor the exigencies of the case would justify the court in permitting this to be done.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

---

37 Cal. App. 778

## PEOPLE v. ROSSI. (Cr. 443.)

(District Court of Appeal, Third District, California. July 16, 1918.)

1. INFANTS ⊂⊃20—LEWD ACTS WITH FEMALE CHILD.
Where defendant committed lewd acts upon body of 9 year old girl calculated to arouse her sexual passions, but made no attempt to have intercourse, he was guilty of violating Pen. Code, § 288, punishing such acts when not constituting any other crime provided for in part 2 of Penal Code.

2. INFANTS ⊂⊃20—LEWD ACTS WITH FEMALE CHILD—SUFFICIENCY OF EVIDENCE.
Evidence *held* to warrant conviction of committing lewd and lascivious acts upon and with the body of a female child under the age of 14 years, in violation of Pen. Code, § 288.

3. CRIMINAL LAW ⊂⊃1159(2)—REVIEW—VERDICT.
Verdict warranted by the evidence will not be disturbed by appellate court.

4. CRIMINAL LAW 730(12)—REMARKS OF PROSECUTOR—CURE BY INSTRUCTION.
In prosecution for committing lewd acts upon body of 9 year old girl, prosecutor's reference to defendant as "debaucher," if improper, was rendered harmless by instruction that, if words had been employed in sense that defendant had had intercourse with the child, evidence did not justify their use.

5. CRIMINAL LAW ⊂⊃719(2)—ARGUMENT OF PROSECUTOR.
Prosecutor may build up theory of case as it is made by evidence, and often in so doing may give expression to thoughts drawn from realms of his imagination.

6. CRIMINAL LAW ⊂⊃719(1)—ARGUMENTS OF PROSECUTOR—EVIDENCE.
Prosecutor, in his argument, must not bring into case facts vitally bearing upon the charge or defendant's alleged connection therewith which have no foundation in the evidence.

7. CRIMINAL LAW ⊂⊃722(3)—COMMENTS OF PROSECUTOR—CHARACTER OF ACCUSED.
Where evidence warrants belief that defendant is guilty, prosecutor, in his argument, may assume his guilt and characterize him according to the nature or degree of turpitude of the crime of which he is accused.

8. CRIMINAL LAW ⊂⊃720(5)—TRIAL—COMMENTS OF PROSECUTOR—CREDIBILITY AND CHARACTER OF WITNESSES.
Prosecutor in his argument may assail credibility of witnesses, when impeached by direct evidence, or by inconsistency or incoherence, manner of testifying, appearance upon the stand, or circumstances.

9. CRIMINAL LAW ⊂⊃991(3)—LEWD ACTS UPON BODY OF CHILD—INDETERMINATIVE SENTENCE.
In view of Indeterminate Sentence Act, court was unauthorized to impose maximum penalty of 20 years' imprisonment for violation of Pen. Code, § 288.

10. CRIMINAL LAW ⊂⊃1184—JUDGMENT—UNAUTHORIZED SENTENCE.
Trial court's error in imposing maximum sentence, where it had no authority to do so, does not nullify entire judgment, but judgment may be modified by appellate court imposing proper sentence.

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Roffi Rossi was convicted of having committed lewd and lascivious acts upon and with the body of a female child under the age of 14 years, and he appeals. Affirmed, as modified.

K. D. Robinson, of Auburn, Cal., and A. J. Harder, of Roseville, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was charged by an information with, and convicted by a jury in the superior court of Placer county of, having committed lewd and lascivious acts upon and with the body of a female child under the age of 14 years, and prosecutes these appeals from the judgment of conviction and the order denying his motion for a new trial.

The information is based on section 288 of the Penal Code which reads:

"Any person who shall willfully and lewdly commit any lewd or lascivious act other than the acts constituting other crimes provided for in part two of this Code upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child shall be guilty of a felony and shall be imprisoned in the state prison not less than one year."

The information charges the offense as follows:

"The said Roffi Rossi, on or about the 17th day of January, A. D. 1918, at the said county of Placer, in the said state of California, and before the filing of this information, did then and there willfully, unlawfully, feloniously, and lewdly kiss, embrace, hug, and place his hands under the clothes and on and between the legs of one Lucille Orsolini, a female child under the age of fourteen years, with the intent of then and there arousing, appealing to, and gratifying the lust and passion and sexual desires of said child, all of which is contrary to the form, force, and effect," etc.

The point first made by the defendant is that if the defendant was shown by the evidence to have been guilty of any crime at all, it was that of an attempt to commit rape, and not that defined by section 288 of the Penal Code. It is hence argued that the verdict cannot stand, because the acts proved come within those "constituting other crimes provided for in part 2 of the Penal Code." The point is without merit.

The child upon whom the alleged lascivious act was committed by the defendant is the daughter of a Mr. and Mrs. Orsolini, residents of Roseville, Placer county, and was, at the time of the commission of said act (the 17th day of January, 1918), a little more than 9 years of age. The alleged crime was committed in the early morning of the day named at the home of the parents of the child in Roseville, after the father had gone to his work as a machinist in the railroad shops at Roseville and the mother had gone to the city of Sacramento to spend the day. A family by the name of Trott was occupying the house temporarily with the Orsolinis, and Trott was the only person left in the house with the child; Mrs. Trott having also gone to Sacramento that day. Trott was in bed, and the little girl was in the kitchen engaged in preparing her own breakfast, when the defendant, for the purpose, so he claimed, of delivering to Trott a key to a house in Roseville which the latter contemplated leasing for use by himself and family, made his appearance at the Orsolini home. Trott was aroused from a semisleeping condition by the noise of persons talking and "rustling around" in the adjoining room, and finally heard a child's voice say, "Don't do that—stop that—it hurts." Trott thereupon went to the bathroom door, from which he could see into the adjoining bedroom, and there he saw the defendant sitting upon the bed, but did not then see the child. Trott then returned to his own room, and went back to bed, and within a few minutes thereafter again heard similar noises to those which he had previously heard, and again he arose and went to the bathroom door, and, looking into the adjoining bedroom, saw the defendant sitting on the bed holding the child between his legs, with the back part of her clothes up and his left hand under her clothes, while his right hand was around her body. Trott said that the defendant was moving himself "up and down" and holding the child on his lap. Trott addressing the defendant, asked, "What in hell are you doing there?" Whereupon the child broke away from the embraces of the defendant and ran into the adjacent room, exclaiming, as she ran out, "You dirty thing; I told you not to do that." When the child thus got away from the defendant, Trott observed that the latter's private parts were out of his pantaloons and exposed.

There was no testimony that the defendant had sexual relations with the child. In fact, the girl testified that he did not insert his private parts into hers, but kissed and hugged her, and had his hand under her dress and upon her person. She explained that when she said to the defendant, "Stop that, it hurts," etc., she had reference to his hugging her or pressing her body to his with such force as to make it painful to her.

[1-3] It requires no argument to demonstrate that, under the facts as they are above briefly detailed, the defendant's acts were those denounced as a crime by section 288 of the Penal Code. It may be true that his intention was to have sexual relations with the child; but there is no evidence that he did have such relations with her nor is there any proof that he attempted to insert his private parts into hers. But, as is obvious from the above statement of the testimony, there is ample evidence showing that he committed acts of lewdness upon her body—acts which very naturally are calculated to excite the sexual passions of a child—and it it just such reprehensible conduct that section 288 was designed to punish. If it had been so clearly shown that the defendant attempted to insert his private parts into those of the child that no other conclusion would have been justified by the jury than that he attempted to commit the crime of rape upon the infant, then this court might be required to agree with appellant's counsel that the act committed was one of those "acts constituting other crimes provided for by part 2 of the" Penal Code, and therefore within the exception prescribed by section 288. But, as in effect heretofore stated, there is evidence which warranted the verdict returned by the jury, and we are in consequence not at liberty to interfere with the result at which they arrived. See People v. Dabner, 25 Cal. App. 630, 144 Pac. 975.

[4-8] The next and last point urged by the appellant for a reversal is predicated upon certain alleged misconduct of the district attorney during the course of his argument to the jury. That officer, several times in his address, referred to the case as one in which the "little girl" had been "debauched" by the defendant, and also declared that the latter was a "debaucher." Counsel for the defendant objected to the use of those words by the district attorney, and the court thereupon suggested that the prosecutor omit their use in his argument, saying that, if the words were employed by the district attorney in the sense that the defendant had actually had sexual intercourse with the child, the evidence did not justify their use. This statement by the court was itself sufficient to overcome the effect of any damage which the defendant might have otherwise suffered from the use of those words by the prosecutor. But we do not think the district attorney went far afield when he described the defendant as a "debaucher." The evidence, of which we have herein given a statement in substance, discloses the defendant's revolting and beastly acts upon the child, and, even though he did not succeed in having actual sexual relations with her, it is fairly and reasonably to be assumed from the evidence that he was not above doing so, and might have carried his lechery that far, but for the appearance of the witness Trott in the room at a timely moment.

We are, however, not so sure that one doing as the defendant was shown by the evidence to have done in this case may not with propriety be termed a "debaucher." His acts with the child were obviously such as to instill into her childish mind thoughts of the most degrading character and tendency, and which are naturally calculated to lead an adolescent, presumably without fixed or correct notions of the principles of morality or a proper appreciation of the appalling significance of the loss of chastity by a female, to the commission of acts of unspeakable depravity. A man responsible for such a state of mind in a young female, who may be assumed, from her immature years, to be mentally irresponsible or without the ability to appreciate the terrible consequences to her of immoral conduct, is, although himself never having been criminally intimate with such child, no less a debaucher than one who has committed upon the child the sexual act itself.

A district attorney, however, has the right in argument to build up a theory of his case as it is made by the evidence, and often in doing so he may give expression to thoughts which have been drawn from the realms of his imagination. If thus he keeps within the general character of the case as it is made by the proofs, then he remains within the sphere of legitimate argument. Of course, the prosecutor should not be permitted, in argument, to bring into the case facts vitally bearing upon the charge, or the defendant's alleged connection therewith, which have no foundation in the evidence; but where the evidence, as here, is such as clearly to warrant the belief that the defendant on trial committed the crime charged, then the prosecuting officer is authorized in argument to assume his guilt and to refer to and characterize him according to the nature or degree of turpitude of the crime of which he is accused. As was said in People v. Glaze, 139 Cal. 154, 160, 72 Pac. 965, 967, in reply to an objection that the district attorney abused his rights in his argument to the jury, so it may with equal propriety be said here:

"A defendant on trial for murder is not entitled as of right to be spoken of as if he were an innocent man in an argument by the officer who is endeavoring to show * * * his guilt."

Hence it has been well said that, in his address to the jury, a prosecuting officer may descant upon the facts proved or admitted, arraign the conduct of the parties or the witnesses, "impugn, excuse, fortify, or condemn motives, as far as they are developed in the evidence, and assail the credibility of witnesses, when impeached by direct evidence, or by the inconsistency or incoherence of their testimony, their manner of testifying, their appearance upon the stand, or by circumstances. His illustrations may be as varied as the resources of his genius, his argumentation as full and profound as his learning can make it, and he may, if he will, give play to his wit, or wings to his imagination." Tucker v. Henniker, 41 N. H. 323. See, also, People v. Molina, 126 Cal. 505, 59 Pac. 34; People v. McMahon, 124 Cal. 436, 57 Pac. 224; People v. Soeder, 150 Cal. 12, 87 Pac. 1016; People v. Weber, 149 Cal. 325, 86 Pac. 671; People v. Wheeler, 65 Cal. 77, 2 Pac. 892; People v. Yee Foo, 4 Cal. App. 730, 741, 742, 89 Pac. 450.

[9] No other points are made by the defendant, but the Attorney General has called our attention to an error in the judgment of sentence of which notice herein should be taken. The crime of which the defendant was convicted was, as above shown, committed in the month of January, 1918. The Legislature of 1917 passed what is known as the "Indeterminate Sentence Act," which went into operation in August of said year (see Stats. 1917, p. 665), said law being now section 1168 of the Penal Code.

Section 288 of the Penal Code, of the alleged violation of whose provisions the defendant was convicted, fixes a minimum penalty of not less than one year for the offense defined therein, but does not prescribe or limit to a specific number of years a maximum penalty therefor, so that the punishment may in such a case run from not less than one year to life. The court below, in sentencing the defendant and in its judgment of sentence, fixed the maximum term of imprisonment at 20 years. Such a sentence in this case the court was without authority to impose, since section 1168 of the Penal Code was in operative effect at the time the crime of which the defendant was convicted is alleged to have been committed. People v. Gonzales, 173 Pac. 407. In that case the defendants were convicted of the crime of robbery, committed after section 1168 of the Penal Code became operative, and the court, in sentencing them, fixed the maximum penalty in each case at a specific number of years. The punishment for the crime of robbery is exactly the same as that prescribed for the offense of which the defendant here stands convicted, viz. "by imprisonment in the state prison not less than one year." This court, in the case above named, among other things, said:

"We can see no merit in the claim that the law does not prescribe the maximum penalty for the crime of robbery. The maximum penalty 'prescribed by the law' is the extreme penalty that the law authorizes to be imposed; that is, life imprisonment in the present case, as we have seen."

The judgment was reversed, "with direction to the lower court to pronounce judgment in accordance with said indeterminate sentence law of 1917." A petition for the hearing of the case by the Supreme Court after judgment here was denied, and the case is therefore controlling upon the question here.

[10] The Attorney General, however, upon a point of practice in a matter of this kind, has called our attention to the case of the People v. Mendosa, 173 Pac. 998, in which the defendant, having been convicted of burglary of the second degree, committed after the indeterminate sentence law became operative, was sentenced by the court to imprisonment in the state prison for not less than one nor more than five years. The maximum punishment for burglary of the second degree is imprisonment for five years in the penitentiary, no minimum penalty being prescribed for said offense. The appellate court of the First district, while holding that the trial court erred in fixing the minimum penalty at one year, further properly held that the error so committed did not have the effect of nullifying the entire judgment, but instead of remanding the case for the purpose of having a proper sentence imposed modified the judgment of sentence by striking therefrom the portion thereof purporting to fix the period of imprisonment. That case was not called to our attention in the Gonzales Case, nor does it in any way conflict with the conclusion reached in the latter case upon the vital question therein decided, but harmonizes therewith. We do not, however, perceive any reason for holding that the course adopted by the appellate court in the Mendosa Case is not in such a situation perfectly proper, legally, and certainly it is the better, or at least the less inconvenient and troublesome, course to follow. We shall, therefore, adopt it in this case, in preference to returning the case to the court below for the imposition of a proper sentence.

Accordingly, the portion of the judgment of sentence herein which attempts and purports to fix the maximum penalty at 20 years is stricken from said judgment, and, as so modified, the judgment appealed from, as well as the order, likewise attacked here, denying the defendant's motion for a new trial, are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

---

37 Cal. App. 796

DUTWILER v. KLUNK et al. (Civ. 2283.)

(District Court of Appeal, Second District, California. July 23, 1918.)

1. SALES ⟸1(4) — CERTAINTY — CARLOAD OF IRON.

A contract whereby one party was to obtain a carload of iron and manufacture the iron into stoves, with dies to be furnished by other party, who was to purchase the stoves, was not void for uncertainty, although parties did not agree on the amount of iron in carload, or maximum or minimum amount thereof.

2. SALES ⟸370 — PERFORMANCE — BREACH — DAMAGES.

Where stove dealers agreed to furnish manufacturer with dies, and to buy all stoves manufactured with such dies out of a carload of iron, but after part performance took dies away from the latter and refused to return them, latter's right to recover damages was not defeated by fact that he had loaned part of the iron, where loan did not interfere with performance of contract, and where dealers knowing of loan, did not object, and treated contract as in force.

3. APPEAL AND ERROR ⟸757(1) — RECORD — BRIEFS.

On appeal under the alternative method provided for by Code Civ. Proc. § 953a et seq., the court will not consider error in ruling on admission of evidence, where no part of the record upon such question has been printed in the briefs, as required by section 953c.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by M. E. Dutwiler against A. J. Klunk and another, copartners. Judgment for plaintiff, and defendants appeal. Affirmed.

Ward Chapman and L. M. Chapman, both of Los Angeles, for appellants. Barstow, Rohe & Jeffers, of Los Angeles, for respondent.

CONREY, P. J. The defendants were engaged in selling a certain kind of patented camp stove. In order to obtain a supply of stoves for the market they agreed with the plaintiff that the plaintiff would obtain a carload of iron and manufacture that iron into stoves, for which the defendants would pay to the plaintiff 75 cents per stove. The stoves were to be made in accordance with certain dies, which the defendants were to furnish and did furnish. After a part of the stoves had been delivered and paid for, the defendants, with plaintiff's consent, shipped the dies to Chicago for the purpose of using the same in manufacturing a quantity of stoves there, but with a promise to return the same to the plaintiff to complete his contract. These dies never were returned to the plaintiff. Of the iron remaining in the plaintiff's hands, a part had been blocked out for stoves and a part was untouched. The judgment, which was in favor of the plaintiff, covers a sum allowed for depreciation in value of the iron which had been blocked out, and a sum covering the profits which the plaintiff would have made if the contract had been fulfilled. The defendants appeal from the judgment.

The principal grounds of appeal urged by the defendants are the following: (1) The contract was void for uncertainty in the attempted specification of the quantity of iron authorized to be ordered, and was therefore unenforceable in so far as uncompleted stoves were concerned. (2) The evidence does not support the finding that defendants agreed to purchase more than the number of stoves to be made from a minimum car of 40,000 pounds, to wit, approximately 3,500 stoves. (3) The judgment for depreciation in value of the cut-up iron and loss of prospective profit was unwarranted, because the contract was not performed, nor was performance

prevented by defendants. On the contrary, plaintiff himself breached the contract and abandoned the same, when he loaned or sold a part of the metal ordered for the performance of his contract. (4) The court erred in declining to allow defendants an opportunity to procure the original freight bill of the car in question and thus prove the weight of the metal delivered.

[1] We have not been favored with a printed copy of the court's findings, but from the evidence produced in the brief we infer that the weight of the iron in that carload was found to be 49,618 pounds. There was evidence tending to show that such was the true weight. Appellants claim that their order was limited to a minimum carload, and that a minimum carload of iron would have weighed only 40,000 pounds. The evidence was amply sufficient to support the court's conclusion that the contract simply provided for a carload of iron, without limiting the quantity to any specified weight. Taking this to be the fact, we think that the contract was enforceable, notwithstanding the fact that the parties in making their agreement did not state how much iron should constitute a carload, and did not attempt to provide what should be either the minimum or maximum amount of iron in such carload. In the case of a contract for nine carloads of lumber it was held by the Appellate Court of Indiana that the parties might contract for nine carloads without specifying the capacity of the cars. Indianapolis Cabinet Co. v. Herrman, 7 Ind. App. 462, 34 N. E. 579.

[2] On cross-examination of the plaintiff he admitted that after the carload of iron came into his possession, and before the dies were taken away by the defendants, the plaintiff loaned 30 bundles of the iron to another corporation. After about six weeks this iron was returned by the borrower to the plaintiff. During that period of six weeks the defendants took away the dies for the stated purpose of sending them away temporarily for the special purpose stated above. They were informed at that time that these 30 bundles had been loaned to another establishment, but they made no objection thereto. On the contrary, the defendants treated the contract as still in force and promised that they would return the dies within a stated time. Our attention has not been called to any evidence tending to show that the act of the plaintiff in lending these 30 bundles of iron, amounting to about 4,500 pounds, caused any delay, or in any manner interfered with the plaintiff's performance of his contract. These facts, therefore, do not furnish any valid ground for appellants' claim that the judgment for depreciation in value of the cut-up iron and the loss of prospective profits was unwarranted.

[3] The last point argued in appellants' brief relates to an alleged error in ruling upon the admission of evidence. No part of the record upon this question has been printed in that brief or in the brief of the opposing party. They disagree about the facts, and the matter in dispute is not properly before us for determination. Where the record on appeal has been prepared in typewritten form under the alternative method provided by sections 953a et seq. of the Code of Civil Procedure, the parties must "print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court." Code Civ. Proc. § 953c; Barker Bros. v. Joos, 171 Pac. 1085.

The judgment is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

---

37 Cal. App. 743

## CALIFORNIA VEGETABLE UNION v. CROCKER NAT. BANK OF SAN FRANCISCO. (Civ. 2440.)

(District Court of Appeal, First District, California. July 8, 1918.)

1. BANKS AND BANKING ⊂⊃148(3) — FORGED CHECKS—NEGLIGENCE OF DEPOSITOR.
Where depositor did not examine monthly statements from a bank, and thus an employé of the depositor forged successive checks throughout a year, depositor was not entitled to recover money so paid out, especially where monthly notices required depositors to report discrepancies within 15 days.

2. BANKS AND BANKING ⊂⊃154(2) — FORGED CHECKS.
Code Civ. Proc. § 340, subd. 3, requiring depositor to bring action against bank for payment of forged check within one year, begins to run on presentment and payment of the check, and not upon discovery of forgery.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the California Vegetable Union, a corporation, against the Crocker National Bank of San Francisco, a national banking association. From a judgment in its favor granting only a part of the relief demanded, plaintiff appeals. Affirmed.

Walter R. Bacon, of San Francisco, for appellant. Morrison, Dunne & Brobeck, of San Francisco (J. F. Shuman, of San Francisco, of counsel), for respondent.

BEASLY, Judge pro tem. The California Vegetable Union is a Los Angeles concern having a branch house in San Francisco. Of this branch house during the period in which we are interested H. F. Ardery was the manager and Fred B. Weeks the cashier. During the years 1911 and 1912 and until the end of the year 1913 the plaintiff's branch house in San Francisco was a depositor of the defendant bank. The bank was instructed to pay checks of the plaintiff when signed by Fred

B. Weeks, its cashier, and H. F. Ardery, its manager. Weeks became an employé of the plaintiff about the 1st of May, 1912, and continued in that employment until about September 1, 1913, when he "departed these quarters for parts unknown, leaving behind him a trail of forged checks." Between September 18, 1912, and August 28, 1913, Weeks forged the name of Ardery to 136 separate checks, all drawn upon the plaintiff's account in the defendant bank, and aggregating $3,972.65. The bank cashed these checks, and charged their amount to plaintiff's account. The checks went through the bank during the various months of this period, and at the end of each month the forged checks paid during that month, together with all the valid checks of the plaintiff, were returned to it, with a list of all checks paid by the bank during that month. The statement accompanying the vouchers also showed the balance to the credit of the plaintiff at the end of the preceding month in each instance, the amounts of all deposits made by it during that month, and separately all checks of plaintiff paid by the bank during the current month, and the balance to the credit of the plaintiff on the defendant's books at the end of the month. These returned checks and these accounts for all of the months from August, 1912, to August, 1913, although regularly received in the course of business at the end of each month during that period, were never examined by the plaintiff, nor by its manager Ardery, until some time in September, 1913, after Weeks had absconded. During the period in which the forgeries were perpetrated Mr. O'Neal, the president of the plaintiff company, visited the San Francisco branch on several occasions. He had opportunity to examine the account of the plaintiff in the bank and the returned checks and vouchers, but he never did it. He did, however, see the general statement showing the bank balance of the branch house during that time. Other officials of the company visited the office in San Francisco during the period but none of them ever examined or paid any attention whatever to the bank balances or to the written statements of the business of the branch with the bank. The plaintiff also employed an auditor in its Los Angeles office, whose duty it was to examine its bank balances and check up month by month the canceled checks and vouchers, but no examination of the checks and vouchers of the branch in San Francisco was ever made by this auditor during that time, nor by any one performing similar duties.

Mr. O'Neal testified that he knew it to be a custom of banks to furnish to their depositors monthly statements showing their balances, together with the vouchers and canceled checks that had been paid and charged to the account during the month; that he never asked Mr. Ardery if he was having that done in San Francisco; that the checks were made up in blocks of 100 each; that a check register was kept numbered to correspond with the various numbers of the checks, and ruled so that the purpose of the check is stated in the cash book or check register; that the regular system of the plaintiff was that every time a check went out the company had a list or memorandum of the check in the office, and that it was possible when the checks came back from the bank at the end of each month to compare them with the check register by numbers and amounts, but this was never done. Had any of these precautions been taken Weeks' rascality would have been discovered. Weeks was not without considerable skill in these forgeries. The forged signatures of Ardery were strikingly similar to his true signature. Several officers of the defendant bank, all skilled in the detection of forgeries, testified that this was so. Mr. Ebner, the assistant cashier of the bank, who has had 33 years' experience in examining signatures on bank checks, said that if the bank were to refuse payment of checks bearing signatures agreeing as closely with the authorized signature in the bank as did the forged signatures of Ardery, the result would be a refusal of payment of about half the checks presented at banks.

Ardery excused his remissness in paying no attention to the bank account by the curt statement that it was none of his business; that "Weeks was under bond to take care of that end of the work." Generally speaking, the method of these parties in doing business may be said to have corresponded with the customs of metropolitan banks and their depositors in transacting business with each other; and it appears from the evidence that had Mr. O'Neal or Mr. Ardery or their auditor given any attention whatever to the returned checks or to the state of plaintiff's bank balances they would have known that from the beginning of his transaction of business with the bank Weeks was forging the name of Ardery to checks, cashing them and converting the money to his own use.

The court gave judgment for the plaintiff for $40, this being based on two checks of $20, each forged and uttered by Weeks prior to his disappearance on the last day of August, and paid by the bank in September about a week after it had been notified by Ardery of the other forgeries.

[1] The principal problem in this case may be stated in the language of the Supreme Court in the case of Otis Elevator Co. v. First National Bank, 163 Cal. 31, 124 Pac. 704, 41 L. R. A. (N. S.) 529, and is as follows:

"The claim made by the" appellant "was that * * * the evidence presented the simple case of a forgery * * * to which is to be applied the well-settled rule that as between the bank

and its customers the payment of forged or altered checks by such bank is made at its peril, and cannot be charged against the depositor's account. This, of course, is the general rule, and it is applied stringently in cases of simple forgery which involve no other elements than that the purported check of the depositor which was paid was a forged one. But this rule is not applied unqualifiedly. It has its limitations and exceptions, as general rules usually have, and is modified to the extent that when some negligent act * * * of the customer has contributed to the payment by the bank, or the facts in a particular case surrounding the forgery of a check and its presentation and payment are of such character as call for the application thereto of some general principle of law or equity, they may be relied on by the bank as an estoppel against the customer, precluding him from denying the correctness of the payment."

The exact question here involved has never been squarely decided in the courts of this state so far as we have been able to discover. An instruction in accordance with the contention of the appellant was expressly disapproved in the case of Janin v. London & S. F. Bank, 92 Cal. 14, 27 Pac. 1100, 14 L. R. A. 320, 27 Am. St. Rep. 82, which instruction read as follows:

"In considering the fact that Mr. Janin's bank book was balanced, and that the bank's statement of the balance was apparently acquiesced in for a considerable length of time, I instruct you that the plaintiff was under no contract to the bank to examine with diligence his returned checks and bank book. In contemplation of law, the book was balanced and the checks returned for the protection of the depositor, not for the protection of the bank; and when Mr. Janin failed to examine it, the only consequence was that the burden of proof shifted. Mr. Janin then became bound to show that the account was wrongly stated. This right he has preserved so long as the claim was not barred by the statute of limitations." "This instruction," says the court in the opinion, "although apparently supported by the authority of Weisser v. Denison, 10 N. Y. 68, 61 Am. Dec. 731, is not in our opinion entirely correct, and is in conflict with the other instructions referred to. When considered in connection with a portion of another instruction given, to the effect that it 'was sufficient to give notice when the forgery was discovered,' this instruction clearly implied that the plaintiff could not be charged with negligence in not examining his checks within a reasonable time, and that the jury were only to inquire whether he was guilty of unreasonable delay in giving notice after he made the examination and discovered the forgery. This is not the true rule. * * *"

The court thus disapproved of the exact contention which counsel for appellant makes in this case, although it must be said that it did not reverse the case for that reason, but on other grounds, holding that in view of the undisputed evidence in the case the giving of this erroneous instruction did not justify a reversal of the judgment. This case and the case of Otis Elevator Co. v. First Nat. Bank, supra, are the only cases that we have been able to find in this jurisdiction, where this rule has been considered by the court; and in neither of those cases, it must be admitted, were the facts exactly those of this case; nor did the Supreme Court in either of those cases finally base its decision upon the propositions of law here involved. However, those cases appeal to us as sound expressions of the legal principle which must apply to the facts of the case at bar; and our conclusion in that respect is in accord with the weight of authority in the United States.

The principle embodied in the case of Otis Elevator Co. v. First Nat. Bank, supra, and the general rule above stated, find emphatic approval and application in the leading case of Leather Manufacturers' Bank v. Morgan, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811, in which the court, treating the presentation of a bank book written up accompanied by the canceled checks of the depositor to him as an account stated, says:

"Where a party to a stated account, who is under a duty, from the usages of business or otherwise, to examine it within a reasonable time after having an opportunity to do so, and give timely notice of his objections thereto, neglects altogether to make such examination himself, or to have it made, in good faith, by another for him, by reason of which negligence the other party, relying upon the account as having been acquiesced in or approved, has failed to take steps for his protection which he could and would have taken had such notice been given," the depositor is estopped by his conduct to question the conclusiveness of the account stated which arises out of the presentation to him of the account and his failure to examine it and detect the frauds contained therein, and give the bank notice thereof in order that it may protect itself against future frauds of a similar character.

In addition to the rule laid down very clearly after an able and exhaustive discussion in the case of Leather Manufacturers' Bank v. Morgan, supra, the question has been before the Court of Appeal of the state of New York in the case of Morgan v. United States Mortgage & Trust Co., 208 N. Y. 218, 101 N. E. 871, L. R. A. 1915D, 741, Ann. Cas. 1914D, 462, in which the legal principle in issue here was approvingly applied and clearly stated in the following language (syllabus):

"Primarily a bank may pay and charge to its depositor only such sums as are duly authorized by the latter, and of course a forged check is not authority for such payment. It is, however, permitted to a bank to escape liability for repayment of amounts paid out on forged checks by establishing that the depositor has been guilty of negligence which contributed to such payments, and that it has been free from any negligence. A depositor who sends his passbook to be written up and receives it back with his paid checks as vouchers, is bound, under certain circumstances, to examine the passbook and vouchers, and report to the bank without unreasonable delay any errors which may be discovered."

The facts in that case were very similar to those in the case at bar, and are stated in the opinion substantially as follows:

"The trustees of an estate had a deposit account with a bank, and checks drawn thereon were signed by a rubber stamp imprinting the name of the estate, authenticated by the actual signature of either trustee. The trustees had a clerk, who was their agent in dealing with the bank. He made deposits, filled out the body of the checks, and obtained from the bank the passbook and vouchers and accompanying check list

whenever the account was balanced. During a period of about a year he forged a number of checks aggregating a large sum, and employed in his forgeries the rubber stamp, with the simulated signature of one of the trustees in authentication thereof. Whenever the account was balanced the clerk withdrew from the vouchers and destroyed the checks forged by him and also the check list, and after as long a delay as convenient delivered the passbook and the genuine vouchers to the trustees, who knew that the passbook was balanced frequently and returned with the paid checks as vouchers and with a detailed list thereof. The trustees also had a journal and ledger account, * * * upon the stubs of which were entered the genuine checks presented to and paid by the bank. The trustee who examined the passbook and vouchers never asked for the check list, which he knew was returned with the vouchers, and which would have shown the payment of the forged checks. He did not examine the balances shown by the passbook which were struck after the payment of the forged checks, but contented himself with a comparison of the genuine checks with the check book and with the books of the estate, which comparison disclosed no signs of the forgeries. The bank also paid interest on the account, and an examination of the passbook would have shown that the amount of interest credited thereon was much less than that on the books of the estate and less than would have appeared except for the payment of the forged checks."

On this state of facts in that case the Court of Appeals of New York held that the depositors, by their own negligence in failing properly to examine their passbook and vouchers, contributed to the payment of the forged checks, and hence that the plaintiff could not recover from the bank the amounts so paid. That case settled the question in New York, overruling the earlier case of Weisser v. Denison, 10 N. Y. 68, 61 Am. Dec. 731, relied on by appellant. It seemed necessary to so settle the question as the authorities were in some confusion in that state upon this subject previous to the adjudication of Morgan v. United States Mortgage & Trust Co., supra.

In Pennsylvania the leading case of Myers v. Southwestern Natl. Bank, 193 Pa. 1, 44 Atl. 280, 74 Am. St. Rep. 672, held in conformity to the views of the United States Supreme Court and of the Court of Appeals of the state of New York in the case above cited and other cases, upholding the same doctrine, and stated that if the plaintiff's duty to the bank had been performed at the proper time, the fact would have appeared that the bank had charged the plaintiff on his bank book with the payment of two items for which no vouchers appeared among the checks handed to him by the clerk, and that, no objection having been made at the time of the presentation of the statements by the bank, the latter had the right to assume that everything was correct, including the two checks purporting to have been forged, and that the silence of the plaintiff was tantamount to a declaration to that effect, and that in afterwards honoring checks signed by the same person the bank had a right to consider the fact that these signatures had been at least tacitly recognized by the plaintiff as genuine. Further the court in that case said:

"In view of the uncontradicted evidence as to the foregoing facts, it cannot be doubted that as between the bank and the plaintiff the latter alone should be held responsible for the consequences resulting from the failure to examine the checks in question and approve or reject them within a reasonable time. In contemplation of law, the delivery of the checks to plaintiff's clerk was a delivery by the bank to the plaintiff himself, as the basis on which its credits were claimed. The bank was therefore entitled to have them examined, and, if rejected, returned within a reasonable time. That was not done, and because of plaintiff's failure to perform his duty in that regard, he should not be permitted to recover. Any other rule would be inconsistent, not only with general and long-established custom, but also with well-settled principles of law on the subject."

Without quoting further, it may be said that the great weight of authority in the United States supports the conclusions arrived at in the cases above cited. It is true that those cases were based upon bank books written up, but there is no distinction in principle between the old-fashioned bank book and the modern statements furnished by a bank to its depositors from time to time upon the balancing of their accounts and the return of the canceled checks to them. Improved methods of bookkeeping in banks do not render inapplicable the rule of law here invoked and applied. To lay down any other rule than that hereinabove stated would be to add an unjust burden to the duties of paying officers of banks. The greatly increased volume of business consequent upon the development of modern commerce, and the almost universal use of checks in settlement of every conceivable obligation, make the post of paying teller of a bank—compelled as he is to know the signature of every depositor of a bank—an exceedingly difficult one. If depositors may regularly at frequent intervals receive their vouchers and be notified, as was the appellant here, of reduced balances of their accounts in banks consequent upon the unfaithfulness of trusted employés during a period of nearly a year, and by neglecting to exercise reasonable supervision over their own business fail to discover fraud which has been perpetrated upon them and the bank, and may thus leave the bank in ignorance of the frauds thus committed, and charge the bank with the losses thus occasioned, then banks and their paying tellers face hard conditions indeed. We do not feel justified in establishing any such rule in this state.

In the case at bar there is an additional reason for the application of this principle arising from the fact that the statements and returned checks were accompanied by the following written request on the part of the bank:

"Please examine the inclosed account and return this at your earliest convenience signed by the principal, as this bank will not consider itself responsible for errors or discrepancies which are not advised within fifteen days after delivery of the statement."

The repeated failures of the appellant to heed this request speaks with much force in favor of the application of the principles above stated.

The claim that the plaintiff never received these statements is hardly worthy of notice, as its officers visited its branch house in San Francisco from time to time, as we have seen, and its manager, Mr. Ardery, was in charge of the branch house constantly during the time when these forgeries were being perpetrated. Their possession of and control over these statements and returned checks follow from their control of their branch establishment.

[2] The final contention of counsel for the appellant is that the trial judge should, even in his view of the law, have given judgment for $140 in addition to the $40 in favor of the appellant to cover three checks in that amount forged by Weeks and paid by the bank in September, 1912, they being the first forgeries, and having been paid by the bank in September, 1912, and included in the bank's statement of October 1st following. One of the defenses set up by the respondent was that provision of the statute of limitations embodied in subdivision 3 of section 340 of the Code of Civil Procedure, in which it is provided that an action against a bank by a depositor for the payment of a forged check must be brought within one year. This section was added to the statute by amendment in the year 1905. The three checks making up the $140 for which appellant claims an additional judgment should have been given him were paid more than one year before the beginning of this action, the action having been commenced on the 18th of May, 1914. They were also included in the statement rendered by the bank to the plaintiff more than one year before the beginning of the action. It is contended by the plaintiff that its cause of action against the bank upon these three checks did not ripen until discovery by it of the forgeries of Weeks, the argument being based, of course, upon the proposition that an action counting upon fraud does not ripen until the discovery of the fraud. There are three answers to this contention which seem to us conclusive. The first is that the action of plaintiff was not based upon the fraud, but rather upon the contractual relations of the parties. It is impossible to read into the plaintiff's complaint anything else than a simple action upon the contract between them. The forgeries of Weeks are not therein mentioned. The second answer to plaintiff's contention is this: The bank committed no fraud against the plaintiff. It concealed nothing from the plaintiff. The section of the Code providing that the time for beginning an action upon fraud is postponed until the discovery thereof does not apply between parties to this action, because the bank was not in any sense a party to the fraud. The third answer to this contention is found in the case of Masonic Benefit Ass'n v. First State Bank, 99 Miss. 610, 55 South. 408, in which the Supreme Court of the state of Mississippi, passing upon the question of the applicability of a statute providing that, where the cause of action has been fraudulently concealed by the person against whom it lies, the time for its commencement does not begin to run until the discovery of the cause of action, in a case where a depositor was suing a bank for cashing a check upon an unauthorized indorsement, said:

"There was no fraud perpetrated or concealed on the part of the appellee. It paid the check in good faith, believing the indorsement genuine. Neither the appellant nor the appellee were at fault in failing to discover the forged indorsement after the payment of the check. Appellee's failure to discover the forgery at the time it was presented, resulting in its payment, made it liable to the party defrauded to the amount of the check; but after that the duty rested equally on the appellant and appellee to discover the forgery, and appellant's opportunities for making the discovery were as good as appellee's, because appellant had in its possession the canceled check with the forged indorsement, which had been rendered to it as voucher. The running of the statute was therefore not delayed to the time of the discovery by appellant of the forged indorsement."

We therefore hold that the action on these checks aggregating $140 was barred at the time the complaint herein was filed. For the foregoing reasons, the judgment is affirmed.

We concur: KERRIGAN, J.; ZOOK, Judge pro tem.

---

37 Cal. App. 723

## GOODALL v. SUPERIOR COURT IN AND FOR SANTA BARBARA COUNTY et al.

(Civ. 2681.)

(District Court of Appeal, Second District, California. July 3, 1918. Rehearing Denied by Supreme Court Aug. 29, 1918.)

1. CONTEMPT ⟸67—WRIT OF REVIEW—UNWARRANTED ORDER.
An unwarranted order, adjudging one guilty of contempt, may be annulled upon a writ of review.

2. INJUNCTION ⟸231—WRIT OF REVIEW—ORDER DISMISSING CONTEMPT PROCEEDINGS.
Where beneficiary of injunction brings contempt proceedings against person violating injunction, court's order, dismissing proceedings without grounds being shown for such dismissal, should be annulled on writ of review.

3. INJUNCTION ⟸230(1)—PROCEEDINGS—AFFIDAVIT—ALLEGATIONS.
Affirmative allegations in affidavit submitted by defendant in contempt proceedings for disobedience of injunction cannot be deemed established without a trial to determine the issues so joined.

4. CONTEMPT ⟸46—LIMITATION—ACTS CONSTITUTING CRIME.
When act sought to be punished constitutes a crime, the court may by analogy adopt the limitation prescribed by statute for criminal prosecutions.

5. Waters and Water Courses ⊜63—Violation of Injunction — Time within Which to Bring Proceedings.

Beneficiary of perpetual injunction restraining obstruction of flow of water is not barred from instituting contempt proceeding against person violating injunction by failure to bring proceedings within particular period, unless obstruction has continued under circumstances and for a period of time from which a grant to obstruct the water would be implied.

6. Equity ⊜67—"Laches."

"Laches" is an equitable defense depending upon circumstances of each case.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Laches.]

7. Waters and Water Courses ⊜63—Violation of Injunction—Laches.

Failure of beneficiary of injunction restraining obstruction of flow of water to bring contempt proceedings until after obstruction had continued for four years did not in itself constitute laches.

8. Waters and Water Courses ⊜63—Violation of Injunction.

Willingness of beneficiary of injunction restraining obstruction of flow of water to waive his rights thereunder provided violator would pay expense of protecting his land from overflow, and his motive in instituting contempt proceedings to compel such payment, did not affect beneficiary's right to maintain proceedings.

9. Certiorari ⊜29—Writ of Review.

An order based upon conflict of evidence, being an error committed within court's jurisdiction, cannot be reviewed on writ of review.

10. Certiorari ⊜28(2)—Unwarranted Order—Absence of Jurisdictional Facts.

An unwarranted order is subject to review by direct attack on a writ of certiorari where court's power to make order depends upon existence of facts as to which there is no evidence; the question presented in such case being one of law.

Writ of review by Harry W. Goodall against Superior Court of the State of California in and for the County of Santa Barbara, and others. Order dismissing contempt proceedings annulled.

Kuster & Salisbury and S. A. McNeil, all of Los Angeles, for petitioner. G. H. Gould, of Santa Barbara, for respondents.

SHAW, J. A writ of review was issued herein upon a petition wherein this court is asked to annul an order dismissing a proceeding instituted in the trial court to have one Mrs. Lora J. Moore adjudged guilty of contempt for the disobedience of a judgment enjoining her from doing the acts of which petitioner complains.

The proceeding was instituted by the filing of an affidavit setting forth the fact that in the year 1908, in a certain action wherein petitioner was plaintiff and certain persons were defendants a judgment was rendered in favor of petitioner and against the defendants, perpetually enjoining them and their assigns, as the owners of a certain tract of land, from obstructing the natural flow of water in its usual course through a certain creek that extended across said tract of land which adjoined a parcel of land owned by plaintiff; that subsequent to the date of said judgment Mrs. Moore, by mesne conveyances, obtained title to said tract of land, and at all times since her acquisition thereof has been in possession of the same; that some time subsequent to June, 1913, Mrs. Moore, as owner of said tract of land through which the waters of said creek flowed, erected and caused to be erected across said stream and upon the land so acquired and owned by her certain concrete walls, dams, and bridges, by reason whereof the waters of said creek were obstructed and diverted from their natural and accustomed course, and caused to backflow upon and across the lands of petitioner, to his irreparable damage and injury; that prior to the doing of said acts, and ever since, Mrs. Moore had knowledge of the existence of said perpetual injunction, enjoining her predecessors in interest in said land and their assigns from doing the acts complained of; that Mrs. Moore has at all times, with full knowledge of said injunctive order, refused to obey the same or to remove said walls, dams, and obstructions.

Upon the filing of the affidavit the court issued an order requiring Mrs. Moore to show cause why she should not be punished as for a contempt of court for disobedience of the order contained in said judgment so rendered in the action wherein her predecessors in interest in said land were defendants. In compliance with this order she filed an affidavit, alleging affirmatively, among other things, as grounds why she should not be adjudged guilty of contempt: First, that petitioner was guilty of laches, "in this, that it appears by said affidavit that said plaintiff was cognizant of all the acts of said Lora J. Moore complained of in said affidavit, for over four years before the issuance of said order to show cause"; and, further, that petitioner caused to be made an estimate of the cost of labor and material which would be required in protecting his land from damage due to the obstruction of said stream by Mrs. Moore, and informed her that the cost thereof would be the sum of $3,500, and demanded that she should pay said amount to plaintiff; "and affiant is informed and believes that these contempt proceedings are undertaken to enforce said payment of $3,500 from affiant to plaintiff." Other matters of an affirmative character, as constituting ground why defendant should not be punished for the acts committed, are averred in the affidavit. On the return day specified in said order to show cause, and upon the presentation of the affidavit of Mrs. Moore, the court requested counsel for the respective parties to submit authorities upon the question of the sufficiency of the demurrer filed by Mrs. Moore, saying that in the event the demurrer was sustained the proceedings would be dismissed, and that in case it was

overruled the matter would be set down for hearing on its merits. Thereafter the court, without further hearing, made an order as follows:

"It appearing to the court that the petitioner has been guilty of laches to such an extent as to cause this court to believe that this contempt proceeding ought not to have been inaugurated, and it further appearing from the affidavit of Mrs. Lora J. Moore, and the admissions made by the attorney for the petitioner, that this proceeding was inaugurated for the purpose of compelling Mrs. Lora J. Moore to pay to the petitioner money which he claims she ought to pay to him, it is ordered that the contempt proceedings in said action inaugurated against Mrs. Lora J. Moore, named in the affidavit of Harry W. Goodall as Mrs. Laura J. Moore, be and the same is hereby dismissed."

[1, 2] That an unwarranted order adjudging one guilty of contempt may be annulled upon a writ of review is conceded. The converse of the rule is likewise true. Hence where, in a proceeding instituted by the beneficiary in a judgment granting an injunction the disobedience of which is made to appear, the court without any ground shown therefor denies to such beneficiary the process of the court, which constitutes the only means of enforcing the judgment, such order should be annulled, since otherwise the judgment solemnly pronounced would be an idle act.

[3-7] In considering the order dismissing the proceedings we are not concerned with the affirmative allegations contained in Mrs. Moore's affidavit. Conceding the facts averred therein, if true, were sufficient to exonerate her from the charge, no trial to determine the issues so joined was had, and without such trial the affirmative allegations cannot be deemed established. In re Buckley, 69 Cal. 1, 10 Pac. 69. The grounds upon which the court made the order are: First, that petitioner had been guilty of laches; and, second, that it appeared from Mrs. Moore's affidavit "and admissions made by the attorney for petitioner" that the proceeding was instituted to compel Mrs. Moore to pay petitioner money which he claimed she ought to pay to him. As to the first ground, respondent insists that because, as shown by the petition, petitioner did not invoke the power of the court in protecting his rights until the lapse of four years after the erection of the walls and dams which obstructed the flow of water, his right to such means of enforcing the judgment is barred by laches. It is quite true that when an act sought to be punished constitutes a crime, the court may by analogy adopt the limitation prescribed by statute for criminal prosecutions. Gordon v. Commonwealth, 141 Ky. 461, 133 S. W. 206; Beattie v. People, 33 Ill. App. 651. This principle, however, has no application to the instant case for the reason that the acts complained of did not constitute a crime. The injunctive order was perpetual and if the acts of Mrs. Moore in obstructing the flow of water in the creek continued for four years constituted a disobedience thereof, petitioner was entitled to proceed against her in contempt proceedings at any time, subject to her right to plead a continuance of the obstruction under circumstances and for a period of time from which a grant so to do would be implied. Moreover, laches is an equitable defense depending upon the circumstances of each case. Conceding, but by no means holding, that in a case of this character one might, short of the time in which the law would imply a grant, lose his right to invoke the aid of the court by instituting contempt proceedings, the petition is wholly barren of any facts tending to show that petitioner was guilty of laches. As indicated in Mrs. Moore's affidavit, the delay might be fully explained by the fact that negotiations involving a continuance of the obstruction and means of protecting petitioner's property from overflow due to the same were pending for a considerable period of the four years.

[8] The other ground upon which the order is based is that it appeared from the affirmative fact stated in Mrs. Moore's affidavit, as to which there was no proof, and admissions made by the attorney for petitioner (whether in court or on the street is not made to appear), that the proceeding was instituted to compel her to pay to petitioner money which he claimed she ought to pay. As appears from Mrs. Moore's affidavit—and we assume counsel's admission was of like import—petitioner had expressed a willingness to waive his right to enforce the judgment upon condition that Mrs. Moore would defray the expense of constructing necessary walls to protect his property from damage due to the obstruction erected by her in the creek, which she refused to pay. Conceding this to be true, and that petitioner was willing, in consideration of the payment of such sum, to forego the fruits of his judgment, neither such fact nor petitioner's motive in legally invoking the aid of the court to enforce a lawful judgment could affect his rights thereunder.

[9, 10] Respondent further claims that since the court had jurisdiction of the matter the making of the order, even though unwarranted, must be deemed mere error committed within the exercise of its jurisdiction, and hence cannot be reviewed in this proceeding. From the very nature of the writ, this is true where the order is based upon a conflict of evidence touching the subject. Where, however, the power to make the order depends upon the existence of facts as to which, as here, there is no evidence whatever, the question presented is one of law and subject to review by direct attack on a writ of certiorari. Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35, and cases cited. The record discloses no evidence whatever tending to establish facts upon which the court was warranted in di-

vesting itself of jurisdiction to try the proceeding.

The order is annulled.

We concur: CONREY, P. J.; JAMES, J.

---

37 Cal. App. 277

## REUTER v. SAN PEDRO, L. A. & S. L. R. CO. (Civ. 2281.)

(District Court of Appeal, Second District, California. May 16, 1918.)

1. RAILROADS ⊜480(1)—FIRES—NEGLIGENCE—BURDEN OF PROOF.
In an action against a railroad company for damages for destruction of property by fire, the burden of proving negligence as alleged is upon the plaintiff.

2. RAILROADS ⊜453—FIRES—LIABILITY.
A railroad company is not an insurer at all events against the consequences of fire set out by its locomotives, and is liable only for fires negligently caused.

3. APPEAL AND ERROR ⊜1012(2)—REVIEW—SUBSTANTIAL EVIDENCE TO SUPPORT JUDGMENT.
The appellate court cannot take the place of the trial court in determining whether the findings are supported by a preponderance of the evidence, but can consider the evidence for the sole purpose of determining whether or not the essential findings of fact are supported by satisfactory evidence.

4. APPEAL AND ERROR ⊜1012(2) — REVIEW—FINDINGS OF TRIAL COURT.
In an action against a railroad company for damages for personal property destroyed by fire set by defendant's locomotives, *held*, that there was satisfactory evidence on which the trial court could find that the fire which destroyed plaintiff's property was communicated thereto by fire originating from defendant's engine.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by Charles F. Reuter against the San Pedro, Los Angeles & Salt Lake Railroad Company. Judgment for plaintiff, and defendant appeals. Judgment affirmed.

James E. Kelby, of Los Angeles (A. S. Halsted, of Los Angeles, of counsel), for appellant. McNabb, Hartzell & Hodge, of San Bernardino, for respondent.

CONREY, P. J. Action to recover damages on account of loss of property, caused by fire negligently set out, through negligence of the defendant. On the 19th day of November, 1914, the plaintiff was the lessee and in possession of certain real property located in San Bernardino county, and was the owner of certain personal property located thereon of the value of $693.50. On that day and for some years prior thereto the defendant corporation was operating a railroad over the right of way and tracks of the Atchison, Topeka & Santa Fé Railway Company, which right of way passes within a distance of 2½ miles northerly from the premises on which said personal property of the plaintiff was located. On that day the defendant company was operating a train running easterly between the city of San Bernardino and the town of Daggett. While running through the territory north of the plaintiff's premises, the train passed through the station Devore, northwesterly through the station called Keenbrook, and thence northwesterly to the station of Alray. It is 4.7 miles from Devore to Keenbrook, and about 12 miles from Devore to Alray. There is an upgrade of about 2 per cent. from Devore to Alray.

In addition to the facts above stated, the findings of the court show the following facts, all of which are alleged in the complaint and denied in the answer: Finding V states that on the 19th day of November, 1914, while the defendant was engaged in running one of its trains on said right of way north of the premises of the plaintiff, at a time when a high wind was blowing in a southerly direction, the defendant so negligently and carelessly managed its train and failed to employ suitable appliances to prevent the escape of soot, sparks of fire, and fire from the engines hauling the train, that fire from one of the engines drawing the train was suffered to escape and did escape from the engine; that the defendant negligently and carelessly allowed burning soot, sparks, and fire to be thrown and dropped from the engine, and the same was carried by the wind and caused to fall upon dry grass and brush situate on the property adjacent and contiguous to the right of way over which the train was being operated; that this property to which said fire was communicated was adjacent to and in a northerly direction from the premises and property of the plaintiff. Finding VI states that the fire so set by reason of the defective engine and the carelessness and negligence of the defendant in operating said engine was by reason of such negligence and carelessness allowed to spread, and did spread, and was driven in a southwesterly direction from the point where it was first allowed to escape by the defendant, and spread and burned over and upon the premises in possession of the plaintiff, in consequence whereof all of said personal property of the plaintiff was burned and destroyed, to plaintiff's damage in the sum of $693.50.

The defendant appeals from the judgment. Briefly stated, the substance of its contentions is that there is no evidence which tends in any way to connect the defendant with the fire; and that there is no evidence tending to show negligence on the part of the defendant or its employés with respect to the construction or condition of its engines or with respect to their operation thereof.

[1, 2] Counsel for appellant have directed our attention to certain rules, concerning which at the outset we will say that they

are pertinent to this case. The gist of the action is negligence, and the burden of proving negligence as alleged was upon the plaintiff. A railroad company is not an insurer at all events against the consequences of fire set out by its locomotives; it is only liable for fires negligently caused by it. The facts upon which the liability of the defendant rests must be proved by satisfactory evidence; they cannot be established by mere conjecture.

[3, 4] Assuming that the foregoing propositions correctly state the law, we have carefully examined the evidence contained in the record before us. The witness Bortz was a section foreman for the Santa Fé Railway Company, who on the 19th day of November, 1914, at the noon hour, was on the west side of the east-bound track and about 150 feet off the right of way. What is called the east-bound track was at that point the southerly track of the railroad, and on that track what is called an east-bound train would at that point be moving in a northwesterly direction. Bortz testified that at 12 minutes past 12 o'clock the Salt Lake train passed him. Immediately thereafter he started down the track and within a minute after that time he discovered fire off the right of way and distant from him about a quarter of a mile. A strong north wind was blowing at the time. Bortz then went down to Devore station to report to the dispatcher to send men to put out the fire. Devore station is a mile and a quarter from the point where Bortz was located when he saw the fire. On his way to Devore he saw a man walking across the bridge toward Devore. Bortz was traveling in a gasoline hand car or motor car.

The witness Clock testified that at noon of that same day he was walking up the track from Devore station, and was passed by the Salt Lake train at the point where the county road crosses the Santa Fé right of way. The train had two engines, and there was a great deal of heavy, black smoke coming from the first engine. There was an extremely high north wind which was carrying the smoke away in a southerly direction. Between 5 and 10 minutes after the train passed the witness discovered a fire burning. He did not see any evidence of the fire before the train passed. This witness made two different statements with respect to the distance from the railroad of the fire that he saw, the greater distance being about 150 feet from the right of way.

It is admitted that all of the Salt Lake engines and all of the Santa Fé engines using that right of way at that time were oil-burning engines. The witness Rinder testified that in the evening on a day in October, 1914, he saw a fire started by a Salt Lake engine in front of his house, which was a mile and a half above Devore. He saw soot like long pieces of rags coming from the smokestack and coming inside his fence, where it set a fire. He saw smoke from the engine and sparks and flakes of soot flying, and saw the fire right after the train passed. The place where the fire was set out was from 125 to 175 feet from the railroad track.

The witness Eubanks was a locomotive engineer and familiar with the workings of oil-burning engines. He testified that when an oil-burning engine is in good working order and properly managed by the engineer and fireman, it would not throw any black smoke, but the smoke coming from the engine would be clear. He testified that he had seen an engine throw burning carbon from its smokestack, and on one occasion saw that carbon ignite other materials. He was familiar with the process of sanding out flues of locomotives for the purpose of removing carbon and what gathers in the flues. During the progress of sanding out flues the engine gives out smoke.

The witness Todd had many years' experience in running locomotive engines, and ran an oil-burning engine for about 2 years. He testified that if an oil-burning engine was in proper working condition and properly managed and handled by the engineer, it would not throw any black smoke, but that the color would be light or steam color; that an engine will choke up if it is not working properly or is not in a clean condition; that the material that accumulates in the flues is carbon, the same as any accumulation from fuel; commonly speaking, it is soot. The witness testified that he had seen what he called carbon or soot exhausted from the smokestack of an engine afire and carry fire to the ground on some occasions. Such occasions would happen when the engine was sanded out and the carbon would cut loose. The effect of that operation was to make the color of the smoke black.

Several other witnesses testified concerning their observations of trains of the defendant and of the Santa Fé Railway Company in and near the city of San Barnardino. According to these witnesses, they have seen smoke, soot, and fire thrown from oil-burning engines, and have seen fires started by them.

It is also shown in evidence that on the 19th day of November, 1914, trains of the Santa Fé Railway Company passed Devore at 28 minutes past 11 a. m., and at 14 minutes past 11 a. m.; and in particular, that a Santa Fé west-bound passenger train passed through Devore at 2 minutes before 12 on that day. Counsel for defendant place a great deal of emphasis upon this last-named train, because it must have passed the place where the fire occurred, and must have passed that point about a quarter of an hour before the defendant's train passed that place. Much evidence was introduced tending to

show that when west-bound trains are coming down the grade the process of braking makes the brakeshoes red hot, so that shavings come off on account of the excessive heat, which are likely to set fire to waste along the track, and that such pieces of burning waste might have been carried by the wind to such distance that they might have set the fire complained of by the plaintiff. The defendant also introduced evidence tending to show that its engine was in perfect condition, and that it was properly operated. H. H. Harris was the fireman on engine 3703, which was the helper engine, from which, according to the testimony of plaintiff's witnesses, the black smoke came. Harris testified that he sanded the engine out after leaving Devore, but, according to his testimony, he completed the sanding out at a point which, according to the scale of the map introduced in evidence, would be about one-third of a mile before the train came to the point opposite the place where the fire was afterwards discovered. Harris testified that when he sanded the engine it threw out black smoke, but not in great quantities. All of the witnesses to the point agree that the right of way was clear of grass and brush.

According to the testimony of expert witnesses produced by the defendant, and if their testimony had been accepted as the truth and the whole truth, by the court which tried the case, the fire which destroyed the plaintiff's property could not have been caused by the engines of the defendant or by anything which came from them. For, as stated by counsel for appellant, their testimony is to the effect, among other things, that it is physically impossible for sand or any other substance coming from the stack of an oil-burning locomotive to ignite anything; that it is physically impossible for a piece of waste or wood cast into the furnace to pass out of the firebox unconsumed; that smoke emitted from a smokestack while an engine is climbing a heavy grade, moving at from 24 to 28 miles an hour, is not symptomatic of defect in the engine or its management, since the emission of such smoke is a condition of the mechanical operation of an oil-burning engine while pulling a train; that it is contrary to the laws of nature for any fire that comes through the smokestack of an oil-burning engine to set fire along the right of way, the fuel consumed being 100 per cent.; that the oil-burning engines of defendant are equipped the same as are oil-burning locomotives wherever used; that it is contrary to natural law for a stream or sheet of fire to leave the smokestack and carry itself 150 to 175 feet.

It must be kept in mind that in considering the merits of this appeal we cannot take the place of the trial court for the purpose of determining whether the findings of the court are supported by a preponderance of the evidence. We consider the evidence solely for the purpose of determining whether or not the essential findings of fact are supported by satisfactory evidence tending substantially to establish the facts as found. "That evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. Evidence less than this is denominated slight evidence." Code Civ. Proc. § 1835. Notwithstanding the contention urged upon us, that the findings attacked by the appellant cannot be sustained except by the indulgence of mere conjecture, we have reached the contrary conclusion. It is true that counsel in their discussion of the evidence have raised a number of conjectures which, if approved as of equal weight with the evidence favorable to the plaintiff, might strongly uphold their argument. We have also kept in mind the fact that the witnesses who saw the engine and its smoke, on the occasion in question, under a noonday sun, did not testify that they saw any sparks, or flame, or burning soot. Nevertheless, our reading of the testimony leads us to the conclusion that there was satisfactory evidence from which the trial court had the right to become convinced and to find that the fire which destroyed the plaintiff's property was communicated thereto by fire which originated in the grass or brush adjacent to the right of way of the defendant; that these fires had their origin in fire which escaped with the smoke from the engine of the defendant; that the escape of the fire, and the consequent damage to the plaintiff, was occasioned by careless and negligent management of its engine by the defendant. From these facts, taken in connection with the other facts about which there is no controversy, to which we have referred, it follows that the plaintiff was entitled to recover.

The judgment is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

---

37 Cal. App. 562

ZUCCO et ux. v. FARULLO. (Civ. 2278.)

(District Court of Appeal, First District, California. June 17, 1918.)

1. APPEAL AND ERROR ⟸865—REVIEW—DEFAULT JUDGMENT—MISJOINDER OF CAUSES OF ACTION.

On appeal upon a judgment roll from a default judgment, the appellate court will not consider misjoinder of causes of action in the manner it would if a demurrer had been filed in the case on that ground.

2. JUDGMENT ⟸101(1)—DEFAULT—PLEADING TO SUPPORT.

If a complaint states a cause of action sufficient as against a general demurrer to sustain the relief actually given in a default judgment, such judgment will not be held invalid because

the complaint also states facts authorizing other relief.

3. LANDLORD AND TENANT ⊂⊃291(17)—DEFAULT JUDGMENT—MISJOINDER OF CAUSES OF ACTION.

That a complaint in an unlawful detainer suit, wherein judgment was taken by default also states a cause of action for the reformation of a lease, and for damages for breach of its covenants, does not make the judgment invalid, where the complaint states a cause of action for unlawful detainer.

4. LANDLORD AND TENANT ⊂⊃291(17)—JUDGMENT—REFORMATION OF LEASE.

In an action of unlawful detainer, that the court attempted to reform the lease in a certain particular does not make a judgment based on a three days summons, under Code Civ. Proc. § 1167, unlawful, since the court might construe the lease to determine its true meaning, and its attempted reformation was immaterial.

5. LANDLORD AND TENANT ⊂⊃291(17) — DEFAULT JUDGMENT—EFFECT.

A default judgment in an unlawful detainer suit, entered without findings, must be taken to have established all the facts aptly pleaded in the complaint.

6. LANDLORD AND TENANT ⊂⊃291(1)—NOTICE TO QUIT—PERFORMANCE OF COVENANTS.

Under Code Civ. Proc. § 1161, subd. 3, a notice to a tenant to quit for nonperformance of covenants in the lease need not demand a performance of a covenant to take care of trees, cultivate the ground, or furnish the landlord vegetables, since such covenants could not afterwards be performed.

7. LANDLORD AND TENANT ⊂⊃291(1)—NOTICE TO QUIT—PERFORMANCE OF COVENANTS.

Where a tenant has committed waste, a notice to quit under Code Civ. Proc. § 1161, subd. 3, need not demand performance of the covenants against committing waste, in view of section 1161, subd. 4.

8. LANDLORD AND TENANT ⊂⊃291(1)—NOTICE TO QUIT—SUFFICIENCY.

A notice to a tenant to quit for failure to perform a specified condition of the lease need not state the reason for terminating the lease.

9. LANDLORD AND TENANT ⊂⊃291(8)—COMPLAINT—SUFFICIENCY.

In an unlawful detainer suit, the complaint need not set out in full the notice to quit; it being sufficient to allege its legal effect.

10. LANDLORD AND TENANT ⊂⊃291(10) — PLEADING—SERVICE.

In an unlawful detainer suit, plaintiff need only allege that he served notice in writing on defendant, or that notice in writing was served, and prove that he served it or had it served.

11. APPEAL AND ERROR ⊂⊃931(5)—REVIEW—FINDINGS OF FACT.

On appeal in an unlawful detainer suit, in which defendant defaulted, it will be presumed that the trial court has taken evidence as to damages.

12. APPEAL AND ERROR ⊂⊃932(1)—REVIEW—ABSENCE OF FINDINGS—DAMAGES.

On appeal in unlawful detainer suit, it will be presumed, in absence of findings, that the damages alleged were supported by the evidence.

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Action by Pierre Zucco and wife against Tommaso Farullo. Judgment for plaintiffs, and defendant appeals. Affirmed.

J. E. White, of San Francisco, and R. N. Wolfe, of Pittsburg, for appellant. Titus, Creed, Jones & Dall, of San Francisco (W. K. Powell, of San Francisco, of counsel), for respondents.

BEASLY, Judge pro tem. This is an action, primarily of unlawful detainer, in which the defendant defaulted, and judgment was thereupon taken against him for the possession of the premises demanded and for damages, and for some other relief hereinafter noticed. He appeals from this judgment, and makes three points for reversal, namely, that three causes of action are improperly united in the complaint, to wit, first, a suit in equity for the reformation of a lease; second, an action at law for damages for breach of the covenants of the lease; and, third, an action of unlawful detainer.

[1-3] This court, upon an appeal upon the judgment roll from a default judgment, will not consider the question of misjoinder of causes of action in the manner it would if a demurrer had been filed in the case upon that ground. If a complaint states a cause of action, sufficient as against a general demurrer, to sustain the relief actually given in the judgment, it will not be held invalid because it also states facts authorizing other relief. This follows from the rule laid down in Alexander v. McDow, 108 Cal. 25, 41 Pac. 24, and Amestoy v. Electric Railroad Co., 95 Cal. 311, 30 Pac. 550. The complaint herein is not obnoxious to a general demurrer. It states a cause of action for unlawful detainer. It also attempts to state facts upon which it is claimed other relief might have been given; but, under the authority of those cases, this court will not, on appeal from a default judgment, where the complaint states a cause of action, as it does here, reverse the judgment because of an attempt to unite other causes of action with that of unlawful detainer.

[4] There are other and more serious questions which arise upon this complaint, and the summons and service thereof, on which this default judgment is predicated. The summons was the usual three-day summons provided in summary proceedings for the recovery of the possession of real property by section 1167 of the Code of Civil Procedure. It was served on May 14, 1907, the day the action was begun. Default of the defendant for failure to appear was entered four days later, namely, on May 18th. Other relief than possession of the property and damages for the unlawful detainer was prayed for in the complaint and granted by the judgment; and it is contended on behalf of appellant that for this reason the three-day summons was not proper, but that the usual ten-day summons should have been issued in the case, and that ten days after service thereof should have been allowed the defendant in which to appear. The other relief consisted in reformation of the lease by substituting the word "second" for the word "first" in reference to the party whose duty it was to

water certain trees planted on the premises and to take care of them. The party of the first part was the landlord; the party of the second part the tenant. The lease, recited literally in the complaint, contained, among others, this provision:

"The party of the second part is to plant trees over ten acres of the tract, and the party of the first part is to furnish the trees therefor. The party of the first part agrees to water all the trees planted on said premises and to take the best care of them. He shall cultivate the space between the trees and all other ground where no trees have been planted."

The lease gave the tenant (the defendant) exclusive possession of the entire property, except a residence, which the landlord (plaintiff) reserved for her own use. The entire care of the property devolved upon the defendant. He was to care for and keep in repair the pumping plant on the premises. As has been said, the particular in which the court undertook to reform this lease was to substitute "party of the second part" for "party of the first part" in the above-recited clause thereof as to watering and caring for the trees. Respondent claims in that behalf that under the rule of Gray v. Maier & Zobelein Brewery, 2 Cal. App. 653, 84 Pac. 280, where there is an obvious inadvertence in naming the party charged with a duty in the lease, and where the defect is so glaring in itself as to suggest the mutual character of the error, the court will, in an action of unlawful detainer, ascertain and enforce the real intention of the parties, without resort to a separate suit in equity to reform the lease. What the court did in that case was to find that the words "first party," used in the lease in connection with an option, were inadvertently used where the words "second party" were intended, and adjudged that the lease be corrected accordingly. While that action was one of unlawful detainer, the parties had appeared; and we doubt if the case is authority for holding that the equitable remedy of reforming a lease can be administered upon default under a three-day summons.

But, however that may be, we do not think it necessary to decide whether such is the rule of Gray v. Maier, supra, nor whether such rule should be applied here; for the trial court, having the right to construe the lease and, holding it by its four corners, to determine its true meaning, and it being unreasonable to put any other construction upon it than that the intention of the parties was that the tenant should water the trees and take care of them, it became unnecessary to reform the lease. The whole question was one of construing the lease and determining its meaning, and that, too, where the meaning was clear, for the landlord was a woman, and in the sentence immediately following, if this paper is to be construed with technical exactness, the pronoun "he"—evidently referring to the party who was to water the trees—can refer to only one person, and that the tenant, who was a man. The lease, it must be admitted, was open to this construction, and really it is impossible to say that any other construction could be placed upon it. The judgment, therefore, attempting to reform the lease, was immaterial.

It is alleged in the complaint that the defendant neglected and failed to perform various conditions and covenants of his lease, in that he failed and neglected during the calendar year 1916, and prior to the 5th day of May, 1917, to water all of the trees planted on said premises, or take the best care of them, and that he did not cultivate the space between the trees and all other ground where no trees had been planted, and that he did not furnish to the plaintiff vegetables and produce from said premises sufficient for the complete family use of the said plaintiff or to her satisfaction, and that he did not furnish all of the labor required to build a house, as agreed in said lease, and that he failed and still fails to furnish certain materials needed in the construction of said house, and that he had not kept in repair or good shape the pump, engine or fences on the premises; that he had not constructed roads and paths required to be constructed by his lease; that he had not kept stock at the required distance from the house on said premises retained by said plaintiff, and that he has not properly cultivated or cared for said premises, and that he has committed waste on said premises—all of which things he was required to do and perform by the terms of the lease itself.

[5] The default judgment, entered without findings, must be taken to have established all the facts aptly pleaded in the complaint, including a finding of the truth of the foregoing allegations. It is provided in subdivision 3 of section 1161 of the Code of Civil Procedure that a tenant of real property for a term less than life is guilty of unlawful detainer when he continues in possession, in person or by subtenant, after neglect to perform other conditions or covenants of the lease or agreement under which the property is held than the one for the payment of rent, and three days' notice in writing requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him, and, if there is a subtenant in actual possession of the premises, also upon the subtenant. Within three days after the service of the notice the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform the covenants or conditions of the lease, or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture: Provided that, if the conditions and covenants of the lease violated by the lessee cannot afterwards be performed, then no notice as last prescribed herein need be given to said lessee or his subtenant, demanding the performance of the

violated conditions or covenants of the lease.

[6] Under this proviso, if the defendant had violated conditions of his lease which could not afterward be performed, it was not necessary to include in the notice a demand for performance of such violated conditions or covenants. It is manifest that Farullo had violated conditions of his lease which could not afterwards be performed, among others that of watering the trees, of taking care of them; the covenant to cultivate the space between the trees and the ground where no trees had been planted, and to furnish Mrs. Zucco with vegetables and produce sufficient for her family use during the calendar year prior to the 5th day of May, 1907, and, perhaps, some of the other violated terms of the lease set forth in the above-quoted allegations of the complaint. These things could not afterwards be performed. Therefore a demand for the performance of these violated conditions, at least, was not necessary to the validity of the notice to quit. It is alleged in the complaint that Mrs. Zucco caused to be personally served on Farullo a notice in writing, wherein she canceled the lease, and demanded that within three days he vacate the premises and surrender the possession thereof. This, in the view we take of the matter, considering the character of the violations of the conditions of the lease, was all that was required in the way of notice.

[7, 8] The violation of these conditions of the lease terminated it. Especially is this true of the violation of the condition against waste. It is provided in subdivision 4 of section 1161, Code of Civil Procedure, that any tenant committing waste upon the demised premises contrary to the conditions or covenants of his lease thereby terminates the lease, and the landlord or his successor in estate shall, upon service of three days' notice to quit upon the person or persons in possession, be entitled to restitution of possession of such premises under the conditions of this chapter. No alternative notice was therefore necessary. The notice to quit was all that was required. A notice to quit, such as is sufficient in this case, differs from a notice to perform or quit. Where the violation is of conditions which upon notice the tenant might perform within the three days, notice to so perform must be given; but where, as here, the breach of the lease is of such a nature that the condition violated cannot be performed, no notice is required. Schnittger v. Rose, 139 Cal. 656, 73 Pac. 449. So, also, no useful purpose could be served by stating in the notice that Farullo's lease was canceled for failure to perform a specified condition of the lease, and for this reason no doubt the statute does not require that the reason for terminating the lease be stated in cases of this nature.

[9] The allegations of the contents of the notice also are sufficient. It was not necessary to set out in full the notice served. The notice was alleged in accordance with its legal effect, and in the respect that it may be alleged either literally or according to its legal effect a notice to quit does not differ from other instruments.

[10] So, also, the service was sufficiently alleged, for it is said in Cowell v. Linforth, 10 Cal. App. 3, 100 Pac. 1071, that:

"It was only necessary for the plaintiff to allege that she served notice in writing upon defendant, or that notice in writing was served upon defendant, and prove that she served it or had it served. The statute (Code Civ. Proc. § 1162) provides three different methods of serving notice, and the plaintiff was only required to allege the ultimate fact," to wit, that she had it served.

[11, 12] It is also claimed that the amount of damages given was too large. The trial court is presumed to have taken the evidence upon this point, and as the allegations of the complaint as to damages are presumed to have been supported by the evidence in the absence of findings, we cannot interfere with the trial court's decision upon that matter.

The judgment is affirmed.

We concur: KERRIGAN, J.; ZOOK, Judge pro tem.

---

37 Cal. App. 239

## HOPE MINING CO. v. BURGER.

(Civ. 1843.)

(District Court of Appeal, Third District, California. May 14, 1918.)

1. TRUSTS ⟸95 — CONSTRUCTIVE TRUSTS — REALTY.

Where holder of option on mining claim transferred it to plaintiff, representing that purchase price was $15,000, whereas it was only $11,000, intending to keep the difference as a commission for himself without plaintiff's knowledge, and taking title in his own name, such holder became a trustee of the property for plaintiff.

2. PRINCIPAL AND AGENT ⟸22(1) — EVIDENCE OF ACTS OF AGENT.

In an action to declare a trust in property conveyed to a promoter's brother for the corporation's benefit, the acts of the promoter were competent evidence of his agency.

3. PRINCIPAL AND AGENT ⟸23(1)—EVIDENCE —SUFFICIENCY.

In an action to establish a trust in property conveyed, for the benefit of the corporation, to a promoter's brother, evidence *held* to sustain a finding that such promoter was the brother's agent.

4. PRINCIPAL AND AGENT ⟸22(2) — EVIDENCE—DECLARATIONS OF AGENT.

Where an agency is otherwise prima facie proved, the declarations of the agent are admissible in corroboration, where they are part of the res gestæ and made at the time of the transaction.

Appeal from Superior Court, El Dorado County; John Hancock, Judge.

Suit by the Hope Mining Company, a corporation, against N. H. Burger, for specific performance. From a decree for plaintiff, defendant appeals. Affirmed.

---

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Butler & Swisler, of Sacramento, for appellant. L. J. Maddux, of Modesto, for respondent.

BURNETT, J. It is difficult to consider seriously the contentions of appellant. The decision of the trial judge is so manifestly just and equitable, and the conduct of appellant in the transaction between the parties so reprehensible, that probably the only question which we ought to notice specifically is whether damages should not be imposed for a frivolous appeal.

However, largely out of respect for the learned counsel for appellant who has manifested zeal and ability worthy of a better cause we will devote some attention to the essential features of the case. There was some conflict in the evidence upon material points, but the conflict was created by the testimony of appellant and his brother, whose statements on the witness stand are apparently characterized by equivocation, evasion, and misrepresentation. It is therefore not surprising that their testimony carried no conviction to the mind of the trial judge. From the opinion filed in deciding the case in the lower court we take the following facts:

The action was brought to compel appellant to convey to plaintiff certain placer mining claims described in the complaint, paid for with the money of plaintiff, and the title to which was taken in the name of N. H. Burger, who is the real defendant in the case, the other names being fictitious.

In December, 1910, the property was owned by one Thomas Clark, who entered into an oral agreement with defendant for its purchase, which was reduced to writing at Placerville on January 3, 1911. The written instrument was somewhat informal, but it recited the receipt of $100 from N. H. Burger, "being a partial payment on the bond of property known as the Landecker mine and equipment on same. The price of said mine and equipment to be eleven thousand dollars to be paid as follows." Then followed the recitation of three installments, the first to be paid January 15 and the last April 1, 1911. It was agreed that a more formal contract should be prepared by Clark and delivered to defendant. This was done on January 14, 1911, and at the trial this agreement was introduced in evidence. According to its terms the purchase price was fixed at $15,000, to be paid in four installments, the last one of $4,000 to be made on or before the 1st of November, 1911. At the same time it was orally agreed between Clark and Burger that this sum of $4,000 was not to be paid to the former, but retained by the latter as a commission; it obviously being the intent that Burger should sell the property to another.

B. E. Burger, brother of defendant, undoubtedly knew of the terms of the agreement between Clark and appellant, and on January 3d he went from Placerville to Modesto, and informed the principal stockholders of a mining corporation called the Alliance Company, that defendant had an option on the Landecker mine, and wanted the stockholders to form a new corporation and take over the mine and option from his brother. He did this under an understanding with appellant. He had with him a copy of the Clark contract, afterward executed on January 14th, which copy he exhibited to the stockholders. At a meeting held the following night it was agreed that Wooten and Benton, two of the stockholders, with B. E. Burger, would examine the mine, and they proceeded to Placerville for that purpose, where they arrived on January 5th. The next day they and the defendant went out to the mine, and on the following night they met at defendant's store and discussed the advisability of forming a new corporation to take over and operate the mine. Defendant informed Wooten and Benton that he would turn over the contract if the new company was formed, and that he would sell the mine "for just what he had paid for it." After this meeting Wooten and Benton returned to Modesto and reported to the other stockholders of the Alliance Company. About a week later B. E. Burger arrived in Modesto, and the plaintiff company was organized. Under said contract of January 14th the first installment of the purchase price could be paid by a joint and several note of defendant and such additional makers as were satisfactory to Clark, said note to be payable on or before February 1, 1911. Two days prior to the execution of said contract of January 14th both defendant and B. E. Burger signed such note at Placerville, and it was by the latter immediately taken to Modesto, where on January 14th it was signed by Benton, Williams, and Wooten and returned to B. E. Burger and afterward delivered to Clark. As a consideration for the execution of this note 25,000 shares of plaintiff company were divided equally among the five makers of said note, and defendant thereby became a stockholder of said company. The Hope Mining Company was organized on January 13, 1911, and its articles filed with the county clerk of Stanislaus county. The company immediately took possession of the mine, and it made three payments on the purchase price of said property, amounting to $11,000, the last payment being made on April 1st. A large sum was also paid by it for work and supplies, and it repaid defendant the $100 which he paid Clark on January 3d. Neither the plaintiff nor any of its Modesto stockholders knew that the price of the mine as between Clark and defendant was $11,000 until the trial of the case at Placerville, when for the first time they learned that the last payment of $4,000 as set forth in the con-

tract of January 14th was not to be paid Clark, but was to be treated by defendant as a commission for the sale of the property. The plaintiff believed at all times up to the date of the trial that the purchase price to Clark was $15,000, and that the only consideration to be received by defendant was a share of the plaintiff's stock. The deed to the property, dated January 12, 1911, from Clark to defendant was deposited in escrow, under the terms of which defendant could obtain it from the bank when the total sum of $11,000 was paid. He could therefore have obtained said deed at any time after April 1st, and he did secure it on August 30th, and had it recorded on that date. On that day he also made a deed of the property to plaintiff, but did not deliver it, and the latter had no knowledge of it until after the commencement of this action. Several weeks before the $4,000 were due Clark according to the contract of January 14th, plaintiff, through its officers, proposed to levy an assessment to make said payment. But defendant and his brother objected, and to avoid the necessity of levying an assessment it was agreed that the time for the last payment would be extended six months.

On October 30th Campbell and Perkins, two of plaintiff's stockholders, went to Placerville and ascertained that defendant had the deed from Clark, and in explanation of this he told them that he had borrowed the $4,000 from a friend named Smith living in San Jose. In March, 1912, and before the expiration of the six-month extension granted by defendant to plaintiff in September, 1911, defendant bonded the property to other parties, and the sum of $6,000 was received as an installment of the purchase price and divided equally between defendant and his brother.

[1] There is abundant evidence to support the foregoing statements, and it is quite apparent therefrom that defendant acted dishonorably with plaintiff, that by his conduct and actions he led plaintiff to believe that Clark was to receive the full $15,000 for the property, whereas defendant had a secret agreement to retain the said $4,000 which was to be paid by plaintiff. Appellant was guilty of a species of sharp practice which may be recognized as legitimate by some promoters, but it cannot be tolerated in a court of justice. It is plain enough that by agreement between plaintiff and defendant the former was subrogated to all the rights and privileges as well as the obligations of the latter under his agreement with Clark. Of course, this means the actual and not the ostensible obligations. Plaintiff believed that it was to pay the sum of $15,000, but this was by reason of the deception practiced by appellant, and when it had paid the sum of $11,000, the actual burden imposed by the original contract, it had discharged its full obligation, and was entitled to the deed from Clark. As plaintiff, therefore, paid the full consideration for the property, manifestly, appellant, in receiving the deed, became a trustee for respondent as the court below rightfully held. The case is essentially this: B. has an option to purchase the property of C. for $11,000, although it is apparently for $15,000. For a valuable consideration B. transfers the option to H., and the latter pays to C. the full consideration for the property, but the deed is taken in the name of B. There can be no difference of opinion as to the constructive trust thereby created. It is true that there was no formal written assignment of said option, but the agreement between plaintiff and defendant was such in effect, and, as it was fully executed by plaintiff, there could be no question of the statute of frauds.

[2] There is some contention made that the agreement contended for by respondent was made by it and said B. E. Burger, and that the evidence is insufficient to show that the latter was authorized to act for the appellant, and, furthermore, that the court improperly admitted as evidence of such agency the declarations of the said B. E. Burger. There is no merit in the contention. The circumstantial evidence was amply sufficient to show the authority of B. E. Burger to represent his brother in the negotiations and contract with plaintiff. Indeed, the conduct of himself and appellant in the whole transaction is entirely inconsistent with any other theory than that of agency. It is clear that the acts of said B. E. Burger were of such character and so construed as to justify the inference that appellant knew of them, and would not have permitted the same if unauthorized. Hence the acts themselves were competent evidence of agency. Cor. Jur. vol. 2, p. 958.

[3] Moreover, appellant testified to facts from which the inference necessarily follows that his brother was authorized to represent him in the sale. He testified that before his brother went down to Modesto the later said, "I can handle the proposition for you," and appellant gave him a copy of the contract with Clark, and he knew what his brother went down there for and the purpose for which he took the note and the copy of the agreement, and knew what his brother was going to do. Of course, there could be no possible doubt that there was, at least, an ostensible agency within the purview of sections 2300–2317 of the Civil Code. Dollar v. International Banking Corp., 13 Cal. App. 331, 109 Pac. 499.

[4] But actual agency was sufficiently established and there was no error in admitting the acts and declarations of B. E. Burger. Where the agency is otherwise prima facie proved, the declarations of the alleged agent are admissible in corroboration, where they constitute a part of the res gestæ and were made at the time of the transaction in

question. They are admissible to show that the agent acted as such, and not on his individual account, and also to show the nature and extent of his authority. Robinson v. American Fish, etc., Co., 17 Cal. App. 212, 119 Pac. 388; 2 Corpus Juris, p. 930.

Moreover, the finding of the court below does not depend upon the agreement made between respondent and B. E. Burger. The evidence is sufficient to show that appellant directly agreed with the representatives of plaintiff that the latter should purchase the property for the price that the former agreed to pay Clark; in other words, that there should be a novation, a substitution of plaintiff for defendant in the contract with Clark. The question of agency may therefore be entirely ignored.

Some question is raised as to the sufficiency of the evidence to support certain specific findings. The material findings are amply supported, and the others need not be considered.

The judgment could be supported upon another theory, but we forbear to consider it further. The appellant appears in a very unfavorable light, and it is not surprising that the lower court believed that he was much more anxious to keep the property than to tell the truth or to act justly. We may add that, notwithstanding the judgment against him, he seems to have profited greatly by his cleverness. Without paying out anything, he received several thousand shares of stock of the plaintiff, about $1,000 in cash from the latter, and $6,000 from Everett and Ames to whom he bonded the mine. In good conscience the cash that defendant received should be paid over to plaintiff, but that consideration is not involved in this proceeding.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

---

37 Cal. App. 523

## GIBSON et al. v. SACRAMENTO COUNTY.

(Civ. 1818.)

(District Court of Appeal, Third District, California. June 14, 1918. Rehearing Denied by Supreme Court Aug. 12, 1918.)

1. COUNTIES ⟹139 — "COUNTY CHARGE" — "OTHER SERVICES."

Services rendered by plaintiffs appointed by judge of superior court to prosecute a district attorney pursuant to Pen. Code, §§ 758, 771, for misconduct in office, constitute a "county charge" within Pol. Code, § 4307, subd. 3, as to "other services" in relation to "criminal proceedings" for which no specific compensation is prescribed by law, being a county charge.

2. COUNTIES ⟹131 — COMPENSATION FOR SERVICES.

There must be some statutory or constitutional authority for compensation for services rendered to a county, however beneficial the services performed may be to the county or the public generally.

3. COUNTIES ⟹139 — "CRIMINAL PROCEEDING."

A "criminal proceeding" means some authorized step taken before a judicial tribunal against some person or persons charged with the violation of some provision of the criminal law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Criminal Proceeding.]

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by Irving D. Gibson and another against the County of Sacramento. Judgment for defendant, and plaintiffs appeal. Reversed.

Ralph W. Smith and Irving D. Gibson, both of Sacramento, for appellants. Hugh B. Bradford, Dist. Atty., and J. R. Hughes, Deputy Dist. Atty., both of Sacramento, for respondent.

HART, J. The complaint alleges: The plaintiffs are attorneys at law, engaged in practice at the city of Sacramento; that on the 1st day of June, 1917, an accusation in writing against Hugh B. Bradford, district attorney of the county of Sacramento, was presented by the grand jury of said county, pursuant to the provisions of section 758 of the Penal Code, which was filed with the county clerk and presented to Honorable Malcolm C. Glenn, judge of the superior court of said county, who, on the 17th day of June, 1917, appointed plaintiffs as prosecuting officers in the matter of said accusation, pursuant to the provisions of section 771 of the Penal Code; that plaintiffs accepted said appointment, qualified as such prosecuting officers, and performed all necessary services and duties in the matter, and that said services were rendered at the special instance and request and for the benefit of said defendant; that the fair and reasonable value of said services is the sum of $1,400; that plaintiffs presented to the board of supervisors of said county their claim and demand for said sum of $1,400, duly authorized and approved by said judge, which was rejected by said board. A general demurrer to the complaint was sustained without leave to amend, and judgment was entered in favor of defendant, from which judgment plaintiffs appeal.

Section 758 of the Penal Code reads as follows:

"An accusation in writing against any district, county, township, or municipal officer, for willful or corrupt misconduct in office, may be presented by the grand jury of the county for or in which the officer accused is elected or appointed."

Section 771 of said Code is as follows:

"The same proceedings may be had on like grounds for the removal of a district attorney, except that the accusation must be delivered by the foreman of the grand jury to the clerk, and by him to a judge of the superior court of the county, who must thereupon appoint some

one to act as prosecuting officer in the matter, or place the accusation in the hands of the district attorney of an adjoining county, and require him to conduct the proceedings."

[1] The sole question presented for decision is: Do such services as were rendered by plaintiffs constitute a county charge?

Section 4307 of the Political Code declares what are county charges, and subdivision 3 thereof reads as follows:

"The expenses necessarily incurred in the support of persons charged with or convicted of crime and committed therefor to the county jail, and for other services in relation to criminal proceedings for which no specific compensation is prescribed by law."

[2] It cannot be doubted that "one who demands payment of a claim against a county must show some statute authorizing it, or that it arises from some contract, express or implied, which finds authority of law." Irwin v. County of Yuba, 119 Cal. 686, 52 Pac. 35; Woods v. Potter, 8 Cal. App. 41, 45, 95 Pac. 1125. Nor may the payment of such a claim be allowed upon the theory that the services performed for which compensation is claimed were beneficial. There must be some statutory or constitutional authority for compensation for services rendered to a county, otherwise it cannot legally be paid, however beneficial the services performed may be to the county or the public generally. Unless, therefore, the services performed by the appellants and for which they are here seeking compensation come within the language or the contemplation of subdivision 3 of section 4307 of the Political Code, no recovery can be had for such services; it being conceded that there is no other law or provision of law authorizing payment of compensation for such services.

It follows that whether the appellants are entitled to compensation for the services named must be determined upon what is ascertained to be the true meaning or the legislative intent at the bottom of the language of said subdivision 3, viz.: "And for other services in relation to criminal proceedings for which no special compensation is prescribed by law." Originally, that language was contained in section 4344 of the Political Code, being embraced in subdivision 3 thereof, which then read as follows:

"(3) The compensation allowed by law to sheriffs and constables for executing process on persons charged with criminal offenses; for services and expenses in conveying criminals to jail; for services of subpœna issued by district attorneys, *and for other services in relation to criminal proceedings for which no specific compensation is prescribed by law.*"

See Newmark's Pol. Code, 1889.

[3] It is very clear that the language herein italicized and which, as seen, is now a part of subdivision 3 of section 4307 of said Code, originally had reference to the compensation to be paid to sheriffs and constables for services which might be performed by them and not enumerated and for which no specific compensation was prescribed. But, in amending certain sections of the Political Code relating to the compensation of county officers, the Legislature, as seen, placed the provision as to services not specially enumerated and for which no specific compensation has been provided, in an entirely different connection from that in which it was formerly or originally used. As the provision now stands, we find it, as it was before, under the heading, "Other County Charges," and employed in a connection to which it does not appear to have natural or relevant application. The two sentences in the subdivision, although conjoined by the conjunctive word "and," seem to relate entirely to different and dissimilar subjects; the one involving expenses necessarily incurred in supporting persons charged with or convicted of crime and committed therefor to the county jail, and the other involving other services in relation to criminal proceedings for which no specific compensation is paid. Obviously, the matter of the support of the persons mentioned in the subdivision is not a "criminal proceeding" within the meaning of that phrase as it is used and referred to in our law. A "criminal proceeding" means some authorized step taken before a judicial tribunal against some person or persons charged with the violation of some provision of the criminal law. The support of those charged with or convicted of crime and who are lawfully incarcerated in the county jail therefor is a duty which the state or the county, its agent, is required to discharge, and while it is true that the county officer whose duty it is under the law to provide such support performs services for the county, when furnishing such persons with necessary support, still such services cannot correctly be said to be performed in relation to a "criminal proceeding" within the true juridical meaning of that phrase. It follows therefore that the words "other services," as used in the subdivision, cannot justly or reasonably be held to refer to "services" like or similar to those referred to in the sentence immediately preceding that containing those words. Indeed, we are unable to conceive of any other services which would be involved in the support of the persons referred to than those specifically mentioned. "Support," in the sense in which that word is used in the subdivision, necessarily means that the persons referred to therein are to be provided with such necessaries as may be required to sustain them under the peculiar conditions by which they are surrounded, including, of course, such necessary medical treatment as may be required, and when such support is provided there are left no other conceivable services to be performed in that connection. Moreover, there is nothing in the entire subdivision indicating that the "other services" are to be performed by a particular county officer or any particular person. The provi-

sion simply declares, in effect, that any other services than those specifically enumerated by the law for which no specific compensation is provided, by whomsoever performed, shall be and constitute a charge against the county. The provision means and was intended to mean something, for that particular language was retained as a part of the law while the part in connection with which it originally appeared in the Political Code was either entirely eliminated from the Code and some other provision for the compensation of sheriffs and constables substituted therefor or was re-enacted in some other connection.

Our conclusion is that there is no natural or logical connection between the two sentences in said subdivision; that is to say, that the language, "and for other services in relation to criminal proceedings for which no specific compensation is prescribed by law," has no reference or application to the language in the same subdivision immediately preceding it or to any of the preceding subdivisions, but that said language was retained as a part of the law to operate as an independent, substantive provision thereof, to cover or meet contingencies which, it was conceived by the Legislature, from common experience, might arise and require the incurring of expense in the prosecution of criminal cases and which human prescience is unable to foresee so that specific provision for the expenses arising may be made. And that the provision, in its present form and connection, was designed, ex industria, to meet just such cases as the one before us and its language broad enough to include services of the character of those for which the appellants claim the right to be compensated by the county, we are in no doubt. If this be not true, then why is the provision in the Code? What other kind of services is contemplated by or included within that language? Certainly it must be assumed that the provision was enacted and inserted in the Code for some purpose. What is that purpose if it be not to provide for the compensation for services such as the appellants performed? Of course, it will not be questioned that an action growing out of either section 758 or section 772 of the Penal Code is a criminal proceeding, and that therefore the services performed by the appellants were "in relation to criminal proceedings." See Pen. Code, § 682; In re Marks, 45 Cal. 199; In re Curtis, 108 Cal. 661, 662, 41 Pac. 793; Matter of Shepard, 161 Cal. 171, 174, 118 Pac. 513; People v. McKamy, 168 Cal. 531, 533, 143 Pac. 752; State ex rel. McGrade v. District Court, 52 Mont. 371, 157 Pac. 1157, 1158.

The respondent, opposing the above construction of the provisions of the Political Code under consideration, undertakes to establish an analogy between a case where the court, exercising the authority conferred upon it by section 771 of the Penal Code, appoints an attorney to prosecute a district attorney on an accusation filed against him under either section 758 or section 772 of said Code and the case in which the court is authorized by section 987 of the same Code to name or assign an attorney to represent and defend the accused where the latter is himself without means to employ counsel and desires the court to assign counsel to defend him. But we perceive no such resemblance between the two cases as requires us to hold that the appellants must be denied compensation for the services performed by them upon the theory supporting the authority vested in trial courts by said section 987.

The central idea—indeed, the polestar—of every system of laws (in civilized countries), is the preservation and protection of such natural rights of mankind as have not necessarily been surrendered or given up in return for the benefits which men receive from organized society, and surely that system which has failed to provide for the full and complete protection of all the rights of person and property to which every member of organized society, whether rich or poor, when measured by the material things of life, is entitled, would fall woefully short of that degree of perfection which it is possible for man-made government to attain. Our state Constitution has therefore specially covered this matter with respect to persons charged with crime. In section 13 of the first article of that instrument it is provided, among other things, that, in criminal prosecutions, "in any court whatever," the party accused shall have the right to appear and defend "in person and with counsel." The federal Constitution (article 6) contains a like guaranty. Of course, the right so guaranteed would involve the granting of a special privilege to a particular class if the right to its exercise were confined to those persons charged with crime having the financial ability to employ and compensate counsel—a situation wholly at variance with the fundamental idea and the general spirit of our systems of state and federal governments as outlined by their respective constitutions—and therefore, in this state, to the end that all men in all circumstances shall have the equal protection of the law, as our Constitution commands, the Legislature has enacted section 987 of the Penal Code, whereby the trial courts are, as seen, vested with authority, in the case of an impecunious person prosecuted upon a criminal charge, to assign him counsel, selected from the membership of the local bar, to defend him without compensation, or to trust for compensation to the future ability and the disposition of the accused himself to pay for the services rendered. Rowe v. Yuba County, 17 Cal. 62; Lamont v. Solano County, 49 Cal. 158. The Legislature, for obvious reasons, has

made no provision for payment for services rendered by an attorney in such a case, although it undoubtedly has the right to make such services a county charge, to be compensated for out of the treasury of the county. Of course, neither in the case of an attorney assigned by the court to defend an impecunious accused, nor in a case where an attorney is appointed by the court to prosecute the district attorney against whom an accusation has been filed, is there any contractual relation thereby or otherwise created or arising between the attorney so assigned or appointed and the county, since the county is not a party to either action and does not control the prosecution of either case; the prosecution in both instances being for the benefit of the county only in so far as it is part of the state, in the name of the people of which and not of the county the proceeding in both cases is prosecuted. Therefore there can be no implied assumpsit against the county—no obligation on its part to pay (Case v. Board of Commissioners, 4 Kan. 511, 96 Am. Dec. 190), notwithstanding that the Legislature, in the exercise of due authority, has made the expenses incurred in public prosecutions charges against the county. In brief, as stated, the whole matter of compensation in either case rests upon the proposition whether there is or is not a statute authorizing payment for the services rendered therein by an attorney assigned or appointed by the court to defend or prosecute the accused, as the case may be.

But, as above intimated, the authority given to superior courts to appoint an attorney to conduct the prosecution of a district attorney against whom an accusation has been filed does not proceed from the theory upon which like authority may be exercised in assigning an attorney to defend a pauper charged with and prosecuted for a crime. The county is not an indigent, but is amply able to compensate (and as of right should compensate) an attorney who is required to perform services which, under other circumstances, it is the duty of the district attorney to perform, and for which the latter is compensated. Naturally enough, therefore, the Legislature would, in such a case, make provision for compensating an attorney for services which the law compels him to perform, whether he desires to perform them or not.

There is, as we read the decision, nothing said in the case of State ex rel. McGrade v. District Court, 52 Mont. 371, 157 Pac. 1157, supra, in conflict with the views above expressed. In that case, under a statute substantially similar in its provisions to section 771 of our Penal Code, the trial court, in a proceeding in which an accusation had been presented and filed against the district attorney, appointed the district attorney of an adjacent county to conduct the prosecution. The latter asked and sued for compensation for his services; but he was denied the right to compensation upon the ground, as stated by the Supreme Court of Montana, that he had merely performed a duty in prosecuting the case that the law had placed upon him as a district attorney, and that the compensation allowed him by law as district attorney covered payment for all services performed as such by him, including services in such a case. The ruling in that case appears to be perfectly sound, but it does not fit this case. Under section 771 of our Code, the court could have appointed a district attorney of one of the counties adjoining Sacramento to prosecute the accusation in this case, in which event what is said in the Montana case would apply here.

It is further argued that the superior court has no authority to incur an obligation against the county, but that such authority is alone vested in the board of supervisors, referring to section 4041 of the Political Code, which, in the enumeration of the powers of such boards, contains the following provision, designated as subdivision 16:

"To direct and control the prosecution and defense of all suits to which the county is a party and, by a two-thirds vote of all the members, may employ counsel to assist the district attorney in conducting the same."

The foregoing, as is to be noted, refers wholly to suits to which a county is a party, and therefore to civil actions. A county is in no sense a party to criminal cases, for they involve "no interest of the county in any sense, other than such interest as the county may have in common with any other county and all the people of the state, in upholding the administration of the law." County of Modoc v. Spencer, 103 Cal. 498, 500, 37 Pac. 483; Conklin v. Woody, 33 Cal. App. 554, 165 Pac. 973.

The proposition, however, that there is no law authorizing a judge of the superior court to incur an obligation against or on behalf of the county is, in a general sense, quite true. But the right in the Legislature to confer such authority upon the superior court or the judge thereof, when it may be essential to the proper transaction of the business of the court, cannot be questioned; and this right has been exercised by the Legislature in the case of the employment and compensation of phonographic reporters of said courts. See sections 269, 274, and 274a, Code Civ. Proc. By those sections, the judges of the superior court are not only authorized to appoint and employ stenographic reporters to take down in shorthand and transcribe the proceedings of their courts, but are authorized to audit or order the payment of the claims of such reporters for their compensation for the services so performed by them. Indeed, by section 869 of the Penal Code, justices of the peace, sitting as examining magistrates, are similarly authorized to order the payment of claims of shorthand reporters whom they have appointed to report the testimony and

proceedings taken and had at preliminary examinations. And, in a case where, as here, an accusation has been filed against the district attorney, the Legislature has expressly conferred authority upon the superior court to appoint an attorney to prosecute the action. Whether such an appointment amounts only to a mere "assignment" of an attorney to represent the people in the action, as in the case of an attorney "assigned" to defend an impecunious person accused of and prosecuted for some crime, or is an employment in the sense that it places an obligation upon the county or the state to pay for the services of the attorney in the action, must, of course, depend upon whether the Legislature has authorized payment out of the public treasury of compensation for such services. The Legislature could, obviously, make such services a direct charge against the state and the compensation payable from state funds. On the other hand, it is clearly within the power of the Legislature to make such services a charge against the county, as it has made all other expenses growing out of criminal prosecutions charges against the county, and, as declared in the outset of this opinion, we think that this is precisely what the Legislature intended to do and has done by the language of subdivision 3 of section 4307 of the Political Code.

The suggestion that the construction herein given subdivision 3 of section 4307 may result in a heavy drain on the county treasury is, of course, no argument against such construction of said section. A proceeding against a district attorney such as the one before us rarely arises, and we may add (more as the opinion of the writer than that of the court) that, if having no stronger reason, legal or moral, for its support than that which prompted this proceeding, no such a move should be made against a public officer; for under such circumstances its result can only be to harass and annoy without the slightest justification a public official who is trying to do his duty as the law lays it down. But, whether meritorious or justified or not, such a proceeding must be disposed of by the court before which it is pending in the manner and mode prescribed by the law, and, when against a district attorney, there is nothing left for the court to do but to appoint either the district attorney of an adjoining county or some other attorney to prosecute the proceeding; in other words, to perform services which, under other circumstances, it would be the duty of the district attorney himself to perform.

Our conclusion is: That the services performed by the appellants are among the "other county charges" contemplated by subdivision 3 of section 4307 of the Political Code, and that compensation therefor by the county is authorized by the latter part of said subdivision of said section; that the claim for such services is one which must be passed upon by the board of supervisors, in which body is lodged the discretion of determining whether the services for which the claim is made have been performed, and, if so, whether the amount of the claim is or is not reasonable in comparison with the character of the services performed; that, if the claim be rejected by the board, then the claimant may finally, as in the case of any other claim against the county and disallowed by the supervisors, either in whole or in part, have recourse to the courts for a judicial adjudication of the claim or the questions thereupon arising.

The judgment is reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

---

37 Cal. App. 335

HUEY v. PATTERSON et al. (Civ. 2307.)

(District Court of Appeal, Second District, California. May 22, 1918. Rehearing Denied by Supreme Court.)

1. CORPORATIONS ⊂=262(1)—ACTIONS AGAINST STOCKHOLDERS — DISSOLUTION OF FORMER CORPORATION.

In an action against stockholders for debts incurred by corporation, it is no defense that a former corporation, whose business and assets the present corporation took over, new stock being issued for surrendered stock, was not properly dissolved, under Civ. Code, § 309, and Code Civ. Proc. §§ 1227–1232.

2. CORPORATIONS ⊂=269(1) — SUITS AGAINST STOCKHOLDERS—BURDEN OF PROOF.

In an action by creditors against stockholders of a corporation for debts incurred in 1913 and 1915, an agreed statement of facts to the effect that defendants were stockholders in 1912 was sufficient on which to base a judgment against defendants, under Civ. Code, § 322, casting burden upon creditors to show who were stockholders "at the time the debt or liability was incurred"; it being presumed that the defendants continued to be stockholders.

3. CORPORATIONS ⊂=237 — LIABILITY OF STOCKHOLDERS.

The liability of stockholders of an insolvent corporation is not primarily predicable upon notes drawn by corporation to pay pre-existing obligations, but upon the enforceability of the pre-existing obligations themselves.

4. CORPORATIONS ⊂=237 — INVALID ASSESSMENTS—RIGHTS OF STOCKHOLDERS.

Where a corporation levies invalid assessments on certain stockholders, they are entitled to recover the same from the corporation, or, in case of insolvency, from the stockholders upon their statutory liability.

5. CORPORATIONS ⊂=178 — ADVANCES BY STOCKHOLDERS.

Where stockholders of a corporation made advances, stipulation in note that note was "to be paid from sales of merchandise or sales of treasury stock" did not make advances voluntary assessments, but amounted to nothing more than an indication of a willingness to await for some time the payment of the notes.

6. LIMITATION OF ACTIONS ⊂=58(4)—STOCKHOLDER'S LIABILITY — ACCOMMODATION INDORSER.

Where, after corporation's failure to pay its note on demand, accommodation indorser and

guarantor paid it, taking assignment thereof, a new obligation arose in his favor, and, as to his right to recover amount paid from corporation's stockholders, the applicable statute, Code Civ. Proc. § 338, began to run at time of such payment; the assignment being immaterial, as the claim was based upon the payment and not on the note.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by L. M. Huey against A. T. Patterson and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Manning, Thompson & Hoover and Andrew M. Strong, all of Los Angeles, for appellants. Herbert W. Kidd and A. W. Ashburn, both of Los Angeles, for respondent.

WORKS, Judge pro tem. This is an action to recover judgment upon the statutory liability of certain stockholders of the Growers' Home Canneries Company, a corporation, which will hereafter, for convenience, be referred to as "Second Company." That company was, under an arrangement which later will be stated more fully, the successor in business of the Growers' Home Canning Company, a corporation, which will be called, henceforth, "First Company." The plaintiff sued as assignee of various holders of claims against Second Company, consisting of seven promissory notes, aggregating a total principal sum of $5,229, and a further claim for $750 principal, money loaned but for which no promissory note was given, or, in all, the principal sum of $5,979. Judgment was rendered against the defendants for their proportionate shares of this amount. The appeal is from the judgment.

One of the contentions of the appellants is that the arrangement by which Second Company succeeded to First Company was void. That arrangement is set forth in an agreed statement of facts found in the record and was, in effect, as follows: At a meeting of the stockholders of First Company there was passed a resolution providing that Second Company be organized with a certain capitalization; that the president and secretary of First Company be instructed to incur the expense necessary for the incorporation of Second Company; that the stockholders of First Company be asked to consent to the transfer of its assets to Second Company and to accept stock in the new company in lieu of their stock in the old in the proportion of ten shares for one, on account of the difference in the par value of the shares; and that all of the stockholders of First Company be given stock in Second Company in proportion to their holdings. All the appellants were holders of stock in First Company, were present at the meeting, and voted in favor of the resolution. At the same meeting it was voted that First Company offer to sell its plants, business, and all its property and to transfer its cash on hand and outstanding accounts to Second Company, the latter to assume the liabilities of First Company, all in consideration of the shares of stock of Second Company to be issued to the stockholders of First Company in proportion to their holdings of its stock, and that the president of First Company be authorized to execute the deeds, assignments, bills of sale, and other papers necessary to carry out the terms of the offer. The motion included a draft of a letter to be transmitted to Second Company, setting forth the terms of the offer, and was carried unanimously. At the same meeting, Second Company already having been incorporated, a letter was received from it, by which the offer of First Company was accepted. Thereupon, a motion was adopted by which the communication from Second Company was ordered received and placed on file and by which the president of First Company was authorized to execute the instruments necessary to effectually carry out the transaction. On the day on which the meeting of the stockholders of First Company was held, there was also convened the first meeting of the stockholders of Second Company. The agreed statement of facts shows that on or about that day each of the appellants subscribed for small holdings of the capital stock of Second Company and each of them was present at the meeting. A resolution was adopted which recited a receipt of the above-mentioned offer from First Company and which authorized the directors of Second Company to accept the proposition, to purchase the property of First Company upon the terms of the offer, and to issue stock in accordance therewith. The appellants each voted for the resolution. The corporations thereafter executed and issued all the instruments and certificates of stock necessary to effectuate the contemplated transaction.

[1] The contention that this arrangement was invalid is based upon section 309 of the Civil Code and sections 1227–1232 of the Code of Civil Procedure. Speaking generally, but yet in terms sufficient for our present purpose, the section of the Civil Code forbids directors of corporations to make dividends on stock except from surplus profits, or to divide, withdraw, or pay to the stockholders any part of capital stock; and the sections of the Code of Civil Procedure provide a scheme for the dissolution of corporations upon notice and by a special proceeding instituted in the superior court.

Dealing with the question of the validity of the transaction between the corporations as measured by the provisions of both section 309 of the Civil Code and sections 1227–1232 of the Code of Civil Procedure, we need concern ourselves only with an inquiry as to whether the appellants are in a position to invoke the terms of the statute. The point made by the appellants goes only to the alleged attempt to divide the capital stock of

First Company among its stockholders and to work a dissolution of that corporation, and has no bearing whatever upon the question of the existence of Second Company or upon the query as to whether the appellants are stockholders in it. Any infirmity in the arrangement between the two corporations because of the sections of the Codes which are cited, is of concern only to those having an interest either as creditors or stockholders, in the property of First Company. The appellants, objecting alone as stockholders of Second Company, and in an action to which First Company is a stranger, are in no position to present the question. These considerations are based on O'Dea v. Hollywood Cemetery Ass'n, 154 Cal. 53, 67, 97 Pac. 1.

[2] The obligations which are the basis of this action were incurred by Second Company in January and September, 1913, and in May, 1915. Under the language of section 322 of the Civil Code, relating to the liability of stockholders for corporate debts, the burden of proof was upon the respondent to show the number of shares of the stock of the corporation held by each stockholder "at the time the debt or liability was incurred." The agreed statement of facts shows who were the stockholders on or about December 11, 1912, and shows the number of shares owned by each; but it does not make such a showing as of any other time. The appellants contend that this condition of the agreed statement does not sustain the burden cast upon the respondent; but the rule is established in a number of cases that, where the state of the title to property is shown as of a particular time, the same condition is presumed to exist until the contrary appears. Under this rule there appears to be no distinction between the different classes of property, as some of the cases relate to realty (Hohenshell v. South Riverside L. & W. Co., 128 Cal. 627, 631, 61 Pac. 371; Jennings v. Jordan, 31 Cal. App. 335, 339, 160 Pac. 576), while others apply the doctrine in the case of personal property (Fredericks v. Tracy, 98 Cal. 658, 33 Pac. 750; Newlove v. Pond, 130 Cal. 342, 62 Pac. 561). We are satisfied that the showing in the agreed statement of facts, there being no evidence to the contrary in the record, is sufficient to support the judgment.

[3, 4] Several of the notes sued on were executed by Second Company for the purpose of reimbursing the payees, who were stockholders in the corporation, in amounts paid by them into the corporate treasury upon a certain invalid assessment upon the corporate stock. The appellants contend that there can be no recovery upon these notes for the reason that the stockholders who advanced their respective portions of the void assessments had no cause of action against the corporation for the recovery of their money, antecedent to the execution of the notes; and it is, of course, true that the liability of stockholders, in such an action as this, must be measured by the question whether an original obligation of their corporation is enforceable by its holder. The liability of stockholders is not primarily predicable upon notes, the execution of which is based upon pre-existing obligations (Hunt v. Ward, 99 Cal. 612, 34 Pac. 335, 37 Am. St. Rep. 87; Santa Rosa Nat. Bank v. Barnett, 125 Cal. 407, 58 Pac. 85; Gardiner v. Royer, 167 Cal. 238, 139 Pac. 75), but upon the pre-existing obligations themselves. Was there, then, a legal liability upon the corporation to return the amounts advanced on account of the void assessment? It appears that this specific question has never been answered in California, nor have we, despite the fact that appellants cite cases from other states to the point, been able to ascertain that it has been passed upon elsewhere, even after some research of our own. There are principles of law, however, announced in decisions of the California courts, which furnish an analogy giving us much aid in the determination of the question. For instance, it is well settled that a corporation which receives and retains the fruits of a contract ultra vires cannot be heard to assert the invalidity of the contract in an action brought to recover upon it. Main v. Casserly, 67 Cal. 127, 7 Pac. 426. See, also, Standard Oil Co. v. Slye, 164 Cal. 435, 445, 129 Pac. 589. Also, there is a long line of cases beginning as early as Argenti v. San Francisco, 16 Cal. 255, laying down the very just rule that a municipal corporation which has obtained the money or property of another through mistake or without legal right may be compelled to return it as upon an implied contract. Some of these cases are on principle closely allied to the one now before us. County of Los Angeles v. City of Los Angeles, 65 Cal. 477, 480, 4 Pac. 453; County of Colusa v. County of Glenn, 117 Cal. 434, 49 Pac. 457; Higgins v. San Diego Water Co., 118 Cal. 524, 555, 45 Pac. 824, 50 Pac. 670; Contra Costa Water Co. v. Breed, 139 Cal. 432, 73 Pac. 189. The language used in the opinion in the first case of this group is particularly apposite. Certain fines belonging to Los Angeles county had been paid into the treasury of the city of Los Angeles by mistake. The county sued the city to recover the diverted moneys, and the Supreme Court said, in disposing of the question:

"Under a mistaken belief that they were legally liable to pay over these fines into the city treasury, the officers reported and paid them to the city, and the city treasurer doubtless received them under the same mistake. But this disposition of them was not authorized by law; and as the city, by the mistake of its officers in the performance of their duty, has obtained money which under the law ought to have been paid into the county treasury, it ought not in justice to be kept; it is the duty of the city to refund it. 'If,' says Mr. Justice Field in Argenti v. San Francisco, 16 Cal. 255, 'the city obtain money of another by mistake or without authority of law, it is her duty to refund it—not from any contract entered into by her on the sub-

ject, but from the general obligation to do justice which binds all persons, whether natural or artificial.'"

We conclude that, under the facts of the present case, the stockholders who paid the amounts attempted to be charged against them by reason of the invalid assessment could have maintained an action against the corporation for their return, and that therefore the liability of the stockholders attaches.

[5] It is objected by appellants that a liability against them as stockholders does not exist in the case of certain other promissory notes upon which respondent sues. These notes were originally given to stockholders of the company for advances made by them and the question arises, upon the point made by appellants, as to whether the advances were loans or were voluntary assessments by the stockholders against their own stock. The appellants make much of the fact that the advances were in amounts equal to 5 per cent. of the par value of the holdings of the stockholders, and they cite cases to the effect that a voluntary contribution by stockholders to the funds of a corporation, to tide it over financial difficulties, is for the betterment of their stock and does not create a debt against the corporation. These authorities are not in point, for the records of the corporation show that the advances were loans, pure and simple. At a special meeting of the directors it was stated that it was necessary to raise a certain sum of money "in order to pay off current and past due bills." A resolution was then adopted authorizing the president and secretary to borrow the amount and to execute a note for it. Some of the directors then indicated a willingness "to make the loan to the Company," whereupon the money was paid over and a note was taken by a certain individual as trustee for the lenders. The promissory note was given in the ordinary form, as the resolution authorizing its execution required the insertion of no special terms in it; but the minutes show, after what they disclose as to the willingness of the stockholders to lend the needed money, that:

"It was further stipulated above-mentioned note * * * is to be paid from sales of merchandise or from sales of the treasury stock of the corporation."

This "stipulation" is no part, in form, of any resolution or motion; but, even if it be treated as a motion, it could not operate to limit the terms of the promissory note. If it be conceded to have any operation whatever as to the lenders, it can amount to nothing more than an indication of a willingness on their part to await for some time the payment of the note. Under all these circumstances, it plainly appears that the advances by the stockholders were not voluntary contributions, but that they fixed the relation of creditors and debtors between the stockholders and the corporation.

[6] It is contended by the appellants that the claim for $750, not evidenced by a promissory note, is barred by the statute of limitations, section 338, Code of Civil Procedure fixing a limitation of three years for the commencement of a certain class of actions, which includes those like the present one. The question arises under the following facts: Second Company was indebted upon a certain promissory note executed by First Company, which Second Company had assumed, and on which one of the stockholders of both corporations, E. B. Rivers, was an accommodation indorser and guarantor. This note was dated more than three years before the commencement of the action. The note was for $1,750, and $1,000 had been paid upon it at a certain time. At a date within three years before the commencement of the action, demand was made upon Second Company for payment of the balance due; but the demand was not complied with. Thereupon, demand was made upon Rivers, and he paid, taking an assignment of the note. A new obligation arose in favor of Rivers upon the payment of the note by him, and the statute began to run at that time upon that obligation. Yule v. Bishop, 133 Cal. 574, 62 Pac. 68, 65 Pac. 1094; McDonough v. Nowlin, 17 Cal. App. 45, 118 Pac. 463. The fact that Rivers took an assignment of the note cannot affect the principle just stated, for the reason that the claim for the amount paid by him is not based upon the note. The claim is not barred.

There are two or three other points presented by the appellants, but they do not merit a specific consideration.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

---

37 Cal. App. 802

BEKINS v. SMITH et al. (Civ. 2502.)

(District Court of Appeal, Second District, California. July 29, 1918.)

APPEAL AND ERROR ⟸781(2)—REVIEW—MOOT QUESTION—VALIDITY OF STAY BOND AFTER REVERSAL OF JUDGMENT.

Where judgment of appellate court in reversing lower court's judgment for plaintiff has become final, an appeal by plaintiff from an order overruling motion to strike out the undertaking and vacate stay of execution raises a question of mere abstract interest, and appeal will be dismissed.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by R. M. Bekins against Ella Smith, also known as Ella Smith-Trull and another. Judgment for plaintiff, and defendant named appealed. From an order overruling motion to strike out the undertaking and to vacate the stay of execution, plaintiff appeals. Plaintiff's appeal dismissed.

Winslow P. Hyatt and David G. Kling, both of Los Angeles, for appellant. R. D.

McLaughlin, J. B. McLaughlin, and Earl Rogers, all of Los Angeles, for respondent.

PER CURIAM. In this action plaintiff had judgment in the court below and defendant Ella Smith appealed. An undertaking was given to stay execution and a stay followed. Plaintiff moved to strike out the undertaking and vacate the stay. That motion was denied and this appeal was then taken. The appeal in the main case has been determined by this court and the judgment of the lower court reversed. Bekins v. Smith et al., 174 Pac. 96. The judgment made on determining that appeal has become final. It would serve no purpose affecting the rights of the parties litigant to now take up the questions discussed as to the validity of the stay bond given in the case. Such questions have become of mere abstract interest. Adams v. Prather et al., 167 Pac. 867.

The appeal is dismissed.

---

37 Cal. App. 697

## RAISCH v. REGENTS OF UNIVERSITY OF CALIFORNIA. (Civ. 2398.)

(District Court of Appeal, First District, California. June 29, 1918. Rehearing Denied by Supreme Court Aug. 26, 1918.)

1. MUNICIPAL CORPORATIONS ⊜426—STREET IMPROVEMENTS — ASSESSMENT — UNIVERSITY LAND.

A strip of land owned by a state university and adjoining land, used for educational purposes, cannot be subjected to street assessment lien, unless it is divisible from land used for educational purposes, and can be separated therefrom without impairing use to which such land is being put by university.

2. MUNICIPAL CORPORATIONS ⊜426—STREET IMPROVEMENTS — ASSESSMENT — UNIVERSITY LAND.

A trip of land fronting on a street, and constituting about one-seventh of a block owned by a state university, six-sevenths of which was occupied by college buildings, *held* not separable from the remainder without impairing its use, and hence not assessable.

3. MUNICIPAL CORPORATIONS ⊜426—STREET IMPROVEMENTS — ASSESSMENT — LAND OCCUPIED BY COLLEGE BUILDINGS.

Land occupied by college buildings of a state university, being devoted to public use, is not subject to street improvement assessment.

4. MUNICIPAL CORPORATIONS ⊜458 — IMPROVEMENTS—ASSESSMENT.

Street improvement assessment must not be confiscatory.

5. CONSTITUTIONAL LAW ⊜290(1)—DUE PROCESS—LOCAL IMPROVEMENT ASSESSMENT.

The tax for local improvements must not be so disproportionate to the value of the property to be subjected thereto as to deprive the owner of his property without due process of law.

6. MUNICIPAL CORPORATIONS ⊜456(1) — STREET IMPROVEMENT — ASSESSMENT — DISTRICT PLAN.

Where costs of street improvement exceeded more than half of assessed value of property assessable on the frontage plan, the city could have adopted the district plan of street improvement provided for by Vrooman Act, § 3, where city, not having been organized under General Municipal Incorporation Act, was not required to follow such plan, but was authorized so to do by San Francisco Charter, art. 1, § 5.

7. MUNICIPAL CORPORATIONS ⊜467—STREET IMPROVEMENTS — ASSESSMENT — VALUE OF PROPERTY.

Under San Francisco Charter, art. 1, § 5, authorizing city to adopt district plan for street improvements as provided for by Vrooman Act, § 3, where cost of improvement exceeded one-half of assessed value of assessable property subject to assessment on the frontage plan, city and county, in assessing property, could take into consideration the value of property back of frontage.

8. MUNICIPAL CORPORATIONS ⊜519(1) — STREET IMPROVEMENTS—VOID ASSESSMENT—WAIVER.

Where assessment of a block of land for street improvement was void because six-sevenths of the land was occupied by college buildings, contractor cannot waive his lien as to the six-sevenths and enforce it against the one-seventh, inasmuch as, assessment being void, he had no lien to waive.

9. MUNICIPAL CORPORATIONS ⊜488, 489(8)—STREET IMPROVEMENT ASSESSMENT — PROTEST.

Property owners whose land is assessed for street improvements are not required to protest the actual assessment in order to protect their rights in court, but have the right to do so.

10. MUNICIPAL CORPORATIONS ⊜514(11) — STREET IMPROVEMENT—INVALID ASSESSMENT.

Where assessment for street improvement was invalid, owner of property cannot be required to face, without the power to protest, a new assessment entirely different.

11. MUNICIPAL CORPORATIONS ⊜488, 489(4) — STREET IMPROVEMENTS — ASSESSMENT — ESTOPPEL.

Property owner was not estopped from asserting the invalidity of a street improvement assessment because he failed to protest to city council or because he remained silent while the work was being done.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by W. C. Raisch against the Regents of the University of California. Demurrer to plaintiff's amended complaint sustained, and from judgment for defendants entered upon plaintiff's refusal to further amend plaintiff appeals. Affirmed.

P. F. Dunne, of San Francisco, for appellant. Warren Olney, Jr., of San Francisco, for respondents.

BEASLY, Judge pro tem. The regents of the University of California were on April 1, 1911, and still are, the owners of an irregular shaped block of land in the city and county of San Francisco, bounded by First avenue, Parnassus avenue, Kirkham, sometimes called K, street, and Fourth avenue, embracing about 13½ acres of land. Raisch, a street contractor, did street work, consisting of grading and sewer construction, on Fourth avenue along the entire front of the university property, and also upon the intersections of that avenue with Kirkham street and Parnassus avenue. This work was done under a resolution of intention of the board of public works providing for the assessment

of its cost on property fronting on the improvement. Legal steps followed leading to an assessment for the cost of all this work. The entire tract of land belonging to the university was assessed to pay $3,681. The entire tract having been so assessed, the plaintiff in his amended complaint sought to foreclose, not upon the whole of the university's property, but upon the Fourth avenue frontage to a depth of 120 feet only.

The trial court sustained defendants' demurrer to the amended complaint, raising questions hereinafter discussed, and entered judgment for defendants, when plaintiff refused to further amend. From that judgment the plaintiff appeals.

The plaintiff concedes that the assessment is void against all of the university property except that portion upon which he now seeks to foreclose. The reason which exacts this concession from the plaintiff is that all of the block except that portion last referred to is used by the regents in the performance of their public functions; but the plaintiff contends that the strip fronting on Fourth avenue to a depth of 120 feet is not so used by the regents, and that it, therefore, should be subjected to his lien as prayed. The plaintiff attempted to frame his amended complaint so as to state a cause of action within the rule of City Improvement Co. v. Regents, 153 Cal. 776, 96 Pac. 801, 18 L. R. A. (N. S.) 451. In that case the rule was stated to be that the regents, being a private corporation charged with the public trust of the general government and superintendence of the University of California, "private property held by them, when actually devoted to public use, is exempt from taxation for street improvement; otherwise not." And it is said that "the principle is well established that where any such lands are not directly and necessarily used for a public purpose they may be subjected to the payment of special assessments for benefits." Much other learning is embodied arguendo in that opinion, which is by Mr. Justice Henshaw; but the above statement is the simplest, and, as to the defendants' position, the most favorable, statement of the rule to be found in the case. An examination of the record in that case indicates that the property there assessed was an entire lot held and devoted, as therein alleged, solely to private uses of the defendants; that it was entirely vacant and unoccupied; not actually nor necessarily incidental nor appropriated to the performance of any public function, and not directly nor necessarily used for any public purpose. Allegations to similar effect are embodied in plaintiff's complaint as to the property affected in this case; and plaintiff seems to concede that before land, a portion of which is actually in use by the university for educational purposes, may be subjected to the lien of an assessment for street improvement, it must be separable from the remainder of the property for the public use of which it is a part without impairing the value of the property for the public use to which the occupied portions of it are already put; for he has alleged that the 120-foot strip is not an indivisible portion of the block described in the assessment, but, on the contrary, is easily divisible therefrom, and when severed will in no way affect the value or use of the remainder of said land for a public purpose or the performance of a public function.

[1] It goes without saying that this allegation was necessary to a statement of a cause of action by plaintiff; for, if the land sought to be subjected to the assessment, and to be sold in a foreclosure proceeding to pay the same, is not divisible from the remainder of the tract without injuring it for the uses to which the university is devoting such remainder, then, of course, the portion sought to be severed is necessary to the use of the remainder of the tract.

[2] Now, in the view we take of this matter, these bald allegations of this complaint, avowedly made for the express purpose of bringing the case within the rule of the case cited, cannot change the patent facts which appear on the face of the complaint itself. It is conceded in the brief of appellant that the whole eastern portion of this block—more than six-sevenths of its area—is occupied by the buildings of the Affiliated Colleges of the University of California. To allege under such circumstances that the other one-seventh of the area is severable and not necessary to the use of the remainder, considering the admitted character of the actual present use of almost the entire property, does not make it so. It is plain that the severance of this frontage on Fourth avenue from the remainder of the property would necessarily impair the present as well as the future usefulness and value of the remainder of the block to the university for its public purposes; and the point of view from which this question must be examined is upon the assumption that the strip is to be sold to satisfy the lien, and thus severed from the remainder of the tract.

When the case of City Street Improvement Co. v. Regents, supra, was decided the Supreme Court had before it no question of the division of a parcel of land upon which, and covering and using nearly all of which, as here, were buildings of the university. Upon this ground alone, then, the cases are distinguishable, and the demurrer was properly sustained.

There is, however, another ground upon which the trial court correctly sustained the demurrer.

[3] It is, as indeed it must be, conceded by appellant, under Witter v. Mission School District, 121 Cal. 351, 53 Pac. 905, 66 Am. St. Rep. 33, that the assessment as to the six-sevenths of this block in actual occupation

—adopting counsel's construction of that term as meaning occupied by buidings in use for university purposes—was void. But the Supreme Court has gone further than this, and has held that where a street assessment covered too much land the whole assessment was void; and in Benson v. Bunting, 141 Cal. 462, 75 Pac. 59, Mr. Justice McFarland stated the rule in this language:

"Appellant contends that he should have been allowed the amount of an alleged street assessment against the land, which alleged assessment the court found to be void. We do not see that the court erred in so holding. The assessment was against too much land, and therefore void (Ryan v. Altschul, 103 Cal. 177 [37 Pac. 339]); and it is unnecessary to consider respondents' contention as to the insufficiency of the engineer's certificate."

It is argued that in these cases the assessment was upon lands not only not assessable for the improvement, but belonging to other parties than owners of assessable lands, and that therefore those cases are distinguishable from the case at bar. We find nothing to indicate such a state of affairs in the case of Benson v. Bunting, supra; and, further, the Supreme Court applied the same rule in the case of Parker v. Reay, 76 Cal. 103, 18 Pac. 124, where an assessment for street work was levied against a lot known as lot No. 13, when it should have been levied against only the easterly half of that lot. This assessment also was declared void because it included too much land, and it does not therein appear that the assessable and nonassessable parts of lot 13 belonged to different parties.

Counsel for the appellant meets these cases with the contention that the basis of the assessment is the frontage only, without relation to the depth of the lot; and hence the enforcement of a lien on the shallow frontage in this foreclosure suit does not injure the defendants, and that they may not complain; and depends for support of this contention upon the case of Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283. In the opinion in that case it is said that the owner cannot be said to be aggrieved merely because the superintendent, while correctly giving the frontage of his lot and assessing the proper amount thereto, has incorrectly delineated its interior lines, since the amount of the assessment is in no wise affected thereby. And it is further said that the basis of the assessment is the frontage upon the work, and the frontage of each lot determines the amount of the assessment against a lot, irrespective of its size, shape, or depth.

But the main question in that case was as to the proper location of Channel street in San Francisco. The court, having settled the proper location of Channel street, used the language above referred to. This language must be read in the light of the facts which were before the court. Those facts are thus stated in the opinion:

"The appellant does not contend that, if Channel street is properly located on the diagram, any other property than that designated therein is assessable. His contention in this respect is based upon his claim that Channel street is erroneously located thereon. The precise distance from Berry street at which Channel street is laid down on the maps named in the statute has never been officially declared, and the different measurements given at the trial were reached by measurement with a scale. One of these distances was less and the others more than is shown upon the diagram. These discrepancies, however, do not of themselves invalidate the assessment. They are ascertained only by evidence outside of the assessment itself, and in such a case the assessment is not felo de se, but, if defective, is to be remedied upon an appeal."

It is apparent that all that the court intended to hold in that case was that if errors were made by the street superintendent in delineating the depth or lateral lines upon the assessment map, such errors were trivial, and could have been cured by an appeal to the supervisors. We undertake to say that the court did not mean that an assessment should be upheld in a case where, without mistake but intentionally, the assessment embraced a tract of land with a depth of approximately 800 feet, an area of 13½ acres, and of which only 120 feet in depth on one front could be legally assessed. That the court did not intend that the language referred to should be given the meaning attached to it by appellant is clear from the following statement from the opinion:

"It is only the land assessed which is subject to the lien, and the judgment directing the sale, as well as the complaint for its foreclosure, must be limited to the description of the lot as found in the assessment."

[4-7] Adopting further the language of Diggins v. Hartshorne, supra, as applicable to this case (in which we think he is mistaken), counsel contends that the basis of the assessment here is the frontage upon the work; that the frontage of each lot determines the amount of the assessment against that lot irrespective of its size, shape, and depth. Viewed from the standpoint of the state of this proceeding at the present time, there seems to be much force in this argument, for this is a front-foot proceeding, and such is the rule as to the method of levying assessments in front-foot proceedings. Nevertheless, the statement is not correct in the sense that the frontage was all that the board of public works was permitted to consider when the proceeding was instituted and the method of assessment determined. To so hold would be to lose sight of the relative cost of the improvement compared to the value of this property, and of the legal principle that the assessment must not be confiscatory, and that fundamentally, in all cases of assessments for local improvements, the taxing powers must not levy a tax that will be so disproportionate to the value of the property to be subjected thereto as to deprive the owner of his property without due process of law. The board of public works, at the inception of this proceeding, and while considering the

method to be adopted for raising the money with which to do this work, had the right, if it was not their duty, to consider the value of the taxable portions of the property assessable for the work. The board of public works had at least two distinct methods provided by law for raising this money. It could, as it attempted to do here, levy the assessment upon the frontage; but it was also provided by an amendment to the charter of the city and county of San Francisco, adopted in 1910 (Stats. 1911, p. 1689, article 1, § 5), that the city might proceed with street improvements under the general street law of the state, which at that time included the Vrooman Act (St. 1885, p. 148) section 3 of which then authorized street improvement under what is known by the common name of the district plan. In that section of the Vrooman Act it is provided that whenever, according to the estimates of the engineer, the total estimated cost and expenses of a street improvement will exceed one-half of the total assessed value of the lots and lands assessed, if assessed, as here, upon the frontage, according to the last assessment roll of the city, the district plan must be adopted. While the city was not bound under the charter, as a municipality organized under the General Municipal Incorporation Act (St. 1883, p. 93) would have been, to follow this district plan in such a contingency, nevertheless it might have done so, provided the cost would exceed one-half the assessed value of that portion of the property assessable and fronting on the street. It must be clear from this that the city and county at the beginning of this proceeding were permitted to take into consideration not only the extent of the frontage, but also the value of the property back of the frontage; and where, as here, the value of the 120-foot strip does not appear, we are not called upon to assume, in order to reverse this judgment, that the board of public works would not have been warranted, and would not, under the circumstances that existed here, have adopted the district plan had its attention been called to the fact that its assessment against the six-sevenths of the property on which the buildings stand was void.

[8-10] Counsel contends that plaintiff has the right, by waiving his lien to the remainder of the property—as he expressly undertakes to do by an allegation of his complaint—to foreclose against the 120-foot strip. We think this contention unsound for the reason that the appellant in this case is waiving nothing, even in his own view of the case, by foregoing a right to foreclose upon the six-sevenths of this property upon which he confessedly can have no lien, and which admittedly was not subject to this assessment. What is really being attempted is to collect by this indirect method an invalid assessment which the board of public works evidently thought would be of benefit to the entire property of the Affiliated Colleges, and the cost of which they assumed would be levied upon that entire property measured by its frontage on Fourth avenue. They were mistaken in this, and had they known of their mistake it is not possible to say at this time that they could have levied this assessment at all. What is really asked of the court here is to make a new assessment for this street contractor, or that he be permitted to make a new one for himself, which the respondents in this case will have no opportunity to protest. While they were not called upon to protest the actual assessment in order to protect their rights in the courts, they had, nevertheless, the right to do so, and they cannot now be compelled by the court to face, without the power to protest, a new assessment entirely different, so far as the property is concerned, from the assessment actually levied.

[11] At the oral argument appellant's counsel contended that the "equities" of the case were all with appellant; that the respondents had stood by and permitted the appellant to expend his money on improvements in front of respondents' property without protest or objection, and should not now be heard to question the legality of the assessment. There is nothing in the complaint in this action to sustain this contention. It does not appear from the complaint that no protest was made, or that no objection was offered; and, further, in the case of Barber Asphalt Paving Co. v. Jurgens, 170 Cal. 273, 149 Pac. 560, the Supreme Court held that a property owner is not estopped from asserting the invalidity of an assessment because of his failure to protest to the city council, or because he remained silent while the work was being done. The principle there enunciated applies to this case. City officials when levying assessments act constantly under the advice of their attorneys; and the language of the case last cited, to the effect that the presumption of knowledge of the previous acceptance of the street, and consequent invalidity of the assessment, did not attach to the property owner with any greater strength than it applied to the city or the contractor, is an apt response to the contention of counsel that the regents should be estopped from asserting the invalidity of this assessment if they remained silent while the work was being done.

We feel, in conclusion, that the language of the late Judge Seawell when he sustained the demurrer is appropriate in this case. He said: "I do not understand upon what theory the plaintiff can expect to have the lien enforced over this limited area, the assessment covering a much larger one."

The judgment is affirmed.

We concur: KERRIGAN, J.; ZOOK, Judge pro tem.

37 Cal. App. 614

## CITY OF OAKLAND v. ADAMS et al.

(Civ. 2025.)

(District Court of Appeal, First District, California. June 24, 1918. Rehearing Denied July 22, 1918.)

1. EMINENT DOMAIN ⟸191(6)—COMPLAINT—DESCRIPTION OF PROPERTY—REFERENCE TO DEED.

Reference in complaint in eminent domain proceedings to deed to plaintiff city as matter of description has same effect as if description were inserted in complaint.

2. EMINENT DOMAIN ⟸191(6)—DESCRIPTION OF LAND IN COMPLAINT.

Complaint, describing line of lands sought to be condemned by reference to a deed, *held* sufficiently to describe the lands.

3. EMINENT DOMAIN ⟸191(6)—DESCRIPTION OF LAND IN COMPLAINT—REFERENCES.

References to deed and patent, with description of line in patent, in complaint of city, seeking to condemn land, taken with allegation that the tract as a whole was to be condemned, *held* sufficient to inform defendants accurately of land plaintiff sought to take.

4. EMINENT DOMAIN ⟸221—CONDEMNATION PROCEEDING—CONSTRUCTION OF TESTIMONY—QUESTIONS FOR JURY.

In city's proceeding to condemn land, question of construction of landowner's testimony as to his intention in fencing, whether or not to mark boundary, and what jury saw on premises, and question of construction of other testimony on subject, were for jury.

5. APPEAL AND ERROR ⟸996 — REVIEW — FINDING BASED UPON INFERENCE.

If a finding of fact is based upon a reasonable inference from facts proved, it is not within the power of the appellate court to set it aside.

6. EMINENT DOMAIN ⟸221 — LOCATION OF BOUNDARIES ON GROUND — DUTIES OF COURT.

In a city's proceeding to condemn land, the court should have determined the boundaries of the land sought to be condemned, and have located such boundaries upon the ground.

7. EMINENT DOMAIN ⟸262(5) — APPEAL — HARMLESS ERROR.

In city's proceeding to condemn land, where jury found boundary of land sought to be condemned to be at fence line, and court adopted such finding, and jury evidently based its verdict on that line, court's failure to locate boundaries on ground was harmless to defendants.

8. EMINENT DOMAIN ⟸262(5) — APPEAL — REVERSAL.

In city's proceeding to condemn land, where record fails to indicate insufficient damages were awarded, and it does not appear there has been miscarriage of justice, under Const. art. 6, § 4½, judgment of condemnation cannot be set aside, because city rested without introducing evidence to identify land, which landowners did.

9. APPEAL AND ERROR ⟸206(2) — RESERVATION OF GROUNDS OF REVIEW—REQUEST TO ADMONISH JURY.

Error cannot be predicated on question on cross-examination to expert witness, on ground that matter prejudicial to appellants was brought before jury, where trial court was not asked to admonish jury to disregard implication of question.

10. EVIDENCE ⟸558(2) — EXPERTS — LIMITATION OF CROSS-EXAMINATION—DISCRETION OF COURT.

In city's proceeding to condemn land, trial court did not abuse discretion, when it refused to permit city's expert witness to answer questions on cross-examination as to character of land and its suitability for residence purposes; matter having been gone into already.

11. EVIDENCE ⟸558(1) — EXPERTS — LIMITATION OF CROSS-EXAMINATION — DUTY OF COUNSEL.

It was duty of counsel to point out to court, in lengthy trial, and on ruling as to scope of cross-examination of expert based on desire to limit examination, the fact, if it was a fact, that question had not been previously asked, particularly where court stated they had gone over same ground previously.

12. EMINENT DOMAIN ⟸202(1)—EVIDENCE—VALUE—PART OF TRACT.

In city's proceeding to condemn land, city attorney could ask of witness value of part of property less in extent than that described in complaint, also less than described in the judgment, particularly where question was asked when boundary had not been settled.

13. EVIDENCE ⟸558(9)—EXPERT—CROSS-EXAMINATION—VALUE OF PROPERTY.

In proceedings to condemn land for park, court properly sustained city's objection to question to one of landowners' witnesses on cross-examination, whether in estimating value he considered purpose for which city was endeavoring to acquire land; any increment in value from intended purpose of city being immaterial to damages it should pay.

14. EVIDENCE ⟸558(7) — CROSS-EXAMINATION OF EXPERT—SHOWING OF INTEREST.

In city's proceeding to condemn land for park, real estate agent, who had estimated value of property for city, should have been permitted to answer landowner's question on cross-examination whether he was interested in sale of land that would be benefited by park.

15. EMINENT DOMAIN ⟸262(5) — APPEAL — HARMLESS ERROR.

In city's proceeding to condemn land for park, error in sustaining objection to question, on cross-examination of city's witness as to value, as to whether he was interested in sale of land that would be benefited by park, was not reversible, where jury did not adopt witness' estimate of value.

16. EVIDENCE ⟸558(8)—EXPERTS—QUESTION ON CROSS-EXAMINATION—GENERALITY.

In city's proceeding to condemn land for park, question asked by landowners of one of city's expert witnesses on cross-examination as to whether he was acquainted with geology of estuary in that locality was too general.

17. EVIDENCE ⟸558(8)—EXPERT—CROSS-EXAMINATION — ANSWER TO GENERAL QUESTION.

In city's proceeding to condemn land for park, court's action in permitting city's expert witness on cross-examination to answer general question of knowledge of geology of estuary in question was not erroneous, in view of testimony he had given as to depth of mud or marsh, etc.

18. EMINENT DOMAIN ⟸262(5) — APPEAL — HARMLESS ERROR—INSTRUCTION.

In city's proceeding to condemn land for park, instruction that duty to prove location of boundary line rested on landowners, abstract and improper, *held* harmless to landowners' substantial rights.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Condemnation proceeding by the City of Oakland, a municipal corporation, against Edson F. Adams and others. From a judgment for plaintiff, defendants appeal. Affirmed.

J. P. O'Brien, of San Francisco, for appellants. Paul C. Morf, City Atty., and John J. Earle, Deputy City Atty., both of Oakland, for respondent.

BEASLY, Judge pro tem. [1, 2] In this eminent domain proceeding by which defendants' property was condemned by the city of Oakland for a public park, the judgment is attacked on this appeal by the defendants on the ground that the description of the property found in the complaint is insufficient.

"The complaint," says appellants' counsel in his reply brief, "does not specifically describe the easterly boundary of this land, but it refers to a deed made by the Oakland Water Front Company to the city of Oakland for such description. This deed fixes the easterly boundary as being the easterly line of the rancho San Antonio as finally confirmed and patented to V. and D. Peralta between stations 131 and 134. * * * Nowhere in the patent are stations 131 or 134 or intervening stations mentioned or referred to."

The reference to the Oakland Water Front Company's deed to the city of Oakland as matter of description has the same effect as if the description were incorporated in the complaint. Vance v. Fore, 24 Cal. 435. This deed describes the westerly line of the park lands as the easterly line of rancho San Antonio, as finally determined and patented to V. and D. Peralta by the United States of America, between stations 131 and 134; and the easterly line of the Peralta grant of the San Antonio rancho between the stations mentioned was described in the patent as follows:

"Thence meandering the west shore of San Antonio creek at the line of ordinary high water" to a station.

Under the authority of Oakland v. Oakland Waterfront Co., 118 Cal. 160, 50 Pac. 277, and City of Oakland v. Wheeler, 34 Cal. App. 442, 168 Pac. 23, this description must be held sufficient so far as the complaint is concerned.

[3] It was further alleged in the complaint that the tract sought to be condemned was the whole of an entire tract, and three boundaries of this tract were admittedly described with certainty, except as to the length of two of them. What may be called the two side lines extending from the Fallon street or western frontage of the property sought to be condemned to the easterly line thereof, which is the line in dispute, were described as so many feet, more or less, in length; and this easterly boundary—which may be called an end line of the tract for convenience—would have been left uncertain, but for the references to the other deed and the patent, and the description of this line in the patent as the meander line of ordinary high tide of San Antonio creek, which is a tidewater stream. But these references, taken with the allegation that the tract as a whole was to be condemned, were sufficient in the complaint to inform the defendants accurately of the land the plaintiff sought to take.

[4] As contended in the case of City of Oakland v. Wheeler, supra, so here it is claimed that the line could not be located on the ground. The force of this objection is weakened by the fact that the city sought to condemn the whole of defendants' tract, and that they themselves, as one of them testified, knew their land extended to the Peralta line, and had always paid taxes on and claimed all the land to the Peralta line. As in the case of City of Oakland v. Wheeler, so here, certain engineers testified that the line of the land could not be located on the ground by the description; but the court and jury visited and inspected the premises. What they found or saw does not appear in the record. There was some evidence as to the location of this tide line upon the ground. There was also a fence on the property erected by the defendant Edson F. Adams, which the jury found in a special verdict, in answer to a question submitted to them, was the Peralta line, and this Peralta line, as we have seen, was the line of ordinary high tide. It does not appear that the jury may not have been able to determine for themselves upon an inspection of the property that this fence was erected upon this line; the natural place for a fence marking the boundary of a man's property to be. It is true that Mr. Adams testified that he did not erect the fence for this purpose, and gave various reasons which, it is claimed, show that he did not erect it with the intention of placing it upon the boundary of the defendants' property; but the question of the construction of this testimony and what they saw when they visited the premises, and of the weight and construction of other testimony on this subject, was for the jury. It is well settled in this state that knowledge gained by the court from a view of the premises is independent evidence, to be taken into consideration in determining the issues of the case. People v. Milner, 122 Cal. 171, 54 Pac. 833; Hatton v. Gregg, 4 Cal. App. 537, 88 Pac. 592.

[5] "If a finding of fact is based upon a reasonable inference, it is not within the power of this court to set it aside, any more than it is within its power to set aside any other finding supported by sufficient legal evidence; for a finding of fact based upon reasonable inferences drawn from facts proved with legal sufficiency is as much and as completely as any other finding of fact a finding based upon good and sufficient evidence." Ryder v. Bamberger, 172 Cal. 791, 158 Pac. 753. If the court and jury discredited Mr. Adams' explanation as to this fence, and found evidences upon the ground which indicated that the fence was actually placed upon the high tide line, their finding in that respect cannot be here reviewed; and it may be added that the jury found this fence line to be the Peralta grant line, and that the court, in findings made up by it, adopted this finding of the jury.

[6, 7] The appellants contend that the court

and not the jury should have determined the boundaries of the land sought to be condemned and have located these boundaries upon the ground. While it may be said that the court should have done this under well-settled authorities in this state (Vallejo, etc., v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238; City of Oakland v. Pacific Coast Lumber Co., 171 Cal. 392, 153 Pac. 705; San Joaquin Irrigation Co. v. Stevenson, 26 Cal. App. 274, 147 Pac. 254, 258), nevertheless, as the jury found the boundary to be at the fence line, and as the court subsequently adopted that finding as a fact, and as the jury evidently based its verdict for damages done to the defendants upon that line, no harm can possibly have come to the defendants by reason of the court not following the course which the defendants insist it should have pursued in settling the location of the boundary. The question of the sufficiency of this description was raised in many ways during the trial, but all these objections are answered by the foregoing considerations.

[8] At the close of plaintiff's testimony the defendants made a motion for a nonsuit. The plaintiff had rested its case without introducing any evidence whatever to identify the land described in the complaint. It may be conceded, although we do not so decide on this record, that the plaintiff should have introduced in evidence the deed of the Oakland Water Front Company to the city of Oakland, and the Peralta grant from the United States government heretofore referred to, at least before resting its case; but these instruments were subsequently offered in evidence by the defendants, and much evidence was taken as to the location of the boundary line, including the examination of the premises by the court and jury. We have examined this entire record with care; and it seems to us that, conceding that the defendants' motion for a nonsuit should have been granted, nevertheless this case comes squarely within section 4½ of article 6 of the Constitution, providing that no judgment shall be set aside in any case for any error as to any matter of procedure unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. An examination of the record here fails to indicate that sufficient damages were not awarded by the jury to the defendants, nor does it appear from an examination of the entire cause, including the evidence, that there has been in any other respect a miscarriage of justice. It seems to us that, even conceding defendants' position as to the error of the court in denying their motion for a nonsuit, this is on that point a proper case for the application of the constitutional provision.

[9] The appellants' next ground for reversal is that their objection to a question asked on cross-examination of one of their expert witnesses as to the value of the land was improperly overruled. The question was whether or not the witness' opinion of the value of the property would be affected, if it were shown that 6 acres of property situate in the neighborhood of the property sought to be condemned had been sold on December 4, 1905, to the city of Oakland by the defendants for the sum of $15,000. The witness answered, "No." Of course, this answer could not have injured defendants; but the defendants complain that the question itself was injurious to them, in that by means thereof the city attorney got before the jury the fact that they had sold to the city of Oakland a similar piece of property for a much lower price than that claimed by them for the property sought to be taken in this proceeding. The answer to this is that the court was not asked to admonish the jury to disregard the implication of the question.

Another similar question objected to by the defendants was whether, if it should be shown to the witness that the property was assessed by the assessor of the city of Oakland at the sum of $5,500, that would affect his estimate of value. The witness answered that it would not, and added to his answer an explicit and lengthy statement of the reasons supporting his opinion as to the market value of the land.

Again, the defendants complain that the question was an attempt to get before the jury evidence of what the property had been assessed for by the city of Oakland, and thus to prejudice their judgment as to its value. But, as with the former question, the defendants did not ask the court to instruct the jury to disregard the insinuation contained therein, and cannot now complain of the effect that may have been produced upon the jury thereby.

[10, 11] Mr. Woodward, one of plaintiff's witnesses, was asked if it was not a fact that certain property in the neighborhood of the property sought to be condemned was marsh land, and all built in and improved with residences and business property, and the further question if it was not a fact that substantial residence existed on marsh land filled in on Harrison street. Objections to these questions were sustained by the court. Mr. Woodward had testified in chief that in estimating the value of the land sought to be condemned he had taken into consideration the character of the land, and that his objection to the property for residence purposes was not only that it could not be sewered by gravity, but also because it was generally undesirable for residential purposes, as it was marsh and low land. This would indicate that these questions should have been answered. But this witness had been examined at great length, and the court undoubtedly, in passing upon this question, as appears from a colloquy between the judge and the defendants' coun-

sel, was attempting to exercise its discretion in limiting the cross-examination of the witness within reasonable bounds. The record in this case is a bill of exceptions, questions and answers do not always appear therein, and much of the evidence of this witness on cross-examination, found in the record in narrative form, indicates that the witness may have been asked similar questions previously and which were allowed to be answered; and we cannot say from this record that the trial court abused its discretion when it refused upon this ground to permit these questions to be answered. Further, it may be said that it was the duty of counsel to point out to the court, in a lengthy trial such as this, and upon a ruling based, as this was, upon a desire to limit the examination, the fact—if it was a fact—that the question which counsel sought to have answered had not been previously asked. This is especially true in view of the fact that the court, in sustaining the objection, said:

"I think we went over this ground practically the other day. It is a matter of repetition."

[12] It is contended that three witnesses called by the plaintiff in rebuttal upon the question of value, were asked to give their opinions of the value of certain land which is essentially different from that described in the complaint. It is sufficient in answer to this, without reciting these very long questions in this opinion, to say that the city attorney evidently attempted in the question to ask as to the value of the property as bounded on the easterly side by the fence which was afterwards found by the jury and by the court to be the easterly boundary line of the property sought to be condemned; but, whether counsel succeeded in doing this or not, he did ask the value of a part of the property less in extent than that described in the complaint, and also less than that described in the judgment in the case. This he had a perfect right to do. It may be added that the question was asked at a time when the boundary of the property had not been definitely settled, nor had the court been asked up to that time to definitely settle this boundary. Counsel were trying the case upon the theory, evidently, that the jury was to settle the location of this boundary line. That being so, the questions of counsel must necessarily have been somewhat indefinite as to the boundaries of the property, and no substantial right of the defendants seems to have been transgressed by the answer to this question.

[13] The court, it is claimed, erred in sustaining plaintiff's objection to the following question asked of one of defendants' witnesses on cross-examination:

"When you made your estimate upon the value of this property did you consider as a basis of your estimate the purposes for which the city was endeavoring to acquire it?"

There is a fundamental distinction between the question asked in the case of Spring Valley Water Works v. Drinkhouse, 92 Cal. 528, 28 Pac. 681, upon which counsel rely, and the question above quoted. It was shown in the case mentioned that the land was valuable for reservoir purposes; and, of course, its value for reservoir purposes should have been taken into consideration (as was there held) by the jury in fixing the value of the property. But here it does not appear that this particular property had any distinct value for park purposes over any other property that might have been acquired by the city of Oakland; at least we find nothing in the record indicating that it had such distinctive value. It does not seem that the fact that the city intended to acquire this property and use it for park purposes should cause it to be penalized, or that the increment in value which might attach to it, because of the fact that the city desired to acquire it to convert it into a city park, should raise its value to the city for that purpose. We think the objection was properly sustained. Indeed, it appears from this record that this property could only be made suitable for park purposes by an expenditure of a great deal of money on it. We think the value to be placed on property situated as this was should not be raised because the city was endeavoring to acquire it for the purpose of a public park.

[14, 15] A. J. Snyder, a real estate agent who had estimated the value of the property for the plaintiff, was asked if he was interested in the sale of land that would be benefited if the land sought to be condemned was acquired for park purposes. An objection to this question was sustained. This objection should have been overruled, as its answer, if in the affirmative, would have shown an interest on the part of Snyder in the acquisition by the city of this property for park purposes; but in view of the fact that the jury did not adopt Snyder's estimates, but on the contrary gave a verdict several thousand dollars higher in amount than the estimate placed by Snyder upon the property, we do not feel inclined to reverse this case because of this error.

[16, 17] The question "Are you acquainted with the geology of the estuary in that locality?" asked by the defendants of one of plaintiffs witnesses on cross-examination, was too general in its nature. The witness had stated that in fixing the value of the property he had taken into consideration the depth of the mud or marsh upon portions of it, and that the value of the property depended upon the depth of the mud and the cost of filling the land. He also testified that he did not know what the depth of the mud was, but had assumed, in making his estimate of value, that the mud was 15 to 20 feet deep. There was no error in not permitting him to give an answer to the general question of his knowledge of the geology of the estuary, in view of the testi-

mony which he had given. If counsel wished to know more about the depth of the mud and the condition of the marsh, he should have directed his questions specifically to those factors of the situation, and should not have asked a general question, such as the one propounded here.

After reciting considerable testimony concerning the value of the property, defendants' counsel contends that the character of this testimony was such that it fell far short of the legal measure of sufficiency which the law requires to sustain a judgment; but an examination of the record shows ample testimony of value to sustain the judgment in this case.

[18] We do not think that the instruction to the jury that the duty to prove the location of the Peralta line rested upon the defendants, falls within the rule laid down in the case of Aliso Water Co. v. Baker, 95 Cal. 268, 30 Pac. 537. The question in that case was the certainty of the description of certain water rights to be condemned. The description of the water rights in the complaint was held uncertain, in not showing definitely what water rights were proposed to be condemned. The case arose on a demurrer for uncertainty to a complaint to condemn certain rights to the water of Sycamore creek; but neither the quantity of the water sought to be condemned, nor the rights thereto which the plaintiff undertook to take from the owners by the proceeding, were definitely set out. In this case the complaint does, as we hold, sufficiently describe the property to be taken. The court and jury, in hearing the evidence, definitely found the boundaries of the property. Conceding that the instruction was in the abstract an improper one, nevertheless we cannot see that the defendants were prejudiced in any substantial right thereby.

These considerations, at the expense of much space, seem to us to dispose of this case.

The judgment is affirmed.

We concur: KERRIGAN, J.; ZOOK, Judge pro tem.

---

37 Cal. App. 415

PEOPLE ex rel. BRADFORD, Dist. Atty., v. DILLMAN et al. (Civ. 1771.)

(District Court of Appeal, Third District, California. June 3, 1918.)

1. NUISANCE ⊂⊃84 — DISORDERLY HOUSE—ABATEMENT—EVIDENCE.

In a proceeding under St. 1913, p. 20, to enjoin the use of real property for immoral purposes, evidence *held* sufficient to sustain a finding that the house was used for prostitution, and that such use had not been abated at the time of the proceeding.

2. NUISANCE ⊂⊃80 — DISORDERLY HOUSE — ABATEMENT.

In proceeding under the Red Light Abatement Act, to enjoin the use of premises for immoral purposes, if it appears that the nuisance has been abated before the action was commenced, proceeding will be dismissed.

3. APPEAL AND ERROR ⊂⊃995 — WEIGHT OF EVIDENCE.

Upon the question of the weight of testimony a very large discretion is committed to trial courts, with which interference by Courts of Appeal is not justified, unless upon the face of the testimony itself it may be said to be unworthy of belief.

4. EVIDENCE ⊂⊃317(8)—HEARSAY.

In a proceeding to abate a nuisance under the Red Light Abatement Act, testimony of a police officer as to an explanation made by a man, caught in a room with a prostitute during a raid, as to his reason for being there, was hearsay and inadmissible.

5. NUISANCE ⊂⊃84 — DISORDERLY HOUSE — ABATEMENT—EVIDENCE.

In a proceeding under the Red Light Abatement Act, considerable latitude is allowed the people in the proof, but there is no legal justification for a radical departure from the long-established rules of evidence.

6. APPEAL AND ERROR ⊂⊃1051(1)—HARMLESS ERROR—EVIDENCE.

In a proceeding to abate a nuisance under the Red Light Abatement Act, admission of hearsay testimony as to the purpose for which a man was occupying a room in the house was harmless, where other evidence established his purpose for being there.

7. WITNESSES ⊂⊃414(1)—CORROBORATION.

It is not proper to corroborate a preceding witness by testifying that witness heard testimony of the preceding witness, and "it was correct" or true in all particulars.

8. APPEAL AND ERROR ⊂⊃1050(1) — HARMLESS ERROR—EVIDENCE.

It was harmless error to permit a witness to corroborate a preceding witness by testifying simply that his testimony was correct, where there was a great amount of other testimony to the same point.

9. APPEAL AND ERROR ⊂⊃1073(1)—HARMLESS ERROR.

A decree under Red Light Abatement Act, enjoining defendants from using certain realty for immoral purposes, but not closing the premises or ordering sale of furniture or taxing costs, could not be prejudicial to defendant, as creating a cloud on the title or otherwise.

10. NUISANCE ⊂⊃88—DISORDERLY HOUSE — PROCEEDING TO ABATE—COSTS.

In a proceeding to abate a nuisance under Red Light Abatement Act, where it appeared that defendant, as owner of the premises, had no knowledge that they were being used for immoral purposes, the court properly imposed no penalty for costs in a decree enjoining the nuisance.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Proceeding by the People of the State of California on the relation of Hugh B. Bradford, District Attorney of the County of Sacramento, State of California, against Chas. F. Dillman and Ludwig Mebius, as trustees of the Marguerite Home, and the Marguerite Home, to enjoin the use of certain real property for immoral purposes. Judgment for plaintiff, and defendants appeal. Affirmed.

White, Miller, Needham & Harber, of Sacramento, for appellants. Hugh B. Bradford, of Sacramento, for respondent.

---

HART, J. The action was commenced, on July 13, 1917, by the district attorney of the county of Sacramento to secure an injunction enjoining the use of certain real property in the city of Sacramento belonging to appellant Marguerite Home, for immoral purposes under the so-called "Red Light Abatement Act." Stats. 1913, p. 20. A trial was had, and the court found that, on and prior to July 8, 1917, the building referred to was used for the purposes of lewdness, assignation, and prostitution, and was a nuisance. Judgment was entered that appellants "do perpetually and absolutely desist and refrain from conducting and maintaining and using, for the purposes of lewdness, assignation, and prostitution" said premises. The appeal is from said judgment.

The facts are: The building, which the petition alleges was used for purposes of assignation and prostitution, is situated in the city of Sacramento, and is the property of the "Marguerite Home," an institution founded and maintained for the care and support of aged women, and of which the appellants Dillman and Mebius are trustees. On the 9th day of March, 1916, the trustees leased said premises for the term of three years, beginning on said date, to one Peter Gilarducci, said lease being evidenced by an instrument in writing, duly executed by the parties thereto. Among the provisions of the lease is one to the effect that the lessee shall not let or underlet the whole or any part of said premises without the written consent of the lessors. Some time after the execution of said lease, Gilarducci, with the consent of the trustees, sublet the building to two men by the names, respectively, of Valentina and Gabriella. It appears, however, that, on the 16th day of November, 1916, Gilarducci, without the consent or knowledge of the lessors, sublet the upper floor of the building to one Joe Caci. This sublease was in writing, and referred to the building as a "lodging house." The lower floor of the building was used as a saloon by Valentina and Gabriella.

On the 8th day of July, 1917, the portion of the premises so sublet to Caci was raided by the police, who found in one of the rooms thereof a woman named and known to the police as Kitty Gray, who was also known by the officers to be a prostitute. The officers thereupon placed the woman under arrest. She was the only female found by the officers in the building on that occasion. On the 13th day of July, 1917, five days subsequently to the raid above referred to, this action was begun by the district attorney of Sacramento county under the act of the Legislature above mentioned, which is popularly known as the "Red Light Abatement Act."

Upon the close of the case of the people, the defendants asked for a nonsuit, on the ground that the evidence was insufficient to make out a case under the act in question. The court denied this motion, and here the appellants complain: (1) That the evidence does not support the findings; (2) that, conceding that, on the 8th day of July, 1917, the time at which the raid was made and the said Kitty Gray put under arrest, the premises were used for the purposes of prostitution, and thus a nuisance therein maintained, the evidence clearly and unquestionably shows that such nuisance was abated by the tenants, Valentina and Gabriella, themselves, and that therefore, at the time this proceeding was instituted, there existed in and on the premises no nuisance to abate; (3) that the trial court made certain erroneous rulings respecting the evidence, from which serious detriment to the rights of the defendants in the trial resulted.

The testimony introduced by the people was given by the police officers who raided the premises on the 8th day of July, 1917, and in substance is as follows: That, on going to the upper floor of the building, they met the woman, Kitty Gray, just as she was emerging into the hallway from her room. Asked by the officers whether there was any one in her room, she replied in the negative, but they proceeded on into her room, and therein found a man, who was in the act of pulling his pantaloons from his lower limbs to his waist. This man, whose name was not given, stated that he had only a moment previously given the woman some money upon an agreement that she would have sexual intercourse with him, but declared that up to that time no sexual relations between them had been had. One of the officers testified that, at some time before the 8th day of July, the premises had been raided by the police and the place closed. At that time there were three or four women of bad repute in the building, one of whom was Kitty Gray, who was then cautioned by the officers against resuming in Sacramento her occupation as a prostitute. The same officer —and the only officer who so testified—said that the general reputation of the premises prior to and on the 8th day of July was that it was a house of prostitution. Each of the officers testified that he did not know, nor had he heard, of any acts of lewdness or prostitution being committed in said building after the said 8th day of July, and that so far as he knew no such acts had been committed in the building after that date.

The foregoing embraces a synoptical statement of all the testimony presented by the people in support of the charge set out in the petition.

The defendant, Dillman, testifying for the defense, testified that he did not know Caci had been given a sublease of the upper portion of the building by Gilarducci until after the Gray woman was arrested on the 8th day of July; that the sublease to Caci was made without the consent of the trustees of the Marguerite Home; that, upon learning of the raid by the officers on the 8th day of July, Valentina and Gabriella dispossessed

and put out of the premises the said Caci; that, so far as he knew, there had been no prostitution or lewdness practiced in the building since the said 8th day of July.

The court found that on and for some time prior to the 8th day of July, 1917, the premises in question were used for the purposes of lewdness, assignation, and prostitution, and that said building was a nuisance under the laws of this state. The judgment thereupon entered decrees that the defendants and their agents, etc., "do perpetually and absolutely desist and refrain from conducting and maintaining and using, for the purposes of lewdness, assignation, and prostitution," the said premises.

[1] It is plainly apparent from the evidence that the trustees of the Marguerite Home were entirely ignorant at all times of the immoral use to which the upper portion of the building was put by the sublessee, Caci, and we think it is very clear that had they known that Caci or any other person was using the building for the purpose of carrying on the immoral traffic which appears to have been practiced in said building, the trustees would promptly have evicted the transgressor and have stopped the illicit business. But we are further of the opinion that the evidence is sufficient to support the decision of the trial court.

[2] It may be observed that it must be true, as counsel for the appellants contend, that where a nuisance has been abated before action to abate it has commenced and it does not exist at that time, the trial of the action will be without a foundation for its support, and utterly barren of substantial results, for in such case, obviously, there would be no nuisance to abate. And if there had been evidence sufficient to support a finding that the nuisance had been abated before this action was commenced, we doubt not that the court below would have dismissed the proceeding or found against the averments of the petition.

[3] It is true that one of the trustees testified that upon learning of the raiding of the building by the officers and of the discovery that prostitution was going on therein, on the 8th day of July, 1917, Valentina and Gabriella, subtenants of the building by consent of the trustees, immediately put Caci out of the possession of the upper story of the building, and thus stopped further prostitution therein. It was further made to appear that, so far as the officers or trustees knew or were advised, prostitution or other acts of lewdness were not practiced in the building after said date. But, while this is all true, there is by the law committed to trial courts, upon the question of the weight or evidentiary value of testimony, a very large discretion, with which interference by Courts of Appeal is never justified or justifiable unless upon the face of the testimony itself, as necessarily it must be presented to the latter courts, it may be said to be unworthy of belief or entitled to no weight. In this case, however, the trial judge was not required to, and most probably did not, disbelieve or discredit the testimony of the appellants who testified to the suppression of the nuisance by the subtenants, Valentina and Gabriella, on the 8th of July, upon learning of its maintenance upon the premises. There was testimony, as we have shown, which tended to establish the fact that prostitution had been carried on in the building prior to and on the 8th day of July. There was no testimony affirmatively showing that prostitution had not been practiced in the building after the 8th day of July. The showing on that question was of a negative character—that is to say, it consisted of statements of witnesses, who had not been about the premises after the 8th day of July, that they had no information that the illicit business had been prosecuted in the building after that date. So upon the question whether the building was used for the purposes of prostitution and assignation at all times down to the filing of the complaint, there was before the trial judge positive proof of circumstances from which the fact might justly be inferred, which proof was negatived only by testimony of a very indefinite, vague, and unsatisfactory nature. Hundreds, no doubt thousands, of witnesses could be produced who would testify that they had no knowledge, either from direct or indirect sources, of the existence or maintenance of immoral practices in the building either before or after the 8th day of July, 1917.

[4] Two only of the several rulings as to the evidence complained of by the appellants were erroneous, but they were manifestly without prejudice to the rights of the appellants. The first of these was the ruling permitting the police officers to testify that the man they found in the Gray woman's room at the time of the raid had told them that he was there for the purpose of having sexual relations with the woman, and had paid her for the service, without receiving the same. This testimony was plainly hearsay and inadmissible.

[5] In this connection, we may, in view of the many cases arising and which will probably in the future arise under the Abatement Act, make these observations: That, while considerable latitude is allowed, and allowable, the people in the proof of a case arising under said act, there is no legal justification for a radical departure from the long-established rules of evidence to establish such a case. The act itself expressly provides that testimony of the general reputation of the place against which the action is brought—a species of hearsay testimony, quite essential, it is true, in most cases under that act and in some otherwise arising—may be received. But, however laudable the purposes of the act may be, no more in a case instituted un-

der the provisions thereof than in any other class of cases should the established rules of evidence be relaxed. Indeed, a trial court, it seems to us, should be specially careful in the trial of such a case, for under said act the personal property of the person charged with keeping a place prohibited thereby may be confiscated and sold, and the right of the owner of the premises against which the action is directed (the action being one in rem as well as in personam) to use the same for the period of one year may be foreclosed, thus depriving the owner of the income which may be derived from the property. Hence, while the people should not be unduly hampered in a proper effort to suppress the social evil which the act was designed to eradicate, and should be accorded in the trial full legal opportunity to do so, the rules of evidence long established, and the wisdom and efficacy of which for eliciting the truth in forensic controversies involving disputed questions of fact have been well confirmed by the test of long experience, should not be twisted or distorted or departed from merely for the achievement of some special end. These observations have no application to the present case, which, generally, appears to have been well and fairly tried, but are made merely with the view of emphasizing the important proposition that neither in a case under the Abatement Act, whose penalties are indeed severe, nor in a case under any other act, should a citizen's rights be so lightly treated or regarded as that he may be deprived of them by a failure to recognize and apply those substantial forms of procedural law which are intended to protect alike the rights of individuals and those of the public.

[6] In the present case, however, the declarations of the man referred to could not have prejudiced the rights of the appellants, since there was other testimony (his presence in the room in a seminude condition with a known prostitute) which appears to have been sufficient conclusively to establish the immoral purpose for which he was in the room, a circumstance strongly supporting the charge that the place was being used for purposes of prostitution. His explanation of the reason for which he was in the woman's room, therefore, was unnecessary to be shown to prove the circumstance to which it related.

[7, 8] The second ruling was in allowing one of the police officers called as a witness for the people to testify that he had heard the testimony of the witness who had just preceded him on the stand, and that "it was correct" or true in all particulars. Of course, such a method of corroborating a witness is not proper. A witness should be examined as to the facts of which he has knowledge, and so give the adversary party an opportunity to cross-examine him and thus test the accuracy of his knowledge of the facts to which he testifies and his memory, etc. But there was so much testimony to the same point that the method adopted was not prejudicial.

[9, 10] We have now examined and disposed of all the important points to which our attention has been directed by counsel. We may well add, however, that the decree itself is without prejudice to the appellants.

There was not made, as a part of the judgment, an order, which may be made under the provisions of section 7 of the Abatement Act, directing "the removal from the building or place of all fixtures, musical instruments and movable property used in conducting, maintaining, aiding or abetting the nuisance, and shall direct the sale thereof," or an order directing the closing of the building or place against its use for any purpose and so keeping it closed for the period of one year, etc.

It will be observed that the decree goes no further than to perpetually enjoin the defendants from allowing the building in question to be used for the purposes of prostitution or lewdness of any kind or character. In other words, the effect of the decree is merely to prevent the defendants from using the building as a place for the commission of unlawful acts, or, expressing the proposition in another form of language, the effect of the decree is only to require the defendants to obey a legislative mandate, viz. not to use their property or permit it to be used for the purposes of prostitution or other like acts of immorality. It adjudges nothing as against the defendants which is not a duty, per se, resting upon all the people of the state—a duty which the defendants, trustees, unquestionably desire and intend, and have always desired and intended, to respect and at all times religiously adhere to. Very properly, since it is apparent that the appellants at no time had any actual knowledge of the existence and maintenance of the nuisance complained of on their premises, the decree does not contain a provision or an adjudication that the appellants shall pay any of the costs of this proceeding. People v. Barbiere, 33 Cal. App. 770, 166 Pac. 812. There is therefore imposed by the decree upon the appellants no penalty in the way of costs.

The claim that the effect of the decree is to cloud the title of the appellants to the property is clearly devoid of merit. It is as obvious as any proposition can be that a judgment the only effect of which is merely to enjoin the use of real property for unlawful purposes cannot be to put a cloud upon the title to such property. Such an adjudication might affect the reputation of the property upon which it directly acts, and so cause the depreciation to some extent of the value of the property for renting or even selling purposes, but most certainly in no conceivable way can it have the effect of disparaging or affecting in the slightest way the title of the owners.

We have found no just reason for disturbing the decree, and it is accordingly affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

37 Cal. App. 296

## WEISSHAND v. CITY OF PETALUMA.

(Civ. 1803.)

(District Court of Appeal, Third District, California. May 18, 1918. On Petition for Rehearing, June 17, 1918. Rehearing Denied by Supreme Court July 15, 1918.)

1. ACTION ⟸45(3)—JOINDER OF CAUSES—INJURIES TO PERSON AND TO PROPERTY—CODE.
Under Code Civ. Proc. § 427, as amended by St. 1915, p. 30, providing that causes of action for injuries to person and to property growing out of the same tort may be joined, causes of action for damages to property and injury to health arising out of the defendant city's damming up the water on plaintiff's land were properly united.

2. ACTION ⟸46—JOINDER OF CAUSES—RELIEF—INJUNCTION.
Where a complaint shows damages to property and injury to health from the flooding of plaintiff's land by the defendant city's grading of the street, and that the damage to both would be continuing, unless relieved, and that it could be relieved, a request in complaint for mandatory injunction did not work a misjoinder of actions.

3. EMINENT DOMAIN ⟸293(1) — STREET GRADING—DAMAGES—COMPLAINT.
In an action against a city for damages from the grading of a street, an allegation that defendant caused the work to be done is sufficient, where the law vests power in the city to authorize the work according to plans it adopts.

4. APPEAL AND ERROR ⟸731(5)—REVIEW—SUFFICIENCY OF RECORD—"BILL OF EXCEPTIONS."
A record wanting in specifications of particulars wherein evidence is claimed insufficient to justify the decision is not a "bill of exceptions," under Code Civ. Proc. §§ 648, 650, and the sufficiency of the evidence to support the findings cannot be reviewed thereunder, where the full record has not been sent up as provided by section 953a.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bill of Exceptions.]

5. APPEAL AND ERROR ⟸556 — REVIEW—STATEMENT ON APPEAL.
St. 1915, pp. 201–207, amending procedure as to the preparation of records on appeal, which were in force July, 1916, make no provisions for "statement on appeal"; the only methods being by bill of exceptions (Code Civ. Proc. §§ 648, 650), and the alternative method of bringing up the full record, under section 953a.

6. APPEAL AND ERROR ⟸731(5)—RECORD — BILL OF EXCEPTIONS—AIDED BY MOTION FOR NEW TRIAL.
An appellant, having failed to set out in the bill of particulars wherein the evidence is insufficient to support the findings, is not aided by its notice of intention to move for new trial, when that, too, fails in the same particular, since a general specification is insufficient, where there is more than one finding.

7. APPEAL AND ERROR ⟸671(1)—REVIEW—RECORD — QUESTION RAISED BY FINDINGS AND ADMISSIONS OF APPELLANT.
In an action against a city for damages resulting to property in grading a street, *held*, that the question whether defendant was liable under the facts could be considered by reference to the facts found by the court and admissions of the defendant, appellant, although the record was deficient.

8. EMINENT DOMAIN ⟸92—STREETS—GRADING—DAMAGES FROM WATER.
Where the work of grading a street was done strictly in accordance with plans and specifications adopted by defendant city, and they did not provide for drainage, and water was thereby prevented from flowing from plaintiff's land, to his damage, the city is liable.

9. EMINENT DOMAIN ⟸101(1) — TAKING PROPERTY FOR PUBLIC USE — GRADING STREET.
The grading of a street by a city in a way preventing the flow of water through a natural water course, damaging plaintiff's land, constitutes an invasion of private property rights for public use without compensation, in violation of Const. art. 1, § 14, and of Const. U. S. Amend. 5.

10. APPEAL AND ERROR ⟸931(1)—BILL OF EXCEPTIONS—EVIDENCE — FINDINGS — PRESUMPTIONS.
All findings of fact, against which the bill of exceptions contains no specifications of their being unsupported by evidence, will be presumed on appeal to be sufficiently supported by evidence.

On Rehearing.

11. EMINENT DOMAIN ⟸101(1) — GRADING STREETS—DAMAGES.
Where the defendant city, in grading a street, dammed up a natural water course, backing water on plaintiff's land, rendering it necessary to raise plaintiff's house, the city is liable for the expense thus incurred.

12. TRIAL ⟸392(1)—FINDINGS — SEGREGATION OF DAMAGE—ITEMS.
In an action against a city for damages to property in grading street, a finding of fact among the conclusions of law as to the whole amount of plaintiff's damage *held* sufficient; it not being necessary to segregate the items of damage, in the absence of a request therefor.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by Carl F. A. Weisshand against the City of Petaluma. Upon plaintiff's death, Theresa Weisshand, as executrix of his will, was substituted as plaintiff. Judgment for plaintiff, and defendant appeals. Affirmed.

G. P. Hall, of Petaluma (E. J. Dole, of Petaluma, of counsel), for appellant. Fred S. Howell, of Petaluma, and W. D. L. Held, of Ukiah, for respondent.

HART, J. Plaintiff's testator brought the action to recover damages alleged to have been caused by the improper grading of a street in the city of Petaluma and the consequent flooding of his land. The original plaintiff died, and Theresa Weisshand, as executrix of his last will, was substituted as plaintiff. The general facts as shown by the findings are, in substance, as follows:

The defendant, during the months of June and July, 1914, by due legal proceedings au-

thorized and caused to be graded, filled, and improved Keller street, between Oak and West streets, in the said city of Petaluma. The plaintiff was the owner of certain premises, which abut upon the street so graded and improved; said premises having a frontage on said Keller street of 184 feet, said frontage beginning at the point of intersection of the southerly line of Kent street with the westerly line of said Keller street. The plaintiff's said lands extend through the entire block to Liberty street, and slope downward in a southerly direction from Kent street in such manner as to cause a small ditch or gully over and upon plaintiff's said lands, and into which, "for time immemorial," the flood waters and drainage of plaintiff's land flowed in an easterly direction from the said lands and over and across said Keller street. Said ditch or gully formed a natural water course over and across Keller street, and by it, for many years prior to the improvement of Keller street as above stated, the plaintiff's lands were thoroughly drained. These lands were suitable for and adapted to agricultural purposes, and for many years prior to the improvement mentioned, and down to the winter of 1914, the plaintiff had cultivated, raised, and harvested on said lands crops of green vegetables and potatoes, and had maintained thereon a full-bearing orchard, consisting of pear, apple, and prune trees, and harvested crops of fruit therefrom.

In the grading, filling and improvement of said Keller street the defendant, or the contractor to whom the contract for performing said work of improvement was awarded, filled up, dammed, and thus obstructed the lower end of said "ditch, gully, and natural water course," and raised the said dam to the height of 21 feet "which said fill extended across the entire lower and easterly side of plaintiff's lands and premises and abutted thereon. The plans and specifications adopted by said defendant for the doing of said street improvement work on Keller street make no provision for any bulkhead or retaining wall to hold or retain the said fill, and to prevent the same from caving in or sliding onto the lands of adjoining private property owners, and accordingly it was impossible to do the said work without extending the said fill, at the base thereof, at least 25 or 30 feet onto the lands of private property abutting upon said Keller street, on either side thereof, including the said lands of plaintiff. The contract for doing said work, which was duly accepted and let by said defendant, provided for a culvert 70 feet in length. A culvert of such length was obviously unfit and insufficient for any purpose whatever, for the reason that in doing said work according to the plans and specifications it was necessary to encroach upon the property of abutting private owners at least 25 feet at the base of the fill on either side of the street, in order that the surface of said street 20 feet above the lowest point of the fill could be held in place. Hence it was apparent, at the time of the doing of said work and of the adoption of the said plans and specifications and the letting of the contract for the doing of said work, that a culvert or drain at least 120 feet in length was necessary, in order that it might extend through the toe of the fill and thus permit the intake of water from the said ditch or gully on plaintiff's lands, and the exit on the other side of the street opposite to plaintiff."

The defendant failed to provide or construct a culvert, conduit, or other adequate means for carrying away the flood waters and drainage from plaintiff's lands and premises, as the same had theretofore been carried away for many years by means of the said natural water course. The result of the fill and the obstruction so caused by the defendant, and its failure or omission to provide a sufficient or adequate culvert or conduit whereby the surface waters could be carried away, was to flood and inundate the lands and premises of plaintiff to the depth of approximately 10 feet during the winters of the years 1914 and 1915, thereby causing to form on said premises a lake or mud pond, which remained upon said lands during the summers of 1915 and 1916. In the summer months of the years 1915 and 1916 said lake or pond "became filthy and contaminated with slime and scum and disease-producing bacteria, and created a stench offensive to the smell and dangerous and injurious to human health." By reason of the unsanitary and unhealthy condition arising from said polluted lake or pond, the premises of plaintiff have been greatly deteriorated in value as residence lots, into which the plaintiff intended to divide said premises and so sell the same, when he bought said premises long prior to the time at which said Keller street was graded and improved under the authority and by the direction of defendant; and because of the flooding of his premises as the result of said grading and improvement of Keller street, and the obstruction of the said natural water course as a result thereof, he was compelled to raise his dwelling house several feet, in order to prevent the surface waters accumulating upon his premises from flowing therein; that, by reason of the conditions above described, and which were created by the acts of the defendant in grading and improving Keller street, and in omitting to establish adequate means for carrying off the surface waters from and draining said premises, the plaintiff has been deprived of the use of his said premises for raising and harvesting fruits and vegetables thereon; that his orchard has been destroyed; that the waters standing upon plaintiff's lands and premises as aforesaid, during the summers of 1915 and 1916, became stagnant and contaminated, and said unhealthy condition of said lands "is liable to subject plaintiff to continuing damage, and is dangerous

to public health in the neighboring district."

While the plans and specifications adopted by the defendant for the grading and improvement of Keller street did provide for an 8-inch corrugated iron culvert 70 feet in length at the bottom of the fill, yet, so the court found, "from said plans and specifications it was obvious that a culvert of such length and size was wholly inadequate, and would serve no purpose whatever, for the reason that the plans as adopted for such improvement would reasonably have required a bulkhead or retaining wall to prevent said street from caving in or sliding onto the lands of adjoining property owners, or in the absence thereof would reasonably have required a drain pipe of at least 120 feet in length, in order that the intake and outlet thereof would have cleared the toe of the embankment, so as to have permitted water to flow through the same."

The defendant demurred to the complaint on both general and special grounds. The special grounds of demurrer involve, among other special objections, an attack upon the complaint for the reason, as set forth in the demurrer, that there are therein several causes of action improperly united and not separately stated. The particular objection on special grounds is that a cause of action for injury to property and a cause of action for personal injury are united in said complaint, and also that a cause of action for damages is improperly united with a cause of action for an injunction.

The demurrer having been overruled, the defendant answered, by denials of the material facts stated in the complaint, and by an amendment of the answer set up a special defense by way of an estoppel—it being alleged that the plans and specifications adopted by the defendant for the construction of the work referred to above provided an ample drain for carrying away the surface waters from plaintiff's lands and for the placing of the said drain in a proper place to accomplish that purpose; that the same was suitable and proper to carry away all of said surface waters, but that the plaintiff requested the contractor and superintendent of streets to change and alter, and upon such request the latter did change and alter, the location of said drain pipe, and place the same at an elevation above the location adopted by said defendant; that plaintiff requested and directed said contractor to dump and deposit the unused dirt and earth caused by the construction of said street onto his land on the west side of Keller street, and at the request of plaintiff said contractor did dump and deposit a large quantity of dirt and earth thereon, by reason whereof the end of said drain pipe was filled up.

The court found that the damage suffered by the plaintiff amounted in money to the sum of $475, of which the sum of $100 constituted the expense necessarily incurred in raising plaintiff's dwelling house to a height which would prevent the flowing of the surface or flood waters therein. Judgment was entered accordingly, and also that the defendant be required to place a suitable drain or culvert of sufficient size and length through and over Keller street as will effectually drain and carry away the surface waters from plaintiff's lands. The appeal is prosecuted by the defendant from said judgment.

As to the special defense that the plaintiff consented to and directed the change in the location of the drain pipe, and instructed the contractor and superintendent of streets to deposit the unused earth upon his premises, the court found:

"That the plaintiff did not request or instruct the contractor or superintendent of streets or any other person to change or alter the proposed location of said drain pipe, or to place the same at an elevation above that adopted by said defendant in the plans and specifications; that the said drain pipe was not located and placed in the position where the same now is, to wit, at a point one foot above the lowest part of plaintiff's premises, at the special instance and request of plaintiff; that plaintiff did not request or direct the said contractor or any other person to dump or deposit the unused earth and dirt caused by the construction of said street on his said lands on the west side of Keller street."

[1] The first point urged for a reversal grows out of the order overruling the demurrer. The defendant claims that the complaint is clearly amenable to the objection that in it are improperly united a cause of action for injury to property and a cause of action for injury to person. It is further claimed, as seen, that it is obnoxious to the same objection, because a cause of action for damages and a cause of action for injunctive relief are united. Section 427 of the Code of Civil Procedure, as amended by the Legislature of 1915 (Stats. 1915, p. 30), provides, among other things, that:

"Causes of action for injuries to person and injuries to property, growing out of the same tort, may be joined in the same complaint, and it is not required that they be stated separately."

It is clear from the averments of the complaint that the two causes of action—one for damages to property and the other for injury to health—grew out of and are the direct result of the same tort; hence the objection to the complaint upon that ground is obviously without force.

[2] Nor was it improper to unite a cause of action for damages with a cause of action for injunctive relief. That a party is entitled to sue for any relief which properly comes within the facts stated in his pleading is an elementary rule in our practice and procedure. The specific relief asked for is in the nature of a mandatory injunction. The complaint clearly enough discloses by its averments that, if the condition existing on plaintiff's premises, which was created by the manner in which the street was authorized and caused to be improved by the

defendant, continued, it would result, not only in permanent injury to plaintiff's freehold, but would operate as a continuing menace to the health of the plaintiff and the people of the neighborhood of the premises affected; and from the averments of the complaint it is clear that the condition in which the defendant left the premises of the plaintiff could be corrected or changed, so that neither the property nor the health of plaintiff and others residing in his neighborhood would be injured. There is nothing said, in Rooney v. Gray Bros., 145 Cal. 753, 79 Pac. 523, which militates against the conclusion thus announced. The demurrer on special grounds was properly overruled.

[3] It is next contended that the general demurrer should have been sustained, for the reason that it does not disclose that the grading and the improvement of Keller street was done by the defendant and that it is responsible for the damage to plaintiff's property. The complaint merely alleges that the defendant caused the work to be done. We think that this allegation was sufficient to indicate that the work was done under the direct authority of the defendant. The case of Krause v. Sacramento, 48 Cal. 221, cited by the appellant, does not support the view that the complaint in this case should fall because it fails directly to state that the work was done by the direct authority of the defendant, although such a statement, it must be admitted, would have improved that pleading. At the time of the decision of the Krause Case (see, also, O'Hale v. Sacramento, 48 Cal. 212), the charter of the city of Sacramento provided that the work of improving streets and constructing sewers should be done by contract, except in certain cases as to the first-mentioned character of street improvement, where the street commissioner might have required the work to be done by the owners of abutting lots. Under the present general state laws authorizing the improvement of streets in municipalities, under which the improvement herein involved was admittedly done, power is expressly conferred upon the governing or legislative boards or bodies of municipalities to order such work to be done according to plans and specifications prepared under their direction and adopted by them. Therefore, in considering the complaint here, we must view it by the light of the power vested by law in the defendant as a municipal corporation to authorize such work to be done according to plans adopted by it, and thus viewing the complaint the averment that the defendant caused the work complained of herein to be done plainly means that the work was done by its direction and according to plans and specifications adopted by it for that purpose.

[4, 5] It is further insisted, however, that under no view of the evidence can the defendant be held liable for the damages claimed by the plaintiff in the complaint. But, in so far as this proposition involves the question of the sufficiency of the evidence to support the findings, there is no proper record for the review thereof. The form of the record here is not a statement on appeal, for, as we will show, there is now no statement on appeal. Nor is it a bill of exceptions, because it is wanting in one of the essential requisites of a bill of exceptions, viz. a specification of the particulars wherein it is claimed that the evidence is insufficient to justify the decision. Code Civ. Proc., § 648; Coveny v. Hale, 49 Cal. 552; Watson v. San Francisco H. B. R. Co., 50 Cal. 523; Bonner v. Quackenbush, 51 Cal. 180; Eltzroth v. Ryan, 89 Cal. 135, 140, 26 Pac. 647; Winterburn v. Chambers, 91 Cal. 170, 185, 27 Pac. 658; Commercial Bank v. Redfield, 122 Cal. 405, 55 Pac. 160, 772; Estate of Behrens, 130 Cal. 416, 418, 62 Pac. 603.

This action was instituted in the month of July, 1916. The Legislature of 1915 so amended the procedure as to the preparation of records on appeal that, at the present time and at the time this action was commenced, there is and was no provision in our law for a "statement on appeal." See Stats. 1915, pp. 201 to 207, inclusive. The result is that, since the changes made by the Legislature of 1915, above referred to, there are two methods only whereby the evidence may be brought up for consideration and review, on appeal, to wit: (1) By a bill of exceptions, as provided by sections 648 and 650 of the Code of Civil Procedure; (2) under what is commonly known as the alternative method, as provided by section 953a of said Code.

It is obvious that the record here was not prepared in pursuance of the provisions of section 953a. Indeed, it is not pretended that the record was prepared under said section; but, to the contrary, counsel designate it as a "statement on appeal after a denial of motion for a new trial, made on the minutes of the court." But, as shown, there is no such a record on appeal now, and the record here was evidently intended as a bill of exceptions, and is in legal effect, if anything at all, a purported bill of exceptions, but, as stated, is fatally deficient as such, in that the particulars in which it is claimed that the evidence does not support the findings are not specified as required by the Code section above named.

[6, 7] Nor is appellant aided in the matter by its notice of intention to move for a new trial, since therein it has also failed specifically to point out the particulars in which it claims the evidence is insufficient to justify the decision. And a general specification is insufficient where there is more than one finding. See cases above cited and also Matter of Baker, 153 Cal. 537, 541, 96 Pac. 12; Hawley v. Harrington, 152 Cal. 188, 92 Pac. 177; Meek v. Southern Cal. Ry. Co., 7 Cal. App. 606, 95 Pac. 166; Dawson v. Schloss, 93

Cal. 194, 29 Pac. 31; De Molera v. Martin, 120 Cal. 544, 546, 52 Pac. 825. It follows that it must be assumed by this court that all the findings of fact have been correctly found or were based on sufficient evidence. Winterburn v. Winters, supra.

[8] But the point made by the appellant, that the defendant is not, under the facts, liable for the damage sustained by the plaintiff, may be considered by reference to the facts as found by the court and certain admissions by the defendant. The contention is that the case here falls within the rule enunciated and applied in the case of Sievers v. San Francisco, 115 Cal. 648, 47 Pac. 687, 56 Am. St. Rep. 153. In that case a contract had been let, after due legal proceedings by the authorities, to grade Van Ness avenue, in the city of San Francisco, to the "official grade," which was 75 feet above base. A futile attempt had been made by the supervisors to change the grade to 83 feet above base. The city engineer and surveyor, whose duty it was to furnish grade lines and levels (Stats. 1891, p. 206), assumed 83 feet to be the official grade, and the contractor filled in accordingly. The result of going beyond the true grade was to dam a well-defined channel through which surface water had always flowed, and back the water upon the land of plaintiff, doing the damage complained of. It was conceded that no such consequence would have followed the grading of the street to the official grade of 75 feet above base. Action against the city of San Francisco was brought by plaintiff for the damage thus occasioned to his premises; the complaint averring that the city wrongfully caused and procured the crossing to be filled with soil, sand, and rock to a height of 83 feet above base. A nonsuit was granted by the trial court upon the showing thus made, and an appeal from the judgment of nonsuit was rejected by the Supreme Court. The court in that case said:

"It does not appear that the supervisors, in any of their proceedings, called for any grading except 'to the official grade and line.' The bids were received under this call, and the contract ran in the same language. Precisely as in Warren v. Riddell, supra, the contractors, through error induced by the city surveyor, or superintendent of streets, or by both, graded 6 or 8 feet above the line called for by the contract. The extra 6 or 8 feet of filling, which alone it is admitted caused the injury, were not placed under any contract with, or directions from, the city. The case, then, differs radically from the many cited and relied upon by appellant, where the injury has resulted from work done for, and as directed by, the municipal authorities. Thus, in Reardon v. San Francisco, 66 Cal. 492 [6 Pac. 317], 56 Am. Rep 109, the injury resulted from street filling done exactly in accordance with the contract. In Conniff v. San Francisco, 67 Cal. 45 [7 Pac. 41], Montgomery avenue was graded as the city directed. But the work dammed a natural water course, and the city was held responsible for the resulting injury to property. In Spangler v. San Francisco, 84 Cal. 12 [23 Pac. 1091], 18 Am. St. Rep. 158, the city had diverted the waters flowing in a natural waterway into a sewer, and had negligently permitted the sewer to fall into a defective condition, whereby the escaping waters caused damage, for which the city was held liable. In Eachus v. Los Angeles Ry. Co., 103 Cal. 614 [37 Pac. 750], 42 Am. St. Rep. 149, the grading was properly done to the official grade, but, for resulting damages, defendant was held responsible. In Tyler v. Tehama County, 109 Cal. 618 [42 Pac. 240], a bridge was built as and where the supervisors directed. But it was constructed upon private property, for the injury to which the owner received compensation. In all of these cases, the act or omission had the sanction, express or implied, of the municipal authorities. In the case at bar, the injury resulted from the act of the contractor, neither contemplated nor called for by the supervisors."

In this case the findings disclose, as above shown, that the work of improvement was done strictly in accordance with plans and specifications adopted by the defendant for the work, but that said plans and specifications did not provide for adequate means for taking care of the surface waters accumulating on plaintiff's lands. Moreover, counsel for defendant, at the trial, stipulated that the work was done by the contractor according to said plans and specifications, and in their brief on file herein practically admitted such to be the fact in the following language:

"The work done on Keller street, which resulted in the damming up of the so-called water course on the Weisshand property, was a work of public improvement, done under the general laws of the state of California. All of the proceedings leading up to the work were legal and regular in character. The contract was let and the work was to be done in accordance with plans and specifications adopted by the council of the city of Petaluma."

It is nowhere made to appear that the improvement was not done in accordance with the plans and specifications adopted by the defendant therefor. Herein, therefore, lies the distinction between the Sievers Case, relied upon by the appellant, and the present case. The facts of the case here, in other words, bring it within the doctrine announced in Reardon v. City of San Francisco, 66 Cal. 492, 6 Pac. 317, 56 Am. Rep. 109; Conniff v. San Francisco, 67 Cal. 45, 7 Pac. 41; Spangler v. San Francisco, 84 Cal. 12, 23 Pac. 1091, 18 Am. St. Rep. 158; Eachus v. Los Angeles Ry. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149, and Tyler v. Tehama County, 109 Cal. 618, 42 Pac. 240, all cited in Sievers v. San Francisco, supra, and therein differentiated from the Sievers Case upon precisely the same reason that the latter case is to be differentiated from this.

[9, 10] In Perkins v. Blauth, 163 Cal. 782, 789, 127 Pac. 50, 53, the court said:

"Upon the other hand, if the act is one commanded by the municipality itself, if inherently wrong, the municipality and the agent who performed will both be liable."

Again, in that case the court, at the same page, says:

"One important principle, however, is to be noted in this connection. Wherever the injury complained of is the taking or damaging of private property for public use without compensation, then under the guaranty of the federal Constitution against such invasion of the private rights of property, neither the state itself

nor any of its agencies or mandatories may claim exemption from liability. Amendment Const. U. S. art. 5; Hopkins v. Clemson College, 221 U. S. 636 [31 Sup. Ct. 654, 55 L. Ed. 890, 35 L. R. A. (N. S.) 243]."

And it might therein have been added, as we here suggest, that such invasion of the private rights of property is also violative of section 14 of article 1 of our own state Constitution, upon which the right of a person to be compensated in damages for injury to his freehold resulting from the act of a municipality in making a public improvement was sustained in Reardon v. City of San Francisco, supra, and in the other cases above named.

The point as to an estoppel is covered by what is said above, that "all findings of fact against which the bill of exceptions contains no specification of their being unsupported by the evidence," we are authorized to presume derive sufficient support from the evidence.

The same reply is to be returned to the contention that the amount of damages awarded by the jury is excessive. The points last made are as to rulings of the court admitting certain evidence. These rulings we have examined and have not found them subject to the objections urged against them.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Petition for Rehearing.

PER CURIAM. Petitioning for a rehearing of this cause, counsel for the appellant insist that we were mistaken in the statement contained in the former opinion filed herein that:

"The court found that the damage suffered by the plaintiff amounted in money to the sum of $475, of which the sum of $100 constituted the expense necessarily incurred in the raising of plaintiff's dwelling house to a height which would prevent the flowing of the surface or flood waters thereon."

[11] It is argued that the reference by the trial court in its findings to the raising of the house, at a cost of $100, "is not a finding as to damage, for the reason that the property may have been worth more after the house was raised at this expense than it was even before the alleged flooding." It is further contended that the alleged finding in the conclusions of law that "plaintiff had been damaged in the sum of $475 is purely a conclusion of law, which must be drawn, if drawn at all, from a reading of the findings of fact and conclusions of law in their entirety."

As to the first proposition, a ready reply thereto is that it can make no difference what the effect of raising the dwelling house upon its value was, if, as the court found, the raising of the house and the expense necessarily incident thereto were absolutely required to prevent the overflow water from entering the dwelling. If a man purposely or negligently sets fire to another's house, and it is wholly or only in part destroyed, it would obviously be no answer to a claim against the wrongdoer for damages for causing the injury so inflicted to say or show that, in rebuilding the house or patching up the portions burned, the owner had thereby become the possessor of a better house than he had before the fire.

[12] With respect to the second proposition, it is to be observed that, while the specific finding of the total damage suffered by the plaintiff is among the "conclusions of law," the finding may nevertheless be treated as a finding of fact as well as a conclusion of law. Counsel in their petition concede that:

"A finding of fact, even though improperly included in what is generally denominated 'conclusions of law,' will be held to be, nevertheless, a finding of fact, if it is in fact clearly and unequivocally made."

But it is contended that the finding is equivocal, and it is argued that "where it is equivocal, and may be either a finding of fact or a conclusion of law, the appellate court will not take it out of the place where it was put by the trial court, but will give it the same effect as the trial court gave it," citing Figg v. Mayo, 39 Cal. 265, where it is said: "In such cases, where the facts are so obscurely found or are so blended with legal conclusions as to render it doubtful whether the facts are only hypothetically stated, we must disregard it as a finding of fact."

There is nothing equivocal or obscure in the finding in question. Particularly is this true when viewing it in connection with the specific finding that the trees, orchard, vegetables, etc., were damaged by the acts of the appellant, in addition to the damage of $100 suffered by reason of being compelled to raise the dwelling, as above indicated. It involves an unobscure, unequivocal statement that, for all the damage specifically found to have been inflicted upon his property, the plaintiff had suffered in the aggregate damages in the sum of $475. This sum is far below that claimed in the complaint, and, so far as we may determine from the findings, the amount found as damages is not excessive. But, to support the judgment, we do not think it absolutely necessary that the findings should contain a segregation of the several items of damage alleged in the complaint, in the absence of a request for such segregation. Foley v. Martin, 142 Cal. 260, 261, 71 Pac. 165, 75 Pac. 842, 100 Am. St. Rep. 123.

Of course, our conclusion here is not to be accepted as an unqualified approval of findings of the character of those in the present case, where, as here, there are presented by the pleading several different issues upon the matter of the damage complained of. Still, we cannot persuade ourselves that, conceding, for the sake of the argument, the findings should have been more specific as to the

damages suffered by the plaintiff, the appellant has been prejudiced thereby, since the findings clearly show that the plaintiff's property was seriously damaged by the acts of appellant and since, furthermore, the damages awarded are far below those claimed. Code Civ. Proc. § 475.

We are satisfied with the conclusion announced in our former opinion in other respects.

The petition is denied.

## MEMORANDUM DECISIONS

HART v. RAILROAD COMMISSION OF STATE OF CALIFORNIA et al. (S. F. 8780.) (Supreme Court of California. June 20, 1918.) In Bank. Application by Loretta B. Hart for a writ of prohibition against the Railroad Commission of the State of California and others. Application denied. Wm. H. H. Hart and T. John Butler, both of San Francisco, for petitioner.

PER CURIAM. The within application for a writ of prohibition is denied. See section 67, Public Utilities Act (St. 1915, p. 161); Sexton v. Atchison, etc., Ry. Co., 173 Cal. 760, 761–765, 161 Pac. 748.

37 Cal. App. 683

PEOPLE v. FLACCO. (Cr. 441.) (District Court of Appeal, Third District, California. June 27, 1918.) Appeal from Superior Court, San Joaquin County; D. M. Young, Judge. Stefano Flacco was convicted of an offense, and he appeals. Affirmed. A. H. Carpenter, of Stockton, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM. There has been no appearance in this court for appellant. An examination of the record thoroughly convinces us that he was fairly tried and justly convicted. The judgment and order are therefore affirmed.

# CALIFORNIA REPORTER

175 PACIFIC REPORTER

(178 Cal. 768)

HEYDENFELDT et al. v. OSMONT et al.
(S. F. 7954.)

(Supreme Court of California. Sept. 3, 1918. Rehearing Denied Oct. 3, 1918.)

1. APPEAL AND ERROR ⟸843(2)—REVIEW—MATTERS NOT NECESSARY.

The reviewing court need not concern itself with other findings, where fraud is essential to recovery, and the finding of its absence is supported by the evidence.

2. EXECUTORS AND ADMINISTRATORS ⟸315(5)—DECREE OF DISTRIBUTION—OMNIBUS CLAUSE.

Decree in terms distributing the residue known or hereafter known or discovered passes title to land omitted from particular description.

3. EXECUTORS AND ADMINISTRATORS ⟸315(6)—DISTRIBUTION—DECREE UNDER AGREEMENT.

Decree of distribution made under a compromise agreement is a contemporaneous interpretation thereof to which the parties agreed, and so may not afterwards be complained of by them; they having known or had the means of knowing its terms and their significance.

4. FRAUD ⟸17—SILENCE—CONFIDENTIAL RELATIONS.

In the absence of confidential relations, mere silence without fraudulent acts or omissions connected therewith is not unconscionable.

5. TRUSTS ⟸103(4)—CONSTRUCTIVE TRUST—FRAUD.

There was no fraud against devisees, giving rise to a constructive trust, from the fact that, in the distribution of the estate, under a compromise agreement, under which there was decreed to an attorney, who had previously represented heirs given nothing by the will, the residue, known or hereafter known, such attorney failed to disclose his knowledge, acquired from papers in the executors' possession of lands belonging to the estate, but not listed.

6. TRUSTS ⟸95—CONSTRUCTIVE TRUST—DECREE OF DISTRIBUTION—SUBSEQUENT ACTS.

Where there was no fraud in defendants' procurement of a decree distributing to them the residue of an estate, there was no ground for the impressment of a trust in favor of plaintiffs because of subsequent concealment by defendants of their claim of title.

Department 2. Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Action by Elizabeth A. Heydenfeldt and others against Augusta C. Osmont and others. From an adverse judgment and order denying motion for new trial, plaintiffs appeal. Affirmed.

Edward E. Cothran, James G. Maguire and R. P. Henshall, all of San Francisco, for appellants. Drown, Leicester & Drown, of San Francisco, for respondents.

MELVIN, J. Plaintiffs, who are appellants here, began this action in equity in which they prayed for a judgment declaring that defendants hold only the bare legal title to five parcels of real property in the city and county of San Francisco. Plaintiffs also asked for judgment that defendants have no right, title, or interest in the property, and they prayed also for general equitable relief. The appeal is from the judgment and from an order denying the motion of plaintiffs for a new trial.

The basis of this litigation is the same fraud on the part of the predecessor of defendants which these plaintiffs sought unsuccessfully to set up in their petition to vacate the judgment in a suit quieting the title of the successors of Thomas M. Osmont to this very property. Osmont v. All Persons, 165 Cal. 587, 133 Pac. 480. Although many of the allegations contained in the complaint in this case are essentially the same as those pleaded in the petition considered by this court on the appeal in the case cited above, it may be well to outline briefly the circumstances leading to this litigation.

The controversy in this action involves only the fee-simple title to the reversion in certain "city slip lots" following the expiration of the grant from the state of California to the use and occupation of the property for 99 years after March 26, 1851. The record reveals the following facts: Solomon Heydenfeldt died testate in 1890, owning at the time of his death the fee-simple title to the land here in controversy, subject to the grant above specified. His will contained a residuary clause, devising and bequeathing to his wife, Elizabeth A. Heydenfeldt, a life estate in all property not otherwise disposed of, with remainder over to her children (the other plaintiffs herein), said property to be distributed to them share and share alike at the death of their mother unless by her will she

should make a different and unequal distribution. Litigation arose over the estate, and was in progress for a number of years. In it Thomas M. Osmont, Esq., an attorney and counselor at law, represented Thomas O. Heydenfeldt and Zeila O. Hellings, who were children and heirs (but not devisees or legatees) of Solomon Heydenfeldt, deceased. In 1901 a compromise agreement was made whereby the devisees, legatees, heirs at law, and others who had claims against some of them bound themselves to abide by a certain settlement and adjustment of all litigation and of their respective shares of the estate. This agreement contemplated the filing of a petition for final distribution in the Estate of Heydenfeldt, praying for division of all the property in accordance with the terms of said contract. One of the claims against Mr. Osmont's former clients was for fees. This was made, however, by his assignee, G. H. Mangels, who was his clerk. In the compromise and the negotiations and court proceedings connected therewith Mr. Osmont appeared as attorney for said Mangels. It is cheerfully conceded by appellants that:

"At all times pending the administration and settlement of the estate of Solomon Heydenfeldt, deceased, and at the time of the execution of said compromise agreement and of the making of the decree of distribution of said estate, all the attorneys of all the parties were in a position to ascertain the right, title, and interest of Solomon Heydenfeldt, deceased, as disclosed by the public records."

It is asserted, however, that as Mr. Osmont had in his possession the original deeds by which Solomon Heydenfeldt gave title to the property, it was his duty to disclose the information to the other parties to the compromise agreement. Neither in that contract nor in the inventory in the estate, nor in the decree of final distribution was this property described, but to Mangels was distributed all the rest and residue of the estate, "real, personal and mixed, of whatever kind or nature, and wherever situated, now known or hereafter known or discovered." This language followed the provision of the agreement of compromise, except that the last seven words of the decree are not in the other instrument, and one of the contentions of counsel for appellants is that Mr. Osmont, who approved the decree before it was signed, fraudulently sought to make it cover property not included in the contemplation of the other contracting parties, nor, indeed, in the terms of the agreement itself. The lower court in this case found that when the decree of distribution was made no one of these plaintiffs, nor any of their attorneys, personally and actually knew that said real property was a part of the estate of Solomon Heydenfeldt, but that Mr. Osmont did have knowledge of that fact. On August 27, 1903, Mangels executed a deed conveying his interest in this property to Thomas M. Osmont, but the deed did not contain any declaration that the grantor claimed title through the decree in the Heydenfeldt estate. This instrument was not recorded during Mr. Osmont's life, but was placed of record 15 days after his death, and subsequently these defendants received by distribution all interest in the land which he had possessed at the time of his death. The date of Mr. Osmont's death was December 20, 1905. The decree of distribution in the Estate of Osmont, made on or about March 8, 1907, did not in terms declare that the fee in this real property was derived from the estate of Heydenfeldt. In August, 1907, the persons who are here defendants began a "McEnerney action" to quiet their title to this property. They obtained a judgment and a decree, which was placed of record March 1, 1910. On September 16th of the same year the persons who are here plaintiffs moved to set aside the judgment with the result which appears in Osmont v. All Persons, supra. The present action was commenced in August, 1912, while the appeal in that case was pending and undetermined.

It was the theory of the counsel for appellants that one of the elements of Mr. Osmont's alleged fraud was his failure to disclose all knowledge which he possessed regarding the title of Heydenfeldt to the lands here involved. In that behalf it was alleged in the complaint that after the execution of the compromise agreement the decree of distribution was prepared by the attorneys for all of the interested parties acting in common accord and not in hostility one to another. The court correctly found against this contention. While Mr. Osmont had appeared for some of the claimants to shares of the estate of Heydenfeldt, he had ceased so to represent them, had been endeavoring to collect his fee, and the compromise agreement, drawn and executed at a time when his former clients were having independent advice, was made partly in settlement of that very controversy. In a sense, it is true that after the compromise was made the attorneys acted in concert in their efforts to have the court distribute the estate in accordance with the agreement, but that does not mean that any one of them was bound to disclose anything which the contract did not, by its very terms or its clear intendment, call upon him to divulge. They were still acting at arm's length, each interested in getting the share allotted to him or his clients, and only concerned about the success of the whole enterprise because distribution according to the terms of the compromise was the agreed method by which that share might be promptly secured. There was no confidential relation between Mr. Osmont and the other attorneys or their clients which would require him to say to them or any one of them that he had knowledge not possessed by them regarding the residuum of the estate.

[1] In this case appellants are confronted by two judgments, one evidenced by the de-

cree of distribution and the other a judgment in rem in the action to quiet title. Assuming that an action in equity such as this will lie, under the authority of such decisions as Soule v. Bacon, 150 Cal. 495, 89 Pac. 324, against both judgments, we must consider the findings of the trial court that fraud was not proven either in the procurement of the decree in probate or the judgment in rem. We are of the opinion that these findings are amply supported by the evidence. These findings being supported, we need not concern ourselves with any others, because the entire cause of action is based upon the supposed fraud of Mr. Osmont. Without findings that fraud existed there can be no recovery, therefore we shall confine ourselves almost entirely to a discussion of the support to be found for the court's decision on this branch of the case. American National Bank v. Donnellan, 170 Cal. 9–15, 148 Pac. 188, Ann. Cas. 1917C, 744.

[2, 3] The "omnibus clause" in the decree of distribution, so far as the evidence disclosed, was not procured by fraud, nor was it so greatly at variance with the contract of compromise as to fail in the carrying out of that agreement. In the first place, it must be remembered that under the decisions of this court decrees which by their terms distribute a residue known or unknown are sufficient to pass title to lands omitted from the particular description. Smith v. Biscailuz, 83 Cal. 344, 21 Pac. 15, 23 Pac. 314. By such a decree the court is required to distribute all the residue to the persons entitled and its order and decree are conclusive in this regard as to the rights of all distributees. Section 1666, Code Civ. Proc.; Humphry v. Protestant Episcopal Church, 154 Cal. 170, 97 Pac. 187; Victoria Hospital Association v. All Persons, 169 Cal. 455, 147 Pac. 124; Marcone v. Dowell, 173 Pac. 465–468. It was the duty of the court making the distribution to decide who was entitled to the residue. This was done, and the appellants, who were parties to the compromise agreement and who in person or by counsel knew or had means of knowing the terms and the significance of the decree of distribution, are not now in a position to object to the inclusion of the "omnibus clause" in the decree. It was a contemporary interpretation of the contract of compromise to which they agreed.

[4, 5] The court found that there was no duty upon Mr. Osmont to declare his knowledge of the title of the Heydenfeldt estate to the lots in litigation here, and that finding is amply supported. In the absence of confidential relations mere silence, without fraudulent acts or omissions connected therewith, would not be unconscionable. Bacon v. Soule, 19 Cal. App. 428–439, 126 Pac. 384; Mulcahey v. Dow, 131 Cal. 73, 63 Pac. 158.

That the appellants had the same means as did Mr. Osmont of acquiring knowledge of the existence of Heydenfeldt's record title to this property is not, and of course cannot be, denied. Indeed, there was a finding by the superior court in this case which stands uncontested, to the effect "that the means of acquiring knowledge of the fact that said real property was at the time of the making of said decree of distribution, and long prior thereto, a portion of the property and estate of said Solomon Heydenfeldt, deceased, was at all times after the death of said Solomon Heydenfeldt open and accessible to the said plaintiffs, and to the said executors, and to any and all persons interested."

Further, the testimony was to the effect that Mrs. Barkley, who called Mr. Osmont's attention to the records of the ownership of these lands, derived her information from those who had been employed by Mrs. Elizabeth A. Heydenfeldt to look up property belonging to the estate and to search the records. Mrs. Barkley had seen Mr. Bracken, a searcher of records, with Mrs. Heydenfeldt. This man gave Mrs. Barkley a list of lots, which she in turn gave to Mr. Osmont, who then examined the titles. It further appears that Mr. Osmont, who at that time represented clients in hostility to these appellants, got permission to examine the original deeds which were in the possession of the executors of the estate. Doubtless Mrs. Heydenfeldt eventually received these papers, for it is in evidence that upon the closing of the estate all the papers went to her. It also appears that upon receiving these documents from the estate for examination, Mr. Osmont signed a receipt for them. From such evidence the court might well conclude that he believed that the executors knew of this property, since his information was derived in part from papers in their custody. In addition to this, he knew that all of those interested in the estate were represented by able counsel, who at all times possessed opportunities quite equal to his own for learning of the record title to all property in the name of Solomon Heydenfeldt. Therefore we conclude that the record supports the finding that no fraud tainted the distribution of the residuum of the estate to Mangels.

[6] There was no fraud shown in the "McEnerney Action," nor in the conduct of Mr. Osmont between the time of the signing of the decree of distribution and his death. It is undisputed that the possession of the land was and of right would be for many years in persons other than the owner of the fee. There is nothing significant, therefore, in Mr. Osmont's failure to record the deed from Mangels, or in the omission from that deed of a description referring specifically to the decree of distribution. But in any event, the concealment of his claim of title could have worked no injury to appellants. Its only effect would be to postpone the running of the statute of limitations against them. Respondents did not acquire title by the decree in Osmont v. All Persons. That

decree established their title, and if, as appellants contend, they hold the naked title in trust for said appellants, they must be trustees by reason of the fraud of their ancestor or his grantor in securing distribution through the residuary clause of the decree in the Estate of Heydenfeldt. But the finding of the superior court on that subject is sustained, and is contrary to the contentions of appellants.

The conclusion we have reached regarding the findings upon the matter of the alleged fraud makes it unnecessary for us to comment upon the finding that the statute of limitations was a bar to any recovery in this case.

The judgment and order are affirmed.

We concur: WILBUR, J.; LORIGAN, J.

---

178 Cal. 715

## In re BOSELLY'S ESTATE. (S. F. 8673.)

(Supreme Court of California. Aug. 8, 1918. Rehearing Denied Sept. 5, 1918.)

1. HUSBAND AND WIFE ⟸264—COMMUNITY PROPERTY—SUFFICIENCY OF EVIDENCE.
Although husband died in California, and his estate was being administered therein, evidence *held* to show that property was not acquired while he was resident of the state, and hence to overcome whatever legal presumption existed as to such property being community property.

2. WITNESSES ⟸379(10) — INCONSISTENT STATEMENTS.
On surviving wife's petition for share of alleged community property, where wife claimed that her testimony as to husband's business affairs was hearsay, statements in wife's deposition previously taken made as of her own knowledge were admissible; court having right to determine if statement as to evidence being hearsay was an afterthought making her testimony and statement in deposition inconsistent.

3. EVIDENCE ⟸272 — STATEMENT AGAINST INTEREST.
On surviving wife's petition for share of alleged community property, where wife claimed that her testimony as to husband's business affairs was hearsay, statements in wife's deposition previously taken, made as of her own knowledge, were admissible, being a statement against interest.

Department 1. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Frederic James Boselly, deceased. Petition by Eugenie Susan Boselly for her share of alleged community property, contested by Violet Aline Holbo. From order denying the petition, petitioner appeals. Affirmed.

Thomas, Beedy & Lanagan, of San Francisco, for appellant. J. Delmore Lederman, of San Francisco (T. E. Pawlicki, of San Francisco, of counsel), for respondent.

RICHARDS, Judge pro tem. This is an appeal from an order denying the petition of the widow of the decedent for distribution to her of her share of what she alleges to be the community property of her husband's estate. The answer filed to the petition by a daughter of the decedent by a former marriage denied that the whole or any part of the estate of the decedent was community property, and alleged that the whole thereof was her father's separate estate, setting up specifically and in detail the circumstances under which the said property had been acquired. The court, after a hearing, found that the facts as thus alleged in the answer were true, and as a conclusion of law from such findings of fact found that the whole of the decedent's property was his separate estate. The facts as thus alleged in the answer and found by the court to be true are as follows:

"That Frederic James Boselly and said Eugenie Susan Boselly were married in the city of Reno, in the state of Nevada, on the 24th day of July, 1897, and thencefrom, up to and at the time of the death of said Frederic James Boselly, deceased, as aforesaid, on the 19th of February, 1913, said Frederic James Boselly and said Eugenie Susan Boselly were respectively husband and wife; that said Frederic James Boselly and said Eugenie Susan Boselly were both residents of the city and county of San Francisco, state of California, at the time of their said marriage, and continued so to be such residents of said city and county of San Francisco and of the state of California until on or about the 1st day of April, 1899; that on or about said last-named date said Frederic James Boselly, with the intent on the part of said Frederic James Boselly to abandon his said residence within the state of California and to become a resident of the state of New York, removed from the state of California and went to the state of New York, arriving in said state of New York on or about the 6th day of April, 1899, and continued thencefrom until the 17th day of September, 1913, to reside without the state of California; that said Frederic James Boselly acquired a residence in said state of New York on said 6th day of April, 1899, and continued thencefrom until about the 1st day of June, 1910, to be a resident of said state of New York; that on or about the 1st day of June, 1910, said Frederic James Boselly, with the intention of abandoning his residence in the state of New York and acquiring a residence in the state of New Jersey, removed from the said state of New York to the state of New Jersey, and on or about said last-mentioned date acquired a residence in said state of New Jersey and became a resident of said state of New Jersey, and continued thencefrom to be a resident of the state of New Jersey until on or about the 1st day of October, 1910; that on or about the 1st day of October, 1910, said Frederic James Boselly, with the intent of abandoning his said residence in the state of New Jersey and acquiring a residence in the state of New York, removed from the state of New Jersey to the state of New York, and on said last-mentioned date acquired a residence in said state of New York and became a resident of said state of New York and continued to be a resident of said state of New York until the 17th day of September, 1913, upon which date he arrived in the state of California; that during all the period from the 1st day of April, 1899, to the 17th day of September, 1913, said Frederic James Boselly was a resident of no other state or states than the states of New Jersey or New York.

"That all of the property which said Frederic James Boselly died possessed of was, at the

time of his death, the separate property of said decedent, Frederic James Boselly, and was acquired by said Frederic James Boselly during the time that he resided outside of the state of California and while he was a resident of the state of New York and of the state of New Jersey under the laws of said states of New York and New Jersey."

The only portion of the foregoing findings with which the appellant disagrees upon this appeal is embraced in the closing paragraph thereof to the effect:

"That all of the property which said Frederic James Boselly died possessed of * * * was acquired by said Frederic James Boselly during the time that he resided outside of the state of California and while he was a resident of the state of New York and of the state of New Jersey."

It is conceded by the appellant that, if the said property of the decedent was acquired by him in and under the laws of the states of New York and New Jersey, it would be his separate estate.

[1] The first point which the appellant urges in support of her above contention is that, the decedent having died in the state of California, and his estate being in process of administration therein, and said property being admittedly accumulated during the period of his marriage with the appellant, and being in his possession at the time of his death, the presumption arose that said property is community property under the sections of the Civil Code dealing with that subject; that the burden of overcoming that presumption by clear and satisfactory proof rested upon the contestant; that such burden had not been sustained, and, in consequence, the foregoing findings of fact could not be upheld upon appeal. It is practically conceded on the part of the contestant that the position of the petitioner with respect to this presumption and the degree of proofs required to overthrow it is correct and is sustained by the authorities which she cites in its support. The dispute arises over the sufficiency of the evidence upon which the court based its finding that the presumption had been overcome. The evidence upon which the contestant in a large measure relied to overthrow the presumption upon which the petitioner depended came from the lips of the petitioner herself, whom the contestant made her witness upon the hearing. It appeared from her testimony that the decedent and herself had been married in Reno, Nev., on July 24, 1897; that they resided from that date until April 1, 1899, in the city of San Francisco, California, during which time he was employed as an agent of the Price Baking Powder Company, keeping at the same time a small store; that in March, 1899, said employment ceased by reason of the absorption of the Price Baking Powder Company by the Royal Baking Powder Company; that shortly thereafter Boselly concluded to go East and seek employment with the Royal Baking Powder Company there; that he sold his store and household furniture, and, taking his wife, went East in April, 1899. The petitioner testified that when she and her husband were married he had no property whatever, and in answer to the question as to whether she knew of her own knowledge whether Mr. Boselly had any property when he left California in April, 1899, she answered, "None to my knowledge," and she further testified that when she and her husband went East in 1899 "we had $726 in a savings bank which we took to go East." And when asked the question, "Had you any stocks or bonds which you carried with you?" she replied, "We had nothing." It is true that the witness undertook to qualify the force of this evidence a little later in her testimony by stating that she only knew what her husband told her upon this subject, but it is a significant circumstance in this connection that, while she testified that her husband and herself were very confidential in respect to her business affairs, she nowhere undertook to testify in support of her own case that her husband and herself had in fact any other property than this small sum of money when they left California for New York in April, 1899. Concerning the rise in the decedent's fortunes after he had taken up his residence in the state of New York and later in the state of New Jersey there is no material dispute. He entered the employ of the Royal Baking Powder Company at a comparatively small salary, but rose rapidly in the confidence and service of the corporation, until he became its president in the year 1906, which position he held until his resignation on account of ill health in 1913. He received a high salary, which he invested wisely. He became associated with other enterprises, and was president of the American Maize Products Company from 1908 on, and was also president of the Tartar Chemical Company, and a director of the Greenwich Bank. He established his legal residence in New York immediately after his arrival there, and later changed his legal residence for a time to the state of New Jersey; and it is an undisputed fact that between the years 1899 to 1913 his actual and legal residence was in one or the other of these two states. In the year 1913 Boselly, on account of his failing health, retired from his business associations and activities in these states and came to California, arriving in September, 1913, where he thereafter resided until his death, five months later, in February, 1914. Taking the story of the decedent's life after the date of his marriage with the petitioner in 1906 and up to the time of his return to California in the year 1913, the conclusion seems irresistible from his widow's own recital of it that whatever property he died possessed of he acquired during the years of his life and business activities and success while a resident of the states of New York and New Jersey. Upon this branch of the case and aside from the question of the competency of the evidence of the petitioner herself by which

the facts were mainly proven, and aside from any question as to errors, if any, committed by the court in the course of its admission, we are of the opinion that the contestant overcame whatever presumption existed as to the property of the decedent being community property by clear and convincing proof.

[2] The petitioner, however, contends that the trial court committed several vital errors in respect to and in the course of the admission of the testimony of the petitioner in evidence, and that but for these errors the required proofs to support the contestant's case would have been lacking. The first of these errors of which the appellant complains is the alleged error of the court in permitting the contestant to question the petitioner, when a witness, as to certain statements contained in a deposition of the petitioner which had been previously taken, the purpose of such inquiry being that of showing that in her earlier deposition she had stated certain facts respecting the state of her husband's business affairs as of her own knowledge, whereas upon the hearing of the case she attempted to assert that these were wholly hearsay derived from what her husband had told her respecting them. The objection which was made on behalf of the petitioner to the introduction of these earlier statements from her deposition was that they were not admissible because they did not contradict her testimony then being given; but we do not deem this objection tenable, for two reasons: First, if the statements of the witness as given in her former deposition were as to matters within her own knowledge, they would have been admissible as statements against interest; second, it was a very proper matter for the court's determination as to whether the statement of the witness that these were matters of hearsay was not an afterthought and that her earlier recital of the same facts was not in fact, as it appeared to be, a recital of matters within her own knowledge. If so, there was a sufficient inconsistency between her earlier and later testimony to have justified the admission of the former in evidence.

[3] This conclusion will dispose of another and very material contention made on behalf of the appellant. It is this: The appellant insists that so much of her testimony as was stated by her to have contained facts derived by her from statements made by her husband to her was erroneously admitted in evidence in violation of the rule of law regarding the inadmissibility of privileged communications between husband and wife. It is to be noted that, if the view of the trial court with respect to the admissibility of the testimony of the witness as contained in her former deposition is adopted, enough was therein stated to have justified the ultimate conclusion of the court, and hence any error which it may have committed in admitting other statements of the witness to which she urged the objection that they were hearsay and privileged would not lead to a reversal of the case.

No other questions requiring consideration are presented upon this appeal.

Order affirmed.

We concur: SLOSS, J.; SHAW, J.

---

178 Cal. 794

## PEOPLE v. KEYES. (Cr. 2154.)

(Supreme Court of California. Sept. 5, 1918.)

1. CRIMINAL LAW ⟸1159(5)—APPEAL—REVIEW—CONFLICTING EVIDENCE.
Where the evidence as to defendant's sanity or insanity was in conflict, a verdict of guilty cannot be disturbed by the Supreme Court.

2. CRIMINAL LAW ⟸57—CRIMINAL RESPONSIBILITY — TEMPORARY INSANITY FROM DRUNKENNESS.
Temporary insanity produced by temporary intoxication does not destroy criminal responsibility, when the party became voluntarily intoxicated, and drunkenness forms no defense whatever, but can be considered only to determine the degree of crime.

3. CRIMINAL LAW ⟸825(3)—DUTY TO REQUEST INSTRUCTION.
In prosecution for murder, defended on ground of insanity, if court failed to instruct on specific character of insanity, defendant should have framed instruction and requested court to give it.

4. HOMICIDE ⟸294(1) — INSANITY AS DEFENSE—INSTRUCTIONS.
In prosecution for murder, defended on ground of insanity, court was not required to designate any particular phase of insanity.

5. CRIMINAL LAW ⟸805(3)—DEFENSE OF INSANITY—EVIDENCE—INSTRUCTION.
In prosecution for murder, instruction as to quantum of evidence necessary to sustain defense of insanity *held* proper, though using "must" in stating evidence must be such that if issue were submitted to jury in civil case they "must" find defendant insane.

6. CRIMINAL LAW ⟸570(2)—INSANITY—PREPONDERANCE OF EVIDENCE.
On issue of defendant's insanity in criminal case, if evidence satisfies jury by preponderance that defendant is insane it is jury's duty to so find.

7. CRIMINAL LAW ⟸778(7) — INSANITY AS DEFENSE—PRESUMPTION—INSTRUCTION.
Instructions as to presumption of continuance of insanity once shown to exist, *held* properly refused as too broad.

8. CRIMINAL LAW ⟸814(13)—INSTRUCTION—SUPPORTING EVIDENCE.
In prosecution for murder, defended on ground of insanity, instruction as to presumption of continuance of insanity once shown to exist *held* properly refused, as introducing matter of lucid interval without evidence supporting it.

9. CRIMINAL LAW ⟸311—RESPONSIBILITY—INSANITY—PRESUMPTION AS TO LUCID INTERVALS.
When it is shown defendant had lucid intervals, it will be presumed offense was committed in one of them, not while he was insane.

10. CRIMINAL LAW ⟸814(13)—INSTRUCTIONS—RELEVANCY.
In prosecution for murder, instruction as to presumption of continuance of insanity once shown to exist *held* properly refused as without relevancy.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

11. Criminal Law ⊂⊃46—Responsibility—Imbecility.
Imbecility is no defense against crime, unless its existence deprives the individual of the power to distinguish between right and wrong.
12. Criminal Law ⊂⊃1147(1) — Review—Sanity of Defendant—Jury Trial.
Right to jury trial to determine defendant's sanity before or after main trial, under Pen. Code, § 1368, is addressed to sound discretion of judge before whom cause is pending, and his determination is not to be disturbed in absence of abuse of discretion.

In Bank. Appeal from Superior Court, Orange County; Z. B. West, Judge.

Edward S. Keyes was convicted of murder in the first degree, and from the judgment and order denying new trial he appeals. Order and judgment affirmed.

Ingle Carpenter, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn and Jerry H. Powell, Deputy Attys. Gen., and L. A. West, Dist. Atty., and A. E. Koepsel, Deputy Dist. Atty., both of Santa Ana, for the People.

LORIGAN, J. The defendant was convicted of the crime of murder of the first degree, sentenced to death, and appeals. The victim of the defendant was a newsboy, 11 years of age, whom the defendant had enticed to his home at night and killed after an attempt to commit sodomy on him, the killing being accompanied by the dismemberment of the body of the boy and an attempt at its concealment. In its details the crime was of a particularly fiendish and revolting character, and, in view of the fact that there is no claim on this appeal but that the evidence adduced fully warranted the conviction of the defendant and the penalty imposed upon him, it will be unnecessary to further refer to that evidence.

[1] The sole defense interposed on behalf of the defendant was that he was insane when the killing was perpetrated, and to sustain this claim there was given in evidence the clinical history of the defendant from his infancy, which consisted in the main of misfortune attending his birth and childhood, physical injuries suffered in early youth and a life made up of waywardness, wanderings, delinquencies, bestialities, drunkenness, temporary reforms and early relapses, a term in the state prison, and detention in an insane asylum. On the other hand, there was evidence on the part of the prosecution, given by witnesses who had known, observed, and talked with the defendant weeks or days before the killing, that he was sane when the crime was committed. On both sides there were opinions of medical experts, some that the defendant was insane when the crime was committed, while others declared him to have been sane. As we do not understand that any serious claim is made but that there was a substantial conflict in the evidence and the opinions of the experts as to the legal responsibility of the defendant for the crime charged against him, it is not necessary to refer in detail to that evidence, because where such a condition exists the verdict of the jury resolved from the conflict cannot be disturbed by this court. There being, then, no claim against the sufficiency of the evidence to sustain the charge of murder of the first degree, and the defense of insanity being found against the defendant upon substantially conflicting evidence, the verdict upon the judgment must stand unless there is some merit in various points made by appellant as to certain instructions given or refused by the trial court, rulings with reference to testimony, and the refusal of the trial court, before and after the main trial of defendant, to submit the question of his then sanity or insanity for determination by a jury.

Approaching a consideration of these points: It is claimed by the appellant that the principal defense of insanity interposed by him was insanity produced by the use of intoxicating liquors covering a long period of time, and which had resulted in what is often referred to in the books as settled insanity produced by habitual intoxication. While this is the claim of appellant on this appeal, it was not the exact theory upon which the defense of insanity was presented upon the trial. The claim then was of a more extended character of insanity, namely, that the defendant was a moral degenerate; that he had been an imbecile from infancy and had since gradually undergone a further mental deterioration; that the habitual use of alcohol would cause such an imbecile with a deteriorating mind to become more irritable and more disturbed, and accentuate any evil passion with which he might be possessed and render him less capable of self-control; that any abnormal sexual impulse in such an individual would be further inflamed by the use of alcohol, and the possible resistance of the victim would further excite and inflame him into a state of rage where he would become utterly irresponsible and would develop an impulse to violence or to murder. It was further in evidence that defendant, while at the house, had a quart bottle of whisky, which he and his victim drank. The foregoing presents in a general way the character of insanity with which it was asserted the defendant was afflicted on the night of the murder and embodies the claim of defendant as to settled insanity.

[2-4] The defendant insists that the instructions given by the court were not sufficiently clear and broad to advise the jury upon the law as to the defense of settled insanity produced by intoxication, and calls attention to the following instruction, which he claims is deficient in that respect:

"Drunkenness is no excuse for the commission of crime. Insanity produced by intoxica-

tion does not destroy responsibility when the party, when sane and responsible, made himself voluntarily intoxicated; and drunkenness forms no defense whatever to the fact of guilt, for, when a crime is committed by a party while in a fit of intoxication, the law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. Evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of crime, and the weight to be given it is a matter for the jury to determine in connection with all the other evidence and circumstances in proof in the case."

This instruction, however, does not purport to deal with settled insanity produced by intoxication, but with temporary intoxication as a defense, and has relevancy only to the intoxication of the defendant existing at the time of the killing from the liquor which he and the deceased drank at the house. As such an instruction, it, and the lengthier portion of the instruction which the appellant omitted to quote, is clearly good law as established by a long line of cases in this court, culminating in People v. Hower, 151 Cal. 638, 91 Pac. 507. Appellant says that in any event the giving of this instruction was misleading, as the court gave no other instruction on the subject of settled insanity from intoxication. The appellant, however, requested a large number of instructions, and, if the court had failed to instruct on that specific character of insanity, he should have framed an instruction and requested the court to give it. The truth, however, is that the court gave the jury full instructions on the subject of the defense of insanity from whatever cause proved. It was not required to designate any particular phase of insanity. It is proper to note, however, that at the defendant's request the court did instruct the jury on the subject of insanity through the use of alcoholic liquors as follows:

"The court instructs the jury that temporary insanity as a defense to a crime is as fully recognized by law as is permanent insanity; and if the jury finds that the defendant, though of weak intellect, was not insane prior to and after the commission of the alleged offense, but at the time of the commission of the crime, through the use of alcoholic drinks or because of some other excitement at the time, he was temporarily in such a mental condition that he was not aware of the nature of the offense, and had not the ability to discriminate between right and wrong, you must acquit the defendant on the ground of insanity."

[5, 6] It is next contended by the appellant that the court erred in an instruction to the jury as to the quantum of evidence necessary to preponderate in order to sustain the burden of proof in a defense of insanity. On that subject the court instructed the jury as follows:

"Although it is true, as you have been instructed, that generally the burden of proof is upon the prosecution, yet to this rule there is this exception: Where insanity is relied upon as a defense, the burden of proving the existence of such insanity is on defendant, and it is incumbent upon him to establish by a preponderance of evidence that he was insane at the time of committing the act charged, and the evidence of mental derangement must be such in amount that if the single issue of sanity or insanity of the defendant should be submitted to the jury in a civil case they must find that he is insane. Insanity must be established by a preponderance of the evidence. Therefore, if you believe that the preponderance of evidence is in favor of the sanity of the defendant, or that there is not a preponderance of evidence to the effect that he was insane at the time of the transaction involved herein, you will act upon the hypothesis that he was sane at that time."

Counsel contends that by the use of the word "must" in the instruction too great a burden was imposed upon defendant as to how far his proof of insanity must preponderate. No fault is found with the instruction save in the use of the word "must" and as to that we think the criticism of appellant not justified. All that the instruction tells the jury is that the defense of insanity must be established by a preponderance of evidence, and that preponderance must be such that if the single issue was presented in a civil action as to whether the defendant was insane or not, the jury would find that he was insane. It is suggested that there is an impulsion implied from the use of the word "must." This may be admitted, but it adds nothing to the force of the defendant's criticism of the instruction. Of course, it will not be questioned but that in a civil case, if a jury is satisfied that a defense of insanity is established by a preponderance of evidence, it is its absolute duty to find to that effect; it is the duty imposed upon them by law—they must so find. So, too, on a similar issue in a criminal case, if the evidence satisfies the jury by a preponderance in his favor that he is insane, it is its duty to so find; they must do it to fulfill their obligations as jurors. This is all the instruction tells them to do. A similar instruction to this was approved in People v. McDonell, 47 Cal. 134, and People v. Hamilton, 62 Cal. 377. Counsel for appellant relies in support of his criticism of the instruction on the cases of People v. Wreden, 59 Cal. 392, and People v. Wells, 145 Cal. 138, 78 Pac. 470. But they are not in point. In these cited cases the court, after telling the jury that insanity must be established by a preponderance of evidence, further proceeded to make explanatory statements as to how that preponderance must be shown, telling the jury that it "must be clearly established by satisfactory proof." It was held that such instructions were erroneous, as they amounted to telling the jury that a defense of insanity must be established beyond a reasonable doubt. The instruction here criticized confines itself to telling the jury that a "preponderance of evidence" is sufficient to sustain the defense. Another instruction was given by the court on this same subject, which, together with the instruction criticized, makes the latter more plain, if,

indeed, anything of the kind was necessary. That instruction is as follows:

"Up to the moment when the killing is proved the prosecution must make out its case beyond any reasonable doubt. When the killing is proved it devolves upon the defendant to show any circumstances in mitigation to excuse or justify by a preponderance of evidence on his part; that is, the killing being proved, the defendant must make out his case in mitigation to excuse or justify by some proof stronger in some appreciable degree than the proof of the prosecution. The burden of proof changes. It must be in some degree, no matter how small, stronger than the proof of the prosecution on the other side."

[7-9] The next point urged by defendant is that error was committed by the court in refusing several instructions. We quote them as follows:

"The court instructs the jury that if the jury finds from the evidence that the defendant was insane at a period before the homicide in question, then in that case his insanity is presumed to have continued up to the time of the homicide providing the exciting cause of such insanity also exists up to the time of the homicide."

"The court instructs the jury that if the jury finds from the evidence that the defendant was insane at a period before the homicide in question there arises a presumption that such insanity continued, and the burden of proof rests upon one who claims that an act of such person was during a lucid interval to show that the lucid interval existed at the time of the act in question."

"The court instructs the jury that although sanity is presumed to be the normal and natural state of the human mind, when imbecility is once shown to exist in a person it is presumed to exist and continue until the presumption has been overcome by contrary or repelling evidence proving sanity; and that such proof of sanity must be without qualification."

These three instructions in varying form were calculated to instruct the jury that, insanity once shown to exist, it is presumed to continue; that is, if the jury found the defendant was insane at some time prior to the killing of the deceased the presumption is that he was insane at the time the killing was done.

In the case of People v. Schmitt, 106 Cal. 48, 39 Pac. 204, the first instruction asked, which is precisely the same as was under consideration in that case, was condemned on the ground that it was too broad; it did not properly limit the insanity to permanent or habitual insanity as distinguished from temporary insanity, concerning the latter of which no presumption of its continuance can be indulged in from proof of its prior existence. Aside from this, it failed to contain the proper qualifications that it would only be presumed to exist until the contrary was shown. People v. Francis, 38 Cal. 183; Wharton's Crim. Law, sec. 55.

As to the second instruction quoted, the same objection applies as to the one we have just had under consideration, with the added vice that it introduces as an element in the case to which the instruction is to be applied a "lucid interval," evidence of which was nowhere in the case or claimed to be. Even as to "lucid interval" it did not correctly state the law of presumption, because it is laid down in 12 Cyc. 389, as the recognized rule that, "when it is shown that a defendant had lucid intervals, it will be presumed that the offense was committed in one of them." In passing it may be remarked, too, that the instruction assumes that the prosecution contended that the crime of defendant was committed during a lucid interval, and inferentially that the defendant had been, prior to the occurrence of said lucid interval, insane. The prosecution contended for nothing of the kind and did not admit that the defendant was insane at any time.

[10, 11] The third of the quoted instructions was properly refused because it had no relevancy to the case, and further, because it was not a correct statement of law. Imbecility is no defense against crime unless its existence deprives the individual of the power to distinguish between right and wrong. No reference is made in the instruction as to the existence of a mental deficiency in this respect with reference to the imbecility mentioned therein. In People v. Oxnam, 170 Cal. 211, 149 Pac. 165, the distinction between imbecility or feeble-mindedness and insanity as a defense to crime is clearly pointed out, and, this distinction not appearing in said instruction, it was for that reason properly refused.

[12] Complaint is made by appellant because the court refused, prior to the main trial and after such trial, to have the sole question of the sanity of the defendant passed upon by a jury. The demand was made by his counsel under section 1368 of the Penal Code, based upon an affidavit of such counsel. The second application was supported by affidavits of two physicians and also officers of the jail. Counter-affidavits were filed on behalf of the state. The right to a jury trial in proceedings inaugurated under said section 1368 is addressed to the sound discretion of the judge before whom the cause is pending, and the showing must be sufficient to create a doubt in the mind of the judge as to the sanity of the defendant before he is required to submit the question to a jury, and we will not disturb his action unless it appears that there was a clear abuse of such discretion. People v. Hettick, 126 Cal. 425, 58 Pac. 918; People v. West, 25 Cal. App. 369, 143 Pac. 793; People v. Fountain, 170 Cal. 460, 150 Pac. 341. There is not the slightest showing of any abuse of discretion on the part of the judge, and the two applications must be deemed properly denied.

These are the only points presented by appellant on this appeal which we deem require an extended discussion, and, finding them all without merit, the order denying the motion of defendant for a new trial and the

judgment awarding the death penalty are hereby affirmed.

We concur: ANGELLOTTI, C. J.; RICHARDS, Judge pro tem.; WILBUR, J.; MELVIN, J.; SHAW, J.; SLOSS, J.

178 Cal. 775

## WOLFSEN v. SMYER et al. (Sac. 2567.)

(Supreme Court of California. Sept. 3, 1918.)

1. SPECIFIC PERFORMANCE ⟸86—PROMISE TO EXECUTE WILL.
Under the laws that existed prior to 1905, an oral promise to convey an estate by will was under certain circumstances enforceable in equity, and is still enforceable, where the promise was made prior to that time.

2. SPECIFIC PERFORMANCE ⟸86—CONTRACT TO MAKE WILL.
Equity may enforce a contract to make a will, where, in reliance on the contract, the promisee has changed his condition and relations, so that the refusal to complete the agreement would be a fraud upon him.

3. WILLS ⟸58(2)—CONTRACT TO MAKE WILL—EVIDENCE.
Evidence *held* to sustain a finding that no promise was made by a decedent to make a will in favor of plaintiff.

4. APPEAL AND ERROR ⟸1071(6)—HARMLESS ERROR—FINDINGS.
When there are sufficient findings on issues made in the case to support a judgment, it is immaterial that there is no finding, on some other issue, which, if made, would not compel any different conclusion from that reached by the findings made.

5. APPEAL AND ERROR ⟸1071(1)—HARMLESS ERROR—FINDINGS.
Where there are sufficient findings on issues made in the case to support a judgment, it is immaterial that there is an erroneous finding on some other issue which, if differently made, would not compel any different conclusion from that reached by the findings made.

6. APPEAL AND ERROR ⟸1047(4)—REVIEW—HARMLESS ERROR.
In a suit to impress a trust upon decedent's property, in enforcement of an alleged contract by decedent to make a will in plaintiff's favor, refusal to reopen the case to admit in evidence a deed for the purpose of contradicting a witness, where such deed would have been of doubtful value as impeaching testimony, if error, was harmless.

Department 2. Appeal from Superior Court, Merced County; F. B. Ogden, Judge.

Suit by Lawrence L. Wolfsen against Mary Smyer, administratrix of the estate of Silas Bowman, deceased, and others, to declare a trust. From a decree for defendants and the denial of a new trial, plaintiff appeals. Affirmed.

Peck, Bunker & Cole, of Oakland, and Ostrander, Tuttle, Griffin & Shaffer, of Merced, for appellant. E. A. Williams and G. G. Graham, both of Fresno, and Croop & Croop, of Merced, for respondents.

LORIGAN, J. The claim of appellant in this action is that Silas Bowman, now deceased, and himself, in 1890, while appellant was a minor, entered into a verbal agreement whereby plaintiff was to live with said Bowman during the lifetime of the latter as his son, and help and work and care for him as a son, and attend to his interests as such, and in consideration thereof said Bowman would at his death leave all his property to the plaintiff; that plaintiff faithfully performed all the conditions and terms of the agreement on his part to be performed as a dutiful, affectionate, and considerate son should do; that, notwithstanding said full performance on the part of plaintiff, said Silas Bowman died without having made any conveyance of his property to plaintiff or any will disposing of the same in his favor, but on the contrary died intestate. Based on this claim, plaintiff brought this action to have a trust impressed on all the property left by decedent in his favor, and, from a decree adverse to him and an order denying his motion for a new trial, he appeals.

The court found that neither in 1890 or at any other time did Silas Bowman agree with plaintiff that he would at the time of his death give or leave to plaintiff any of his property owned by him, and that it was not true that plaintiff had performed all the provisions and covenants of the alleged agreement on his part to be performed. The court further found that the claim of plaintiff asserted in his complaint that, pursuant to said alleged agreement, he had during all the years from 1890 till the death of deceased given his efforts, care, services, and attention to the affairs, business, and property of said Bowman, foregoing all opportunity for his own personal advancement, profit, and improvement, was not true; that it was not true that for the services rendered by said plaintiff to said Bowman in his lifetime compensation could not be made in money or that the same were not so compensated.

The contention of the appellant here is that the evidence in the case does not support any of these findings as made by the court, but, on the contrary, clearly showed a contract entered into between Bowman and himself as claimed by him and full performance thereof on the part of plaintiff, and that the court erred in finding differently.

The case was tried by Hon. F. B. Ogden, of the superior court of Alameda county, sitting in the superior court of Merced county, and in disposing of the case in that court the learned judge rendered an opinion as follows:

"This is an action to enforce a trust. The plaintiff claims that in the year 1890 he engaged with one Silas Bowman to give his attention, labor, and services to said Bowman, in return for the promise of said Bowman to leave to said plaintiff all of the property possessed by him, said Bowman, at the time of his death. From the testimony of plaintiff it appears that with his father and two sisters he migrated to America from Germany in the fall of 1881. The father was a widower, and the three children were small; the plaintiff about seven years of

age, having been born in 1874. Upon the advent of the family to this country, they went to the residence of Henry Wolfsen, an uncle of the plaintiff. In December of 1881, or the first part of January, 1882, this uncle took his nephew, this plaintiff, to the home of Silas Bowman, where he was installed as a member thereof. Silas was a bachelor residing with his niece on a ranch in Merced county. What arrangements were made between Henry and Silas for the keeping of plaintiff, the plaintiff did not know, as he was unable to understand the English language, in which the conversation between the older men was carried on. It appears that the father of the plaintiff on his arrival here had but little of this world's goods and was without any means of earning the livelihood for the family except through his manual labor. So pressed was he for funds that he was compelled to place one of his daughters with a family, and the other found lodgment in an institution.

"In the family of Silas the plaintiff was made welcome and took the place of a son. He did many of the chores, brought in wood, cooked meals on occasions, washed dishes and clothes, and as he matured in years gave of his advice freely, to Silas, when that advice was sought. During his residence in the Bowman home, the plaintiff went regularly to school, there first learned the English language, and at the age of twenty-one or two graduated from the grammar grades. During the minority of plaintiff his wants were supplied by Silas, who bought the school books necessary, gave to plaintiff such money as he needed, and apparently did everything that a father ordinarily does for a son. It also appears that Silas indulged his foster son, the plaintiff, in outdoor sports, and gave to him, as well, the privilege of earning money on his own account. In this connection it appears that the plaintiff worked on neighboring farms, sold watermelons, killed coyotes for bounty, and in other ways made spending money for himself.

"The father of plaintiff in 1887, or 1888, left Merced and went to the Kittleman Plains, and it appears in evidence that in 1890 he sent a communication to the plaintiff, suggesting that the plaintiff join him there. This was communicated to the decedent Silas, and it is claimed by the plaintiff that Silas then asked the plaintiff if he desired to go with his father; and on being answered in the negative then said, if the plaintiff would stay with him (Silas) and help him on the place, upon the death of Silas, he (Silas) would leave all his property to plaintiff. Plaintiff avers that said Silas repeated this promise on sundry occasions thereafter. After graduating from the grammar grades, the plaintiff bought some well-boring tools, and commenced taking contracts for sinking wells. The money to make the purchase, it may be assumed, was the result of the savings of the plaintiff while a minor. For about a year and one-half the plaintiff followed this latter vocation, still living with Silas, and performing about the place much of the same work as theretofore, and adding to his patrimony by investing in live stock. In 1898, the plaintiff made a trip to Alaska for the purpose of looking over that field, and, if possible, of bettering himself there. His money on hand was about $375, $100 of which was loaned him by Silas, and $275 the result of his earnings. The trip was made with full consent of Silas. In Alaska the plaintiff stayed one year, earning enough money to pay his way and returning with about $400. With this sum he returned to Silas the $100 advanced by him, and resumed the old life upon the farm, and there remained for a short time, when again, with the consent and advice of Silas, the plaintiff made a trip to his father at Kittleman Plains. There it was proposed that the plaintiff file on a homestead in the government domain. This was done in February, 1900, and the land entered upon was improved by a small cabin purchased by the plaintiff in compliance with the necessities of the act of Congress. The plaintiff states, however, that the time he was away from the Bowman place was only about two weeks, although it was his intention at the time of making the entry to comply with the law as to residence, etc. Prior, however, to this entry, and in 1898, he had purchased 160 acres of land adjoining the Bowman place, paying therefor $250. During this time it appears that the plaintiff and Silas had stock which used the lands of Bowman and plaintiff in common. The holdings of the plaintiff were, in 1902, augmented by his purchase of an additional 160 acres of land for which he paid $975, and by a further purchase in 1903 of still another quarter section, costing $1,175.

"In 1904, plaintiff married and took his bride with him to the Bowman place, where the three, Silas, the plaintiff and his wife, remained until 1907. During this time part of the household expenses were borne by plaintiff, and part by Silas. The wife of plaintiff contributed to the domestic happiness and economy by the usual wifely duties. It appears that no stated amount was fixed upon as the share of the plaintiff, and he cannot tell just what amount he paid in as his contribution to the expenses of the family. During all of this time down to 1907, the plaintiff bought and sold stock and used in common with Bowman these lands for pasture. In 1907 at the suggestion of Bowman the plaintiff moved to a house on one of the quarter sections taking with him 35 head of stock, which belonged to him; Bowman being the possessor of about 70 or 75 head. From this new home plaintiff continued the business of well-boring and cattle raising, and in 1908 added to his possessions by a further purchase of 160 acres; this time buying from Silas. Part of the time to 1907 the decedent Silas was away visiting in the Eastern states, and during such time the plaintiff was in charge of the ranch of Bowman, or gave it some supervision, when it had been rented by Bowman.

"In 1912, decedent Silas made a trip to Honolulu, and in 1913 made another to San Diego, at which latter place he died from paralysis. February, 1914, was the date of death. The estate left by him was approximately $30,000. In August, 1913, before leaving, decedent Silas made a lease to plaintiff of his ranch of 750 acres at the agreed price of 80 cents per acre. The lease was for one year with the privilege of three. A portion of the Bowman place, about 50 acres, was reserved from the lease whereon was the house and surroundings, but it appears that even this reservation was not actual, as the plaintiff had the privilege of it except when occupied by Silas. Upon telegraphic advice, from San Diego, that Silas Bowman was in extremis, the plaintiff accompanied by Thomas Scofield, a stepnephew of Silas, journeyed to San Diego, and arrived in time to see him die. Plaintiff paid the hospital bills, undertaker, and incidental expenses of the trip, and was repaid by the administratrix, upon her appointment.

"Many witnesses were examined upon the trial of this case, 43 in all. More than 30 witnesses called in behalf of the plaintiff testified as to the faithfulness of the plaintiff in his devotion to decedent, Silas, and to the expressions of affection of Silas towards the plaintiff. To many of them Silas had declared that the relatives should get nothing, and that his ranch and property should go to the plaintiff on his death. To many of his friends Silas declared that he had already made deeds to the plaintiff and that they were contained in a tin box then in a Merced bank. One or two witnesses stated that Silas had declared that he had promised the boy—meaning the plaintiff—to give him (the plaintiff) the property on the death of him (Silas) in return for the labor of plaintiff.

"From the testimony of all the witnesses it does affirmatively appear that Silas Bowman

had a sincere affection for his foster son, the plaintiff, and often expressed the intention of leaving all of his property to him, except that he (Silas) intended to aid Thomas Scofield to some extent. It further appears from the evidence that, upon the return of the plaintiff and said Scofield from San Diego with the remains of Silas, a meeting of some of those interested in the estate was held in the office of W. B. Croop, a practicing attorney of Merced. Before the meeting, Mr. Croop, who had for several years acted as the attorney for the decedent, Silas Bowman, went to the bank which held the papers of the decedent, secured the tin box in which they were contained, and on the arrival of Thomas Scofield and Mrs. Smyer, niece of decedent, the plaintiff proceeded to open the aforesaid box. The key to this box, it appears, was held by Scofield. On opening the box, neither will, deed, nor other paper was found, which could throw light upon the intended disposition of the property of Silas Bowman. Twice afterwards the box was inspected with no better results. Mr. Croop also testified that he had never drawn any deed wherein Silas Bowman made conveyance to the plaintiff.

"After the appointment of Mary Smyer as administratrix of the estate of Silas Bowman, the administratrix requested the plaintiff to give to her the lease under which he held the Bowman ranch, and the plaintiff replied that he could not comply, as this lease was the only evidence of his right to the possession thereof. It also appears in evidence that at another time, after said appointment, and when the plaintiff was being reimbursed for his outlay on the San Diego trip, he was asked if he had any other claim against the estate, and he answered in the negative. Evidence was also introduced on behalf of the defendant tending to show that, at one time after the return of the plaintiff from Alaska, the decedent, Silas, told the plaintiff that he had given to him all that he (Silas) intended to give, and that he need not expect more. Other witnesses for the defense testified that the plaintiff had informed them that he did not expect anything from the estate of Silas Bowman, because Silas had too many relatives. It further appears that the plaintiff asked of the attorney for the administratrix if he could hold the Bowman place under the lease.

[1, 2] "There can be no doubt that, under the law of this state as it existed prior to 1905, an oral promise to convey an estate by will, under certain circumstances, was enforceable in equity and is still enforceable where the promise was made prior to said date. In the case of Owens v. McNally, 113 Cal. 449, 45 Pac. 711, 33 L. R. A. 369, Mr. Justice Henshaw, speaking for the Supreme Court, said (quoting Jaffe v. Jacobson, 48 Fed. 21, 1 C. C. A. 24): 'We concede the law to be that a court of equity will specifically enforce a promise to leave to another the whole, or a definite portion of one's estate as a reward for peculiar personal services rendered, or other acts done by the promisee, which are not susceptible of a money valuation, and were not intended to be paid for in money, provided the consideration has been substantially received at the promisee's death.' (Through inadvertence the word 'promisee's' was quoted in the California case instead of 'promisor's.') And in the opinions in Owens v. McNally the following language was also used: 'The question whether relief should be granted or denied in a particular case addresses itself peculiarly to the conscience of the Chancellor.' And the rule laid down in Pomeroy on Specific Performance is cited with approval in McCabe v. Healy, 138 Cal. 84, 70 Pac. 1008, as follows: 'Courts of equity will under special circumstances enforce a contract to make a will, * * * where, in reliance upon the contract, the promisee has changed his condition and relations so that a refusal to complete the agreement would be a fraud upon him.' In addition, before such enforcement can be had the court will be more strict in examining into the nature and circumstances of such agreements, than any others, and will require very satisfactory proof of the fairness and justness of the transaction. McCabe v. Healy, Id. See, also, Owens v. McNally, supra; Flood v. Templeton, 148 Cal. 374, 83 Pac. 148; Baumann v. Kusian, 164 Cal. 582, 129 Pac. 986, 44 L. R. A. (N. S.) 756. The strictness with which courts of equity look upon such agreements has its philosophy in the rule that the stability of the possession and title to property must be preserved. Mr. Justice Melvin, in Blanc v. Connor, 167 Cal. 722, 141 Pac. 218, says: 'It is asserted that this is a class of cases sometimes arising in fraud and abounding in perjury.' But while this observation may have no just application to this case at bar, yet the rule that oral contracts affecting title to real estate are enforceable in equity doubtless gives vigor to the art of imagination and the science of auto-suggestion. The Legislature realizing this, in 1905, provided by statute that agreements to devise or bequeath property must be in writing. Section 1624, Civ. Code.

"From the foregoing statement of the facts in the case it will be seen that considerable doubt exists—viewing the testimony most favorably to the plaintiff—whether a case has been made out authorizing the extraordinary remedy sought by plaintiff. The case at bar is more nearly like the case of Baumann v. Kusian, supra, than any other decided by our Supreme Court. In the case cited two girls were taken into the family by their benefactress, and it was claimed by them that their benefactress agreed to make them heirs of her estate if they complied with her wish to come West with her. The court said: 'We are of the opinion that it also sufficiently appears that there was no such showing of adequacy of consideration for the alleged promise * * * as to appeal to a court of equity as requiring specific performance in the face of the rule that the contract must be just and fair.' In the case at bar the plaintiff gave up nothing of value to become an inmate of Silas Bowman's home. Unable to speak the English language, he was there taught it. Carefully nurtured by loving hands, he received also an education at the expense of his benefactor. Small wonder was it that, when in 1890 the father of the plaintiff sought to gather together his children, the plaintiff revolted and would not return. His affections had been won by his foster parent, and this fact best portrays the kindness of Silas Bowman.

"Unlike the case of McCabe v. Healy, supra, the plaintiff did not give his entire time or services to Silas. During the period of plaintiff's minority he had ample time to work for others, and did so. As one of the witnesses for the plaintiff testified, 'He,' Silas Bowman, 'told me that there was not much work on the ranch and he wanted to have Lawrence go out and work that he might understand the value of money.' That the lessons taught by the foster parent found lodgment in a fruitful field is shown by the fact that in 1907 the plaintiff had in live stock almost one-half the number owned by his foster parent, and land in proportion. So does it appear that, in every venture of the plaintiff to better his condition, he had the active co-operation of Silas. No thought of self-aggrandizement possessed Silas Bowman when the welfare of the plaintiff was concerned, and the court can only marvel that no provision was made carrying out the expressed intention of Silas Bowman to provide well for his protégé. That the plaintiff, after his graduation from the grammar school, looked to his own emolument, there seems to be no doubt. The venture in well boring, the acquisition of stock and land, in which Silas Bowman had no interest, so indicates. The trip to Alaska was likewise taken to provide for the financial inter-

est of plaintiff solely. The work and services of plaintiff from the age of 7 years to 21 must have been of inconsiderable value as opposed by the return given him in the way of education, and comfort and nurture. And when we consider the fact that, during all of this time of minority, the plaintiff had the privilege of earning money for himself, we must conclude that the net value to Silas Bowman of the services of the plaintiff was small and was capable of estimation in dollars and cents. The value of the services of the plaintiff to his foster parent after majority was negligible. A careful perusal of the testimony fails to show any considerable service performed by the plaintiff for Silas Bowman after the trip to Alaska, while it does appear that Silas loaned to his foster child money and otherwise cared for him.

"If then the case at bar does not portray such a one (even viewed most strongly for plaintiff) as appeals to the conscience of a chancellor to award specific performance, it becomes unnecessary to declare upon the weight of evidence. But in passing it is not improper to say that evidence of the declaration of the plaintiff to the effect that he 'expected nothing from the estate of Silas,' and that 'he had no claim against it,' are inconsistent with the idea that a binding obligation had been assumed by Silas Bowman to leave all of his estate to the plaintiff. * * *

[3] "It follows from the views expressed that the plaintiff is not entitled to the remedy sought."

An examination and consideration of the record on appeal, under the claims made by appellant for a reversal, satisfies us that in the foregoing decision of the case after submission to him the trial judge stated all the material facts in evidence and correctly applied the law to them. It also fully answers the objections as to the sufficiency of the evidence to sustain the findings challenged and the further claim that the findings do not support the judgment. We are fully satisfied with the reasoning and conclusions of the trial court, and the opinion of the judge thereof embodying them is hereby adopted as the opinion of this court.

[4, 5] It will be observed that in writing the opinion, though reciting the facts, the court devotes but little discussion to the question whether the contract asserted by appellant to have been made with Silas Bowman was in fact made, the view of the court being that, even if such contract had been made, still the case presented by appellant was not, for the reasons given by the court and sanctioned by the authorities, of such a character as would warrant specific performance. After the filing of its opinion and when the court came to make findings, it found, however, that the contract asserted by appellant as having been entered into between himself and the deceased had not been made, and one of the claims of the appellant is that this finding is not supported by the evidence but is contrary thereto. While we think that there was sufficient evidence in the case warranting the court in making the finding it did, still whether that finding was or was not correctly made could not affect the judgment. The other findings made, with or without any finding on the issue of the making or nonmaking of the contract, support the judgment, and the rule is that, when there are sufficient findings on issues made in the case to support a judgment, it is immaterial that there is no finding, or an erroneous finding, on some other issue which, if made, or differently made, would not compel any different conclusion from that reached by the findings which were actually made.

[6] One point on a ruling as to evidence is made. The court refused to reopen the case on the motion of counsel for appellant in order that he might introduce in evidence a deed from one Bent to appellant, made October 4, 1899. A witness for respondent (Elmer Hill) had testified that he heard Silas Bowman, in July or August, 1898, or 1899, say to plaintiff, "You had better move to your own place," and the averred purpose of the intended offer of the deed by plaintiff was to contradict this witness by showing that appellant had not at the dates mentioned by the witness Hill any place of his own to move to, not having acquired the deed from Bent. As the witness Hill was not at all confident as to the exactness of the dates given by him, this evidence would have been of doubtful efficacy as impeaching testimony. The matter of these dates did not affect the substance of the statement made by Bowman, and, even if it was error to have refused it, it was too trivial to warrant a reversal of the judgment.

The judgment appealed from is affirmed.

We concur: MELVIN, J.; WILBUR, J.

---

178 Cal. 776

MARYSVILLE WOOLEN MILLS v. SMITH, Marshal, et al. (Sac. 2574.)

(Supreme Court of California. Sept. 5, 1918. Rehearing Denied Oct. 3, 1918.)

1. TAXATION ⊂⊃811—SALE FOR TAXES—DETERMINATION OF INVALIDITY.

In action to remove cloud on title through issuance of certificate of sale at delinquent tax sale, finding that plaintiff was owner of property involved was necessarily determination that tax sale to defendant was void.

2. STATUTES ⊂⊃219—EXECUTIVE CONSTRUCTION—ACTION UNDER REPEALED LAW—DISTURBANCE OF TITLES BY COURT.

Where city for nearly 50 years has acted in all tax proceedings on theory that repealed tax law was in force, court will be particularly loath to disturb such condition, and unsettle titles, and will do so only when a clear necessity for deciding the point shall arise.

3. TAXATION ⊂⊃656—SALE BEFORE DELINQUENCY—VOID CHARACTER.

A sale for taxes, made December 4th, before the taxes were delinquent, on the first Monday in January following, was void.

4. MUNICIPAL CORPORATIONS ⊂⊃982—CHANGE IN TAX LAWS—ORDINANCES—BURDEN OF PROOF.

In action to remove cloud on title through issuance of certificate of sale at delinquent tax sale, burden was not on plaintiff to prove or-

dinances of city changing dates of assessments, delinquencies, sales, etc.; it being defendant purchaser's duty to show general law which governed had been modified, the sale being otherwise void.

5. EVIDENCE ⊂⊃32—JUDICIAL NOTICE—MUNICIPAL ORDINANCES.

Supreme Court cannot take judicial notice of tax ordinances of city in action to remove cloud on title, through issuance of certificate of sale in delinquent tax sale, originating in superior court.

6. TAXATION ⊂⊃800(1)—VOID SALE FOR TAXES—TENDER TO PURCHASER.

Sale for delinquent taxes and certificate of sale issued to purchaser being void, owner of property, before bringing action to remove cloud on title, was not required to make any tender to purchaser at all; latter being entitled only to reimbursement for moneys spent in purchasing and for subsequent taxes and interest.

7. INTEREST ⊂⊃50—SUSPENSION—TENDER.

In action to remove cloud on title through certificate of sale for delinquent taxes, purchaser having refused to take more than he was entitled to when plaintiff tendered it, and forced him to sue, trial court's denial to purchaser of interest on purchase price of property and subsequent taxes paid will not be disturbed.

Department 2. Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by the Marysville Woolen Mills against Chester A. Smith, Marshal and ex officio Tax Collector of the City of Marysville, and Waldo S. Johnson. From the decree, and an order denying his motion for new trial, defendant Johnson appeals. Judgment and order affirmed.

Evan J. Hughes, of Sacramento, W. E. Davies, of Marysville, and Downey, Pullen & Downey, of Sacramento, for appellant. W. H. Carlin, of Marysville, for respondent.

LORIGAN, J. Two other cases on appeal—California Midland Ry. Co. v. Chester A. Smith, Marshal, etc., et al., Sac. No. 2576, and John Martin v. Chester A. Smith, Marshal, etc., et al. Sac. No. 2575, 175 Pac. 16, involve the same controlling points as are embraced in this appeal and by stipulation of all parties are submitted to abide the decision on the appeal under present consideration.

This action was brought to remove a cloud upon the title of the plaintiff to certain property in Yuba county through the issuance of a certificate of sale to defendant Johnson at a delinquent tax sale and to enjoin the issuance of a tax deed on the certificate. The court entered a decree declaring the tax sale and tax certificate issued thereon invalid, enjoined the issuance of a tax deed, but required that plaintiff pay to defendant Johnson the sum of $641.91, the amount due for taxes and paid by him for the property at the tax sale. The defendant Johnson appeals from this decree and from an order denying his motion for a new trial.

[1] The only attack made on this appeal is on the findings. The court found that plaintiff was the owner of the real and personal property involved in the tax sale which, it may be here remarked, was necessarily a determination that the tax sale to appellant was void. It further found, among other proceedings eventuating in the sale of the property for delinquent taxes, that the tax collector of the city of Marysville published in a specified newspaper a notice stating that taxes fixed and levied against the property of the plaintiff would be delinquent on October 3, 1914; that thereafter, said taxes not having been paid, said tax collector published, for the proper time required by law, a delinquent tax notice which provided for the sale of the property on the 3d of December, 1914; that at no time, however, did said tax collector make, or file with the city clerk of the city of Marysville, or with any other person, or in any office, or at all, any copy of the publication aforesaid, or any affidavit attached thereto, or any proof of any such publication; that said sale was advertised and noticed for December 3, 1914, but on said last date was postponed till the 4th day of December, 1914; that said tax collector neither gave, or caused to be given, any notice of the said postponement of sale; that on December 4th a sale was had and the property herein was sold to defendant Johnson and a certificate of sale issued to him; that on December 2, 1915, the plaintiff, through its attorneys, offered in writing to pay defendant Johnson the amount of money paid by him upon the sale of the property, together with interest thereon, and 50 per cent. additional for the purpose of redeeming from said tax sale and offered to pay any other sum that defendant Johnson might claim was necessary for a redemption, but that said Johnson refused to accept any sum except upon payment by plaintiff to him of the sum of $11,000, being the value of certain personal property assessed against the plaintiff in addition to the assessment of the real estate and which purported to have been sold with the real property to said defendant Johnson at the tax sale above mentioned. Upon the refusal of the defendant Johnson to accept the redemption money tendered, plaintiff brought this action with the result above stated.

At the threshold of this appeal, we are asked to determine whether the law governing taxation and tax proceedings as it existed in 1876 applies and governs with reference to this tax sale made in 1914, or whether the general law on the subject of taxation and a sale for delinquent taxes existing when the sale was made in 1914 is to prevail. This question is sought to be presented under the charter of the city of Marysville. It appears that the city of Marysville operates under a charter granted by a special act of the Legislature in 1876 and which expressly

provided that the city should be organized with the powers and under the provisions of title 3 of the Political Code of this state. Section 4390, part of title 3 provides, among other things that:

"The mode of making out the list and of certifying the value of property, and of collecting all taxes is the same as prescribed in this Code for assessing and collecting the state taxes."

In harmony with this section, the city of Marysville has been levying and collecting its taxes and making delinquent sales and certificates and deeds thereon to purchasers under the tax law as it stood in 1876 unaffected by any change, alteration, repeal, or amendment to which the law as it then stood has been subjected during the course of these many years. The tax law as it then stood has been treated as incorporated in and as an inflexible part of the charter, and under the provisions of the tax law as it existed in 1876 the taxes, sale, and tax certificate in question here were levied and made, and appellant Johnson defends his title acquired at the delinquent sale on the ground that it was made in full compliance with the tax law governing under the charter. On the part of respondent it is asserted that it was not the intention of the charter provision that the city should be bound inflexibly by the taxation law of 1876, but that it was subject to the changes of the Code and the repeal, modification, or amendment of the tax law, and that the collection and levy of taxes and the proceedings under which the sale here in question was made and the sale itself should have been had under the provisions of the general taxation law as it existed in 1914.

[2] As it is conceded that the city of Marysville for nearly half a century has been proceeding on the theory that the tax law of 1876 bound her in all tax proceedings, and under it has been making her assessments, levying her taxes, selling at delinquent tax sales, and making deeds to purchasers thereat, a court would be particularly loath to disturb this condition of affairs and unsettle titles based on tax sales heretofore made and would only do so when a clear necessity for deciding the point should arise, and we do not here find the existence of any such necessity. It is conceded if the tax law as it existed in 1914 applied to the city of Marysville, notwithstanding the charter provision, that the tax sale here involved was void because there is no pretense that any of the proceedings for taxation or collection of taxes or sales for delinquencies thereon were made under it. As to the tax law and procedure existing in 1876, which for present purposes we will assume governed as to the sale here made, we are satisfied that the tax sale and the certificate thereunder here in question were void for failure to comply with the law.

[3-5] It is provided by section 3746 of the Political Code as it stood in 1876 and as incorporated into the charter of Marysville that "taxes shall become delinquent on the first Monday in January next thereafter," which, of course, as applied to the tax sale in question here was the first Monday in January, 1915. The sale, however, as we have pointed out, was made to the defendant Johnson on December 4, 1914, before the taxes were delinquent, and necessarily the sale was void. It is insisted by the appellant that, while no change was made in the method or mode provided by the state law of taxation, by various ordinances of the city of Marysville changes with reference to the dates of assessments, delinquencies, sales, and other matters provided for in the tax law as laid down in the Political Code in 1876, were made, among others, one with reference to the date, when the taxes should become delinquent, and that under said changes the sale in question made here on December 4, 1914, was authorized. Assuming that the city of Marysville had the authority to change the state law with reference to taxation to the extent contended for by appellant, the trouble in this case is that there is no evidence that this was in fact done. Appellant likewise insists that the burden was upon the respondent to make proof of such ordinances and relies upon the presumption that official duty has been regularly performed and that the law has been obeyed (Code Civ. Proc. §§ 1981, 1963, and section 1533, subd. 6) in aid of the validity of the tax certificate. The burden was not upon the plaintiff to make proof of such ordinances. It was the duty of the appellant to show that the general law which governed upon the subject had been modified or changed. Nor in this case can the presumption which the appellant attempts to invoke of duty regularly performed and the law obeyed have any force. The general law required that the tax sale be made on the first Monday in January, 1915. The certificate of the tax sale produced in evidence, together with the testimony of the officer who made the sale, which was the only evidence on the subject, show that the sale was actually made on the 4th of December, 1914, and at a time when under the law the taxes were not yet delinquent. Notwithstanding the absence of anything in the record with reference to the ordinances claimed to have been passed by appellant, we are asked to take judicial notice of the fact that such ordinances were passed. But we cannot take judicial notice of the ordinances of the city of Marysville in a proceeding originating in the superior court. If, in fact, there were ordinances of the city of Marysville existing which modified the provisions of the general law with reference to tax sales which were expressly incorporated into the charter of the city of Marysville, the burden of proof to show their existence was upon the appellant. Metteer v. Smith, 156 Cal. 574, 575, 105

Pac. 735; Tilton v. Russek, 171 Cal. 731, 735, 154 Pac. 860.

Without consideration of the other attacks made upon the validity of the tax sale, we are satisfied that this plain disregard of section 3746 of the Political Code as to the date upon which tax delinquency occurs vitiated all the subsequent proceedings, and that the tax sale and certificate made and issued before there was any tax delinquency in law rendered them void.

[6, 7] Appellant contends that the tender made by respondent was insufficient; but, as the tax sale and certificate were void, plaintiff was not required to make any tender to defendant at all. All defendant was entitled to was to be reimbursed for the moneys he had paid out in purchasing the property at the sale when an action was brought by the owner to set aside the tax certificate and deed. He complains also because the court did not allow him, in addition to the amount paid as the actual price, $641.91, interest on that amount, and also 50 per cent. penalty added thereto. But the penalty could only be collected upon redemption from a valid sale. Here defendant was offered that amount in an effort to redeem, although the tax sale was void; but defendant refused to accept it. When plaintiff was compelled to sue to remove the cloud upon his title, the defendant, as a matter of equity, was only entitled to be reimbursed for what he had actually paid out as the purchase price and whatever subsequent taxes he had paid and interest thereon. Holland v. Hotchkiss, 162 Cal. 366, 123 Pac. 258, L. R. A. 1915C, 492. What he had actually paid out was $641.91. Ordinarily the purchaser would be entitled to interest on that amount, and the judgment here might be modified by ordering it allowed by the court below; but we do not think that under the circumstances disclosed here we will disturb the judgment even by a modification. The trial court doubtless took the view that as the defendant refused to take more than he was entitled to when plaintiff offered to redeem from the illegal sale and put him to the trouble, annoyance, and expense of bringing an action, no rule of equity would be violated by at least refusing him interest.

The judgment and order appealed from are affirmed.

We concur: MELVIN, J.; WILBUR, J.

---

178 Cal. 812

## CALIFORNIA MIDLAND RY. CO. v. SMITH, Marshal, et al.
## MARTIN v. SAME.

(Sac. 2575, 2576.)

(Supreme Court of California. Sept. 5, 1918.)

STIPULATIONS ⊂=14(5)—ABIDING RESULT OF OTHER CASE.

Where parties to appeal stipulate decision in companion case shall control and judgment and order involved in such case are affirmed, judgment and orders involved in appeal will be affirmed.

Department 2. Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Actions by the California Midland Railway Company and by John Martin against Chester A. Smith, Marshal and ex officio Tax Collector of the City of Marysville, and Waldo S. Johnson. From judgments for plaintiffs, and orders denying his motions for new trial, defendant Johnson appeals. Affirmed.

Downey, Pullen & Downey, of Sacramento, and W. E. Davies, of Marysville, for appellant. W. H. Carlin, of Marysville, for respondent.

PER CURIAM. By stipulation of the parties in the above two causes, it is agreed that the decision in the case of Marysville Woolen Mills, Plaintiff and Respondent, v. Chester A. Smith, Marshal and ex officio Tax Collector of the City of Marysville and Waldo S. Johnson, Defendants and Appellant, Sac. No. 2574, 175 Pac. 13, shall govern and control the disposition of said two appeals; and, the judgment and order of the trial court in said latter case having this day been affirmed, it is hereby ordered that the judgment and the orders denying motions for a new trial, given and made by the trial court in each of the above-entitled actions, be and the same are hereby affirmed.

---

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

37 Cal. App. 811

PEOPLE v. TINNEY et al. (Cr. 605.)

(District Court of Appeal, Second District, California. July 29, 1918.)

INTOXICATING LIQUORS ⟸143 — KEEPING PLACE—CLUB.

Where members of Loyal Order of Moose in no-license territory, desiring liquor, notified steward, who ordered from wholesaler, liquor being shipped to and charged to club, and upon arrival distributed among members and kept either in locker used in common or in refrigerator indiscriminately until served by steward, the club, and its chairman of house committee and steward as its agents, were acting in violation of Wylie Local Option Act, § 14, prohibiting keeping, etc., of place within no-license territory where alcoholic liquor is sold, served, or distributed.

Appeal from Superior Court, Imperial County; Z. B. West, Judge.

George A. Tinney and R. F. McCombs were convicted of violating Wylie Local Option Act, § 14, and they appeal. Affirmed.

Ault & Chase (Dan V. Noland, of El Centro, of counsel), for appellants. U. S. Webb, Atty. Gen., Joseph L. Lewinsohn, Deputy Atty. Gen., and Jerry H. Powell, of Los Angeles, for the People.

SHAW, J. Defendants, alleged to be acting as agents of the Loyal Order of Moose in the city of Calexico, were convicted of the violation of section 14 of what is known as the "Wylie Local Option Act," which provides that:

"It shall be unlawful for any person, corporation, firm, company, association or club, within any no-license territory, to keep, conduct or establish, as principal or agent, any place where alcoholic liquors are sold, served or distributed, or are kept for the purpose of sale or distribution, except as provided in section 16 hereof. * * *" St. 1911, p. 599.

It appears without contradiction from the evidence that in the city of Calexico, which was "no-license territory," there existed a lodge of a fraternal order known as Loyal Order of Moose, No. 1623, which, for the use of its members, maintained in the rooms of a building separate from the meeting place of the lodge certain clubrooms, which were in the immediate charge of what was known as a house committee of which Tinney, the dictator of the lodge, was chairman, and wherein McCombs was employed as custodian or steward. In the rear of one of the rooms there was kept a long counter or bar, back of which was another bar upon which, on the night defendants were arrested, were numerous open bottles of liquor of various kinds, and hanging from the bar a government liquor license issued to the lodge. In the rooms at the time were found some seven barrels of whisky, wine, and beer. The evidence further conclusively shows that it was the practice for members desiring liquor to notify McCombs, who would order the same from some wholesale liquor house, which shipped it to the lodge, making a charge therefor, not against the member for whom it is claimed it was purchased, but against the lodge, which paid the seller therefor. Having thus purchased the liquor, it was, upon delivery to the lodge at these clubrooms, distributed and served to the members, according to the kind and quantity ordered, and from whom payment therefor was collected by the lodge in accordance with statements rendered therefor. As desired, the beverage so acquired by a member, and which he kept either in a locker used in common with other members, or placed indiscriminately with that of others in a refrigerator for cooling, was served to him by McCombs who, as custodian of the rooms, was paid a salary for his services by the lodge.

The contention of defendants is that such liquors as those served did not belong to the lodge, nor to defendants, or either of them, but that they were purchased and owned by the members of the lodge, who kept lockers and receptacles wherein the same were placed for the individual use of members who had purchased the same, and since, as held in People v. Winkler, 174 Cal. 133, 162 Pac. 109, the statute does not prohibit one in dry territory from purchasing intoxicating liquors outside of such territory and bringing them within such no-license territory for his own consumption, it was likewise permissible for the individual members of the lodge to employ the lodge or defendants as their agents to make such purchase and delivery, serve and distribute the liquors to them at the clubrooms. So claiming, they contend that the court erred in refusing to instruct the jury to the effect that they should acquit defendants if they found that in the purchase and delivery of such liquors they acted as agents of the owners thereof who used it on the premises.

The prosecution in the Winkler Case was under section 13 of the act, which makes it unlawful to sell, furnish, distribute, or give away, within the boundaries of no-license territory, any alcoholic liquors, except in certain cases. The prosecution here had was under section 14 of the act, which makes it an offense to keep, conduct, or establish a place where alcoholic liquors are sold, served, or distributed, except as provided for in section 16 of the act, under which one is permitted to serve liquors at his own home to members of his family or to guests as an act of hospitality. No claim, however, is made that these clubrooms constituted the home of the members of the lodge. Moreover, in the Winkler Case, wherein it was held that an agent was not guilty of a violation of the law in acting as the agent of another in the purchase of alcoholic liquors in license territory and bringing them within no-license territory, the transaction was had with the principal himself, who was the pur-

chaser of the beverage in no-license territory. Not so, however, in this case, since it appears that the transaction, wherein the liquors were acquired outside of the city of Calexico was one had between the seller and the lodge, which made the purchase and thereafter sold the liquors to members of the lodge, in kind and quantity as ordered.

The fact that such sales were by the bottle or barrel makes it none the less an offense than if it had been sold by the drink. There was no privity of contract between the member acquiring liquor and the wholesale house in license territory which sold it to the lodge. Such house did not look to the member for payment, and there was no privity of contract between the two. The members looked to the lodge in supplying them with liquor, and the lodge, having received orders therefor, purchased such liquor from outside territory, and sold, distributed, and served it to the members, thus bringing itself and defendants as its agents within the terms of section 14 of the statute, which prohibits such business. Clearly, this clubroom was a place established and conducted by defendants as agents of the lodge for the sale, distribution, and service of alcoholic liquors. The entire scheme was a subterfuge, calculated to evade the plain provisions of the law, and for this court to give countenance to the practice concededly carried on would nullify the law, both in letter and spirit.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

---

38 Cal. App. 1

NELLIGAN et al. v. KNUTSEN. (Civ. 1813.)

(District Court of Appeal, Third District, California. July 29, 1918. Rehearing Denied Aug. 29, 1918; Denied by Supreme Court Sept. 27, 1918.)

1. SALES ⊂⊃417—BUYERS' ACTION—IMPOSSIBILITY OF PERFORMANCE—SUFFICIENCY OF EVIDENCE.

In buyers' action for breach of contract to sell white Egyptian corn, evidence *held* insufficient to show seller was prevented from fulfilling his contract by the destruction of the corn contracted to be delivered.

2. SALES ⊂⊃172 — AGREEMENT TO SELL — IMPOSSIBILITY OF PERFORMANCE—LIABILITY OF SELLER.

Where seller made unconditional agreement to sell specified amount of corn of certain grade, expecting to procure the corn from certain growers, the impossibility of obtaining the corn from such source will not excuse nonperformance.

3. SALES ⊂⊃179(4)—AGREEMENT TO SELL—ACCEPTANCE OF INFERIOR GRADE—WAIVER.

Where seller agreed to sell 4,500 sacks of No. 1 white Egyptian corn, buyers' acceptance of corn of inferior quality constituted a waiver of the defects in the quality.

4. SALES ⊂⊃417 — BUYERS' ACTION FOR BREACH OF CONTRACT—SUFFICIENCY OF EVIDENCE.

In buyers' action for damages for failure to deliver, evidence *held* to sustain verdict of $850 for buyers.

Appeal from Superior Court, Stanislaus County; W. H. Langdon, Judge.

Action by G. Nelligan and M. F. Nelligan, a copartnership, doing business under the firm name of Nelligan & Son, against K. Knutsen. Judgment for plaintiffs, and defendant appeals. Affirmed.

W. N. Graybiel, of Turlock, and E. H. Zion, of Modesto, for appellant. R. R. Fowler, of Turlock, and James L. Crittenden, of San Francisco, for respondents.

HART, J. The complaint alleges: That plaintiffs are partners under the firm name and style of Nelligan & Son, doing business in the city of Santa Rosa, and that defendant is a resident of the county of Stanislaus; that on or about the 11th day of September, 1916, a written contract was entered into between the parties hereto by which plaintiffs agreed to purchase from defendant and defendant agreed to sell to plaintiffs 4,500 sacks of No. 1 white Egytian corn for the sum of $32.50 per ton; that, in accordance with said contract, defendant has delivered to plaintiffs 2,250 sacks, and that 2,250 sacks remain undelivered; that on or about February 19, 1917, plaintiffs demanded the delivery of said corn, but that defendant has failed and refused to deliver the same; that on said date, "and within such period thereafter as would have sufficed for the plaintiffs to purchase the same quantity of Egyptian corn of like quality and kind as specified in said contract, the plaintiffs would have been compelled to pay in the market where delivery of said Egyptian corn was to have been made according to the terms of said contract, to wit, on board cars at Turlock, Stanislaus county, the sum of $942 more than the price for which the defendant promised and agreed to sell said Egyptian corn to plaintiffs," and that on said day, or within a short time thereafter, plaintiffs could have obtained for said corn the sum of $1,305 "more than the price for which the defendant promised and agreed to sell said corn to plaintiffs." Judgment in the sum of $1,305 was prayed for.

The answer admits the execution of the contract and the delivery of 2,250 sacks of corn, but denies that defendant failed or refused to deliver to plaintiffs the balance of the corn; admits demand for the delivery of the balance; denies the allegation of the complaint that plaintiffs, had they purchased corn at Turlock, would have been compelled to pay $942 more than the price agreed upon in the contract, and denies that plaintiffs have sustained any loss. The answer then alleges that at the time of the execution of the contract referred to "plaintiffs understood that the corn which said defendant had agreed thereby to deliver to said plaintiffs was corn which was contracted to be delivered by several different persons who were

growers of the same; that without any fault or neglect on the part of this defendant" he has received from said growers only the 2,250 sacks which he delivered; that there was an agreement by plaintiffs that 600 sacks might be released from delivery by defendant; that before the corn contracted for was harvested there were heavy rainstorms, and "that nearly all Egyptian corn that could be obtained was colored and mouldy by reason of having been rained upon in the fall; that by reason of the rains aforesaid defendant could not obtain No. 1 white Egyptian corn as specified in said agreement"; that in December, 1916, defendant shipped a carload of corn to the plaintiffs, who rejected 100 sacks thereof as not being No. 1 white Egyptian corn; that plaintiffs refused to receive corn from defendant between the 12th of December, 1916, and the first of the year 1917, by reason of which "defendant was deprived and prevented while the price was low, namely, the price of $33 per ton, from buying corn outside of that which he had contracted from the growers."

The cause was tried before a jury, and, in accordance with their verdict, judgment was entered in favor of plaintiffs for $850. The appeal is by defendant from said judgment.

Appellant's position is thus stated in his brief:

"The appellant and defendant relies as a first defense on the fact that the appellant was prevented from fulfilling his contract by destruction of the thing to be delivered, and in connection with that the court erred in refusing to allow the defendant to introduce samples of the corn that was in dispute; and for a second defense the appellant contends that if he were not released by impossibility of performance that all the plaintiffs and respondents could recover would be the sum of fifty cents a ton, the difference between the contract price of $32.50 and that of $33, the price that corn of like quality to that which they had accepted could be bought for in the open market at Turlock."

Under the last contention it is claimed that $50.75 is the greatest amount of damages plaintiffs could recover, being 50 cents per ton for 141½ tons, or 2,250 sacks.

[1] 1. Appellant's contention that he was prevented from fulfilling his contract by reason of the destruction of the corn contracted to be delivered is not borne out by the facts as disclosed by the evidence. The contract was entered into in September, 1916, and thereafter there were heavy rains which caused some damage to the crop. Nevertheless, defendant was able to deliver to plaintiffs 2,250 sacks, which were accepted by plaintiffs as complying with the requirements of the contract as to quality and grade. The witness Brooks, manager of the Turlock Merchants' & Growers' Association, testified that "there was plenty of corn offered us to purchase at that time (between January 8 and February 26, 1917, upon which latter date the complaint in this action was filed), and we purchased considerable." He estimated that between the dates mentioned the association bought between 200 and 400 tons of Egyptian corn No. 1 in and about Turlock.

[2] The above state of facts brings the case within the rule, stated in Pearson v. McKinney, 160 Cal. 649, 654, 117 Pac. 919, 921:

"Where one makes an unqualified agreement to sell goods to be delivered at a fixed time, or on demand of the buyer within a stated period, and it is inherently possible to obtain the goods, the fact that the seller may have expected to manufacture the goods himself, or to procure them from a certain source, and has not been able to complete or obtain them when delivery is due, does not excuse performance. In that event, his contract being unconditional and unqualified, he must go into the market if necessary and obtain the goods, and he will be liable in damages for nondelivery."

Appellant cites the case of Mineral Land Park Co. v. Howard, 172 Cal. 289, 156 Pac. 458, L. R. A. 1916F, 1, wherein it was held, as stated in the syllabus:

"Where performance depends upon the existence of a given thing, and such existence was assumed as the basis of the agreement, performance is excused to the extent that the thing ceases to exist or turns out to be nonexistent."

But in the case at bar the jury was justified in finding that the corn, the subject of the agreement, had not ceased to exist, and that defendant could have performed his contract. See cases cited in 2 Bechem on Sales, § 1103.

It is contended by appellant that there was no "No. 1 white Egyptian corn" in or about Turlock during the time covered by the contract in question, and he refers to the testimony of H. G. Thompson, a grain broker, who stated that there was no No. 1 corn in the year 1916; that corn was rated as No. 1 1916 corn; "we had a grade this year that we called 'season's average' corn, and that is the term that we usually used, and you could not specify absolutely No. 1 or No. 2 corn; we simply had to describe it as best we could as being nearly season's average."

From a letter dated December 12, 1916, written by plaintiffs to defendant, it appeared that plaintiffs had rejected 100 sacks of corn from a carload shipment because it was "mouldy corn." It is further stated therein: "We would prefer to have less corn than the contract calls for than to have mouldy corn mixed with it." It appeared from the testimony of Morris F. Nelligan, one of the plaintiffs, that the mouldy corn complained of was not part of that covered by the contract in question, but was sold by defendant to plaintiffs for $40 per ton.

[3] Plaintiffs accepted all the corn offered them by defendant except the 100 sacks above referred to and those were rejected because of being mouldy. If, as stated by the witness Thompson, there was no No. 1 corn, but that corn "was rated as No. 1 1916 corn," and if corn so rated had been accepted by plaintiffs, it must be assumed that they would continue to accept a similar grade of corn from defendant until his contract was fulfilled. And if plaintiffs accepted corn that

was inferior in quality to that called for by the terms of the contract, such acceptance constituted a waiver of the defect in the quality. Jackson v. Porter Land & Water Co., 151 Cal. 32, 90 Pac. 122.

2. On cross-examination this question was asked of the witness Nelligan: "I want to ask you, Mr. Nelligan, what kind of corn you call that? (Showing Egyptian corn to witness.)" To this question an objection was interposed on the ground that it was immaterial, incompetent, and irrelevant, and any testimony that he might give in connection with the grade of the corn would be absolutely irrelevant and incompetent as to the merits of this action, providing he was willing to accept it. The court asked defendant's attorney what the purpose of the testimony was, to which he replied:

"The purpose, in the first place, is the contract calls for number one white Egyptian corn. * * * If this was number one white Egyptian corn which the contract calls for, then if that was what Mr. Knutsen, the defendant, agreed to sell him, then he can't compel Mr. Knutsen to sell to him some other grade. * * * In the next place, I want to know if he knows—he testified yesterday to certain grades of corn. If for no other purpose, I got a right to test him on that."

The objection was sustained and this ruling is complained of as erroneous.

As heretofore stated, plaintiffs had accepted the corn shipped to them by defendant, and it was immaterial whether or not it was No. 1 corn. The last shipment was made on December 21, 1916. On December 26th plaintiffs wrote defendant: "You can ship the other cars contract corn as soon as you want." On January 8, 1917, plaintiffs wrote a letter demanding the shipment of the balance of the corn, to which, on the 10th of January, defendant replied: "I have no more corn to deliver to you." An oral demand for the delivery of the corn was made by plaintiffs on February 17, 1917. The 100 sacks which were rejected because mouldy formed no part of the "contract corn," so plaintiffs had accepted all of the 2,250 sacks which had been delivered, and they requested defendant to ship the balance.

We hold to have been proper, under the indicated circumstances, the ruling sustaining the objection to the question as to what kind of corn the samples shown the witness were.

3. The contention that the only amount which plaintiffs could recover as damages for the breach of the contract was 50 cents per ton is equally devoid of merit.

The witness Nelligan testified that on January 8, 1917, the date when plaintiffs made a written demand upon defendant to fulfill his contract, the market price of corn of like quality as that contracted for and what plaintiffs would have had to pay for it was $41 per ton, and that they could have sold it for $47 or more within a short time after said date, or for a profit of $17 per ton. He said that plaintiffs, relying upon the promise of defendant to furnish corn, had entered into contracts to sell to third parties; that they fulfilled said contracts, purchasing the corn from the Turlock Merchants' & Growers' Association in different lots, in March, 1917; that for one lot they paid $45 per ton, for another $47, and for another $58.

H. Brooks, manager of the Turlock Merchants' & Growers' Association, called as a witness for plaintiffs, testified that from about Christmas, 1916, to February 1, 1917, there was a lull in the market: "The buyers ceased to buy; the bottom dropped out of the market." Witness paid to growers for corn which he bought during that time $33 per ton, and he stated that the market price to any one who desired to purchase from his concern was $40 per ton.

The witness H. G. Thompson, called on behalf of defendant, testified that during January, 1917, and until the 1st of February, the price of corn "was in the neighborhood of $33 and $34 per ton to the rancher, f. o. b. cars at Turlock." On cross-examination he stated that he bought corn about the 20th of December, 1916, at $33 per ton; that there was a general slump in the market during the winter; that the market began to rise about the 1st of February; "that from the 1st of February on it began to strengthen up, and in the middle of February we bought —about the 15th of February—we bought two thousand sacks at $37.50 a ton; * * * it was good No. 1 corn; that is, this year's." The witness stated that at the time the complaint was filed, February 26, 1917, the price was about $39.50.

[4] The verdict of the jury was for the sum of $850. They evidently agreed upon a price of $38.50 per ton, which for 141½ tons would amount to $849. Under the evidence above set out, we must hold that the verdict is sufficiently supported.

Appellant contends that the breach of the contract occurred between the 6th and the 10th days of January, 1917, on each of which dates he wrote letters to plaintiffs stating that he had no more corn to ship, and, as we have seen, plaintiffs wrote, on January 8th, demanding delivery of the balance of the corn. Respondent relies upon the oral demand, made upon February 17, 1917, as the date of the breach. This was a matter for the jury to determine, and, obviously, they selected the latter date as the correct one.

On the theory that the breach of the contract occurred on January 8, 1918, appellant claims that plaintiffs did not "exercise reasonable care and diligence to avoid loss or to minimize the resulting damage," it being contended that they could have purchased corn at and in the neighborhood of Turlock for $33 per ton. But as the jury found that the breach did not occur until February 17th,

the rule invoked does not apply, there being but nine days between that date and the date of the filing of the complaint.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

---

37 Cal. App. 799

PEOPLE v. HARTWELL. (Cr. 608.)

(District Court of Appeal, Second District, California. July 27, 1918.)

1. CRIMINAL LAW ⟸407(2)—EVIDENCE—ADMISSIONS—SILENCE OF ACCUSED.

Statements of third person, made to or in presence of accused and tending to connect him with commission of crime charged, are admissible not to prove facts stated, but to show what accused should have replied thereto; his failure to reply where statement called for repudiation constituting evidence of his admission of truth of statement.

2. CRIMINAL LAW ⟸407(2)—EVIDENCE—ADMISSIONS IN SILENCE — FAILURE TO DENY STATEMENTS.

In prosecution for lewd acts upon young child, under Pen. Code, § 288, the fact that accused remained mute when his wife stated that he had been "warned about this thing before," and that she did "not believe in this thing of ruining little girls," did not tend to prove his guilt; the statements in no way connecting him with offense charged.

3. CRIMINAL LAW ⟸409—EVIDENCE—ADMISSIONS.

In prosecution, under Pen. Code, § 288, for committing lewd acts upon young child, admission by accused that he had been warned is not, in the absence of evidence showing reason or occasion therefor, evidence tending to prove that he was of a lascivious nature or that he had theretofore indulged in such acts.

4. CRIMINAL LAW ⟸1169(1)—APPEAL—PREJUDICIAL ERROR.

In prosecution, under Pen. Code, § 288, for committing lewd acts upon young child, erroneous admission of testimony that accused's wife told accused that he had "been warned about this thing" and that she did "not believe in this thing of ruining little girls," where prosecutor laid great stress on the statements in his argument, *held* prejudicial error.

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

F. S. Hartwell was convicted of committing lewd or lascivious acts upon body of child under 14 years of age, and appeals from the judgment and an order denying new trial. Reversed.

L. E. Dadmun, of San Diego, for appellant. U. S. Webb, Atty. Gen., Joseph L. Lewinsohn, Deputy Atty. Gen., and Jerry H. Powell, of Los Angeles, for the People.

SHAW, J. Upon an information charging him therewith, defendant was convicted of the offense defined in section 288, Penal Code. On his appeal, prosecuted from the judgment and an order denying his motion for a new trial, numerous alleged errors are argued in support of a reversal, only one of which, however, we deem it necessary to consider.

In the course of the trial, the court, over defendant's objection, admitted in evidence the testimony of Officer Cooley as to what transpired on the occasion of a visit made by defendant to his home, as follows:

"We went into the house, * * * and his wife and daughter were there, and his daughter says: 'Well, you don't need to tell us what you are here for,' or words to that effect. 'We already know about it.' Then Mr. Hartwell said he had to have bail or bonds, and asked his wife if she would go on his bonds. She said she didn't know whether she would or not. And they talked back and forth there about the bonds, and she said: 'You have been warned about this thing before now; you have been warned time and time again, and I do not believe in this thing of ruining little girls. I don't know whether I want to go on your bonds or not, as all I have got is this place.' She said: 'I never had a dollar of my own and you never gave me a dollar.' In reply to which defendant said: 'This is not any place to discuss that.' He says to his daughter, 'You get your mother to sign the bonds and get me out of jail.'"

[1-3] In our opinion, the ruling constituted error. Statements of third parties made to or in the presence of one charged with the commission of a crime, and tending to connect him therewith, are admitted, not as of themselves constituting evidence of the facts stated, but to show what it is that calls for a reply; and where the statement is such that under the circumstances the accused, if innocent, should repudiate it, his remaining mute will constitute evidence of his admission of the truth of the statement made. People v. McCrea, 32 Cal. 98; People v. Philbon, 138 Cal. 530, 71 Pac. 650. Other than saying "This is not any place to discuss that," defendant made no reply to what his wife said. The word "that" might well be deemed to refer to her statement that she "never had a dollar of my own and you never gave me a dollar." Assuming, then, that she said, "You have been warned about this thing before now," and that she did not believe in ruining little girls, neither statement constituted an accusation of doing anything which defendant was called upon to deny, and assuming, further, that by remaining mute he be deemed to have assented to all that his wife said, it at most would constitute an admission on his part of the truth of his wife's expressed belief and the fact that he had been warned against committing offenses of a similar character to that with which he was charged. Since, however, the statements made by the wife, if true, did not purport to in any manner connect him with the offense, his assent thereto could not be deemed evidence tending to prove his guilt. Nor, conceding the competency of evidence of prior lascivious acts, as held in People v. Love, 29 Cal. App. 521, 157 Pac. 9, can the admission that he had been warned, in the absence of evidence showing the occasion or reason therefor, be deemed evidence tending in any degree to prove that he was of a

lascivious nature or that he had theretofore indulged in such acts. One entirely innocent of ever committing a crime might be warned against so doing; indeed, one of the chief purposes of education is the teaching of obedience to laws having their basis in the principles of morality which govern civilized people.

[4] By reason of the nature of the case, the evidence so erroneously received was not only highly prejudicial, but the effect thereof on the minds of the jurors was no doubt greatly accentuated by the argument of the district attorney, based, not upon the defendant's acts and conduct, but upon this hearsay testimony of his wife. In his discussion of the case he laid great stress upon the fact that, as shown by the statements of the wife and daughter, they knew that defendant was given to the commission of acts like that with which he was charged. True, an objection to this line of argument was sustained, after which the district attorney again directed the attention of the jury to the fact that the wife said, "I do not believe in ruining little girls; you have been warned of this time and time again," and closed by saying, "I am going to leave it to the jury to say what she meant."

Our conclusion renders it unnecessary to consider other alleged errors.

The judgment and order are reversed.

We concur: CONREY, P. J.; JAMES, J.

---

(38 Cal App. 13)

## PLACENTIA NAT. BANK v. LANDSBERG.

(Civ. 2582.)

(District Court of Appeal, Second District, California. July 30, 1918.)

1. BILLS AND NOTES ⟸488 — PLEADING—EXHIBITS—VARIANCE.
Allegation that defendant made, executed, and delivered a described note to the payee is not negatived by the mere fact that the signature in form was "M. L. [defendant], by N. L."

2. BILLS AND NOTES ⟸467(2)—ACTION—DELIVERY.
In action on promissory notes, allegations that payee indorsed to plaintiff, and that plaintiff at all times since had been and was then the owner and holder, were sufficient statements, as against demurrer that complaint did not state cause of action, that each note was delivered by payee to plaintiff.

3. BILLS AND NOTES ⟸488—ACTION—ALLEGATION OF INDORSEMENT.
In action on notes, fact that in each count copy of note as set forth carried series of names indorsed thereon, of which payee's was not last name, was not alone sufficient to overcome allegation that payee indorsed to plaintiff.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by the Placentia National Bank against Marcus Landsberg. From the judgment, defendant appeals. Affirmed.

Stewart, Weil & Turner, of Los Angeles, for appellant. Spencer Thorpe, of Los Angeles, for respondent.

CONREY, P. J. By his complaint, which is in four counts, the plaintiff brought this action to recover upon four promissory notes, each of which was made payable to J. M. Thomas or order, and signed "Marcus Landsberg, by Nathan Landsberg." The defendant appeals from the judgment.

It is claimed that for three reasons the complaint does not state a cause of action: (1) Because the copy of the note set out in each count shows that it was not executed by the defendant, as alleged in the complaint, but by Nathan Landsberg, and there is no allegation in the complaint that Nathan Landsberg had any authority to execute the note for or in the name of Marcus Landsberg. (2) Because there is no allegation in either of the four counts that the notes or either of them were ever delivered to the plaintiff. (3) Because the indorsements on each note set out in the complaint show that the same was not indorsed by J. M. Thomas, the payee, but, on the contrary, show in each instance the name of some person other than plaintiff following the name and indorsement of J. M. Thomas, and therefore that the indorsement made by J. M. Thomas must have been made to such other person, and not to plaintiff.

[1] The complaint in each count alleged that the defendant made, executed, and delivered to J. M. Thomas the described note. This is not negatived by the mere fact that the form of signature to the note was as above stated. Goetz v. Goldbaum, 4 Cal. Unrep. Cas. 749, 37 Pac. 646.

[2] The complaint in each count alleged that at a stated time the said J. M. Thomas "indorsed said note to plaintiff, and plaintiff at all times since has been and is now the owner and holder of said promissory note." We think that this was a sufficient statement that the note was delivered by Thomas to plaintiff. It is true that in a certain sense there may be an indorsement of a note prior to delivery thereof; but to construe the stated allegation as merely alleging an indorsement without delivery would be to ignore the meaning of the language used in the allegation as quoted above. There was no demurrer on grounds of uncertainty or ambiguity in the complaint. The sole point urged is that the complaint does not state a cause of action.

[3] It is true that in each count the copy of the note as set forth carries a series of names indorsed thereon, of which J. M. Thomas is not the last name. This is not alone sufficient to overcome the allegation that Thomas indorsed the note to plaintiff.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

---

37 Cal. App. 803

FIRTH (IMMEL, Intervener) v. BOHRMANN et al. (Civ. 2629.)

(District Court of Appeal, Second District, California. July 29, 1918.)

1. HIGHWAYS ⟸77(5)—VACATION—PROCEEDINGS—PETITION AND PARTIES.

On proceedings to vacate a road, the qualifications of the signers of the petition required by Pol. Code, § 2681, and the genuineness of the signatures, are to be determined by the board of supervisors, and in such determination the board acts judicially.

2. HIGHWAYS ⟸77(11)—VACATION—REVIEW—PRESUMPTIONS.

Where hearing of board of supervisors under Pol. Code, § 2688, on proceedings to vacate road, was regularly had upon a petition sufficient both in form and substance, the evidence will be presumed on collateral attack, to be ample to establish the truth of the board's adjudication as to qualifications of signers of petition and genuineness of signatures.

3. HIGHWAYS ⟸77(11) — VACATION — PROCEEDINGS—COLLATERAL ATTACK.

The adjudication of board of supervisors vacating a highway at hearing, under Pol. Code, § 2688, regularly had upon petition sufficient both in form and substance, can be vacated only in the manner and upon the grounds that would justify vacation of a court of record.

4. HIGHWAYS ⟸77(11) — VACATION — PROCEEDINGS—COLLATERAL ATTACK.

Board of supervisor's adjudication vacating a highway at a hearing, under Pol. Code, § 2688, regularly had upon petition sufficient in form and substance, cannot be vacated because of error in adjudication of question of fact not procured by fraud extrinsic or collateral to such question.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Emil Firth against Howard W. Bohrmann and others, in which Thomas Immel intervened. Judgment for defendants, and from order denying new trial plaintiff and intervener appeal. Reversed.

Sheldon Borden, George H. Moore, and Jas. B. Redd, all of Los Angeles, for appellants. A. J. Hill, County Counsel, and Chas. E. Haas, Deputy County Counsel, both of Los Angeles, for respondents.

SHAW, J. In this action plaintiff sought a judgment enjoining defendants from working, improving, and using a certain strip of land as and for a public road. Judgment went for defendants. Thereafter plaintiff's motion for a new trial was by the court denied, from which order he prosecutes this appeal.

It appears that in May, 1909, plaintiff, Firth, was the owner of a tract of land comprising over 400 acres which, under the designation of "Orange Cove," he subdivided into lots ranging from 5 to 18 acres each. Over this tract at said time there extended a meandering public road known as the Vinedale road. On May 19, 1909, there was presented to the board of supervisors a petition in due form and substance, signed by ten persons who therein represented themselves as being freeholders, and praying that said road be abandoned and vacated. After notice thereof published as provided in section 2688, Political Code, a hearing of the petition was had, followed by an order wherein, after reciting that evidence both oral and documentary was received touching all matters set forth in said petition, the board expressly found said petition to be true, and that "all said petitioners are freeholders in said Vinedale road district and taxable therein for road purposes; that they will be accommodated by the proposed vacation, and that at least two of said petitioners are residents in said road district"; and thereupon said board ordered that the petition be granted and that the highway, which was in said petition and said order described, be vacated and abandoned and the land contained therein restored to acreage. Thereafter, on August 5, 1912, the board of supervisors, by a purported order made and entered, rescinded the order made July 7, 1909, hereinbefore referred to, whereby said road was vacated and abandoned.

[1-4] In its answer defendant alleges that four of the ten persons whose signatures were attached to the petition for the vacation and abandonment of said highway were not freeholders; hence it is claimed the petition was insufficient to vest jurisdiction in the board of supervisors to make the order vacating said roadway, or, to use the language of counsel for defendant:

"The county of Los Angeles maintains that inasmuch as the petition was not signed by ten freeholders, as required by section 2681 of the Political Code, the board of supervisors did not obtain jurisdiction and that this order declaring the road vacated was without jurisdiction and void."

In support of this allegation contained in the complaint and in accordance with counsel's contention, the court, over plaintiff's objection, received evidence tending to show that some of the signers of the petition were not freeholders and would not in fact be accommodated by the closing of the road. That a board of supervisors may, of its own motion and without any petition therefor, order a public road abandoned, was held by this court in Swift v. Board of Supervisors, 16 Cal. App. 72, 116 Pac. 317, where it was said:

"That by subdivision 3 of section 2643, Political Code, it is made the duty of the board, of its own motion and without hearing evidence, to abandon by proper order such roads as are not necessary for the public use, and thus relieve the county of the expense and burden of their maintenance."

Conceding, however, that this statement was, as claimed by respondent, unnecessary in the decision of that case, and that the presentation of a petition signed by at least ten freeholders, two of whom shall be residents of the road district wherein the road proposed to be vacated is situated and taxable therein for road purposes, all as provided in section 2681, Political Code, is a necessary

prerequisite to the making of such an order, nevertheless the question as to the genuineness of the signatures and the qualifications of the signers of the petition is one to be determined by the board (Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35), and as to which question the order in this case recites that evidence was heard and upon which the board found such facts to be established. As to this question the board acted judicially. Waugh v. Chauncey, 13 Cal. 11. We must assume that at the hearing regularly had upon a petition sufficient both in form and substance the evidence was ample to establish the truth of the facts so found; hence it follows that such adjudication "can be vacated only in the manner and upon the grounds that would justify the vacation of a judgment rendered by a court of record, and a mere error in the adjudication of a question of fact, not procured by fraud extrinsic or collateral to such question, is not ground upon which it may be vacated, since, if it were, no adjudication of a question of fact would ever become final, so long as new evidence could be had, or a different conclusion be reached upon the same [or, as in this case, other] evidence." People v. Los Angeles, 133 Cal. 338, 65 Pac. 749. To permit a collateral attack in such cases as permitted herein by the trial court must inevitably lead to intolerable confusion. The abandonment of the road was not a proceeding which directly affected private property, and hence is distinguishable from those cases in proceedings to open, grade, or improve a street, as was that of Wilcox v. Engebretsen, 160 Cal. 288, 116 Pac. 750.

That the action of the board of supervisors in making the order vacating the road in question is not open to collateral attack is sustained by numerous decisions, among which see Swift v. Board of Supervisors, supra; Levee District v. Farmer, 101 Cal. 178, 35 Pac. 569, 23 L. R. A. 388; Belser v. Hoffschneider, 104 Cal. 455, 38 Pac. 312; County of Siskiyou v. Gamlich, 110 Cal. 94, 42 Pac. 468.

The order is reversed.

We concur: CONREY, P, J; JAMES, J.

---

37 Cal. App. 807

## PEOPLE v. DELGADO. (Cr. 607.)

(District Court of Appeal, Second District, California. July 29, 1918.)

1. INFANTS ⊜20—LEWD ACTS—SUFFICIENCY OF EVIDENCE.
In prosecution, under Pen. Code, § 288, for committing lewd acts upon and with body of child under 14 years of age, evidence *held* sufficient to warrant conclusion that accused was the person who committed the acts charged.

2. CRIMINAL LAW ⊜507(7)—EVIDENCE—"ACCOMPLICE."
In prosecution, under Pen. Code, § 288, for lascivious conduct with 8 year old girl, where accused was charged with placing the girl's hand upon his person, the girl was, if anything, a mere passive instrument, and was not an "accomplice," as defined by Pen. Code, § 1111, as amended in 1915.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

3. CRIMINAL LAW ⊜351(2)—LEWD ACTS — EVIDENCE—SUBSEQUENT ACTS.
Where defendant was charged with committing lewd acts upon and with body of 8 year old girl, in violation of Pen. Code, § 288, evidence of what occurred 2 weeks subsequent to date charged, when defendant came and sat down by and started talking with the girl, at which time he was arrested, *held* admissible.

4. CRIMINAL LAW ⊜1169(9)—HARMLESS ERROR—EXPERT TESTIMONY.
In prosecution for lascivious conduct with young girl, in violation of Pen. Code, § 288, the admission of expert testimony to prove that the placing of a girl's hand upon a man's person would tend to excite his passion and to a certain extent gratify his desire, *held* harmless, where jury under the evidence could not well have concluded that acts committed were other than those denounced by such statute.

5. CRIMINAL LAW ⊜939(1)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE.
Where accused's defense was that, on day crime was committed, he was not in the town in which it was committed, court did not abuse its discretion in denying new trial on ground of newly discovered evidence that accused had been seen a considerable distance from such town at time of crime, which evidence, in view of alibi defense, was not such as could not have been procured with reasonable diligence.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Louie Delgado was convicted of willfully and lewdly committing a lewd and lascivious act upon or with the body of a child under the age of 14 years, and he appeals from the judgment of imprisonment and from an order denying his motion for new trial. Affirmed.

J. C. C. Russell, of Hanford, for appellant.
U. S. Webb, Atty. Gen., Joseph L. Lewinsohn, Deputy Atty. Gen., and Jerry H. Powell, of Los Angeles, for the People.

JAMES, J. Defendant, after conviction of the crime described in section 288 of the Penal Code, appeals from a judgment of imprisonment and an order denying his motion for a new trial.

[1] The evidence offered on behalf of the prosecution was as to its most material effect furnished by a little girl eight years of age. She testified that on the 17th day of February, 1918, she entered a picture theater in the city of Hanford and took a seat well towards the front of the room; that in the seat next to her was the defendant, a young Mexican, whom she had never seen before to her knowledge; that defendant offered her 5 cents and told her to get some popcorn, but that she did not do this; that defendant offered her 10 cents, but did not present it to her; that he gave her another 10-cent piece and took that away, then "half a dollar or a dollar" and took that away; that when he proffered her the first 10 cents he said, "if

you will give me a kiss;" that thereafter he moved over toward her, placed his hand under her dress, and placed one of her hands in his lap under his hat and upon his private organs. The little girl further testified that she took her hand away "about a minute after," and that upon going out of the theater she told her mother, who in turn told the father. The evidence was further that on a Sunday, 2 weeks later, she went to the theater with her mother and father; the latter being determined to trap the man if he should again approach the child. The mother and father took seats toward the rear of the room, and the child went to the front and sat down. Soon the same man came and sat beside her and began to talk to her, whereupon an officer was called, who placed him under arrest. Throughout the early part of her testimony the little girl had referred in positive terms to the defendant as being the man who had committed the lewd act on the 17th day of February. Toward the conclusion of her testimony she was asked by the district attorney whether she was sure that the defendant was the same man who molested her on the 17th of February, and the following dialogue thereupon occurred:

"A. I am almost sure, because he offered me money. Q. Are you not positive? A. I am almost sure. Q. You are almost sure? A. Yes, sir. Q. Are you sure that it is the same man that came in the second time when they arrested him? A. I am almost sure. Q. Well, are you just as sure it was the same man they arrested on the second Sunday as you are that it was the same man you saw there on the 17th? A. I am almost sure. Q. Well, I want to find out how sure you are, Birdie. You say you are almost sure it was the same man both times; now are you just as sure that it was the same man the first time as you are that it was the same man the second time? A. Yes."

The latter answers given by the child form the basis for the argument made by appellant that the evidence was insufficient to warrant the conviction, in that there was no sufficient proof of the identity of the defendant. The cross-examination of the child developed no greater uncertainty as to the matter of her identification of the defendant than that appearing from the testimony quoted. We think that there was enough presented to the jury to warrant it in concluding that the defendant was the person who committed the lewd acts on the day charged; that is, there is no such want of evidence as to authorize this court to say that the verdict in that particular is unsupported.

[2, 3] The appellant further contends that, if any criminal act was committed, the child was an accomplice to it, and that her testimony should have been corroborated. It does not appear that the child was an active participant in the unlawful performance, but rather that she was, if anything, a mere passive instrument in the hands of the defendant. She was therefore not an accomplice. People v. Camp, 26 Cal. App. 385, 147 Pac. 95. Furthermore, as the Attorney General properly suggests, she could not have been an accomplice under the definition given in Pen. Code, § 1111, as amended in 1915. The amendment referred to is as follows:

"An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

See, also, People v. Beggs, 172 Pac. 152.

The decisions cited by appellant, which refer to the state of the law as it existed prior to the date of the amendment, are plainly not in point. The evidence of what occurred on the Sunday subsequent to the 17th of February and at the time when defendant's arrest occurred, was admissible under the rule now well settled. There are a number of decisions which give expression to that rule, only one of which need be cited: People v. Mathews, 139 Cal. 527, 73 Pac. 416.

[4] Appellant claims that it was prejudicial error for the court to permit a physician to testify in answer to a hypothetical question embodying the circumstances of the offense, and to give his opinion that the acts complained of would "tend to excite the passions and gratify to a certain extent the desires of the individual perpetrating such acts." The matter was probably not one calling for the expression of expert opinion; but, conceding error in admitting this testimony, we cannot see that any prejudice could result therefrom. Defendant denied in toto the commission of any such acts. The acts themselves, as described by the child (we have not attempted to relate all of the details in the foregoing), were in their very nature of the kind denounced by the statute; and under the evidence the jury could not well have concluded that they were other than of that variety.

The court instructed the jury fully and fairly, and we think no error is shown in the refusal to give certain instructions offered by the defendant and in modifying others. The errors claimed as affecting the instructions, in our opinion, do not warrant any particular discussion. It may be noted that the court was careful to advise the jury that the testimony of a child of tender years ought to be viewed with great care and caution and without bias and prejudice; further stating that the charge made against the defendant was one "easy to make, but hard to disprove."

[5] Appellant urged before the trial court that he was entitled to a new trial because of alleged newly discovered evidence. This evidence, as shown by several affidavits used on hearing of the motion, consisted in the statements of persons who deposed that they had seen the appellant, on the day and during the time that the alleged crime was committed, a considerable distance away from the town of Hanford. One of these deponents at least had talked with the appellant, who, he deposed, was driving a horse and wagon on a journey for firewood. The nature of this so-called newly discovered evidence was such as must have been within the reach of defendant at all times during his trial. His counsel, by the very nature of the defense

which he presented, was put upon inquiry as to the same facts. Defendant at the trial testified that he was not in the picture show house on the 17th of February, but that he was at work on a ranch. This contention of his would at once suggest the finding of other evidence in the nature of alibi proof and would ordinarily lead to an inquiry by his counsel as to what persons the defendant had been with, seen, or talked to at the important time. It cannot be said, we think, that the evidence claimed to have been newly discovered was such as could not have been procured with reasonable diligence at the trial. No abuse of discretion is therefore shown in denial of the motion.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

---

38 Cal. App. 8

## DONNATIN v. UNION HARDWARE & METAL CO. (Civ. 2574.)

(District Court of Appeal, Second District, California. July 30, 1918. Rehearing Denied by Supreme Court Sept. 27, 1918.)

1. TRIAL ⊜343—REVIEW — IMPLIED FINDINGS.
In action for negligence, where defendant claimed contributory negligence, verdict of $1 for plaintiff implied findings adverse to defendant upon the issue as to its own negligence and plaintiff's alleged contributory negligence.

2. APPEAL AND ERROR ⊜878(2)—REVIEW—QUESTIONS REVIEWABLE.
In action for negligence, where defendant claimed contributory negligence, verdict of $1 for plaintiff implied findings adverse to defendant upon the issue as to its own negligence and plaintiff's contributory negligence, which by its failure to appeal or ask for new trial must be deemed a final determination of such issues upon plaintiff's appeal from order denying motion to vacate verdict in so far as it fixed damage at $1.

3. NEW TRIAL ⊜75(4)—GROUNDS — INADEQUACY OF DAMAGES.
In personal injury action, inadequacy of damages awarded by jury may constitute ground for the granting of a new trial of the case on its merits.

4. NEW TRIAL ⊜9 — ERROR AS TO DISCONNECTED ISSUE.
Where there has been an erroneous trial of a litigated issue, which is separable from other issues in the trial of which there was no error, a new trial may be granted as to the specific issue affected by the error committed.

5. NEW TRIAL ⊜6—DISCRETION OF COURT.
Application for new trial is addressed to sound discretion of trial court.

6. APPEAL AND ERROR ⊜977(1)—REVIEW — DISCRETION OF COURT.
Trial court's ruling on application for new trial will not be disturbed by appellate court, unless abuse of discretion is affirmatively shown.

7. APPEAL AND ERROR ⊜933(1)—REVIEW—PRESUMPTION — ORDER REFUSING NEW TRIAL.
On appeal from order denying motion to vacate that part of verdict fixing amount of damage and for new trial of issue as to damage sustained, every intendment must be indulged in support of trial court's ruling.

8. NEW TRIAL ⊜75(4) — DISCRETION OF COURT—INADEQUACY OF DAMAGES.
In action for negligence, if court considered that evidence proved defendant not guilty of negligence, it did not abuse its discretion in denying plaintiff's motion for new trial upon ground of inadequacy of damages awarded, where there was verdict of $1 for plaintiff.

9. APPEAL AND ERROR ⊜907(2)—REVIEW — PRESUMPTIONS—EVIDENCE.
In action for negligence, where there was verdict of $1 for plaintiff, it will be assumed, on appeal from order denying plaintiff's motion for new trial of issue as to extent of damage sustained, in absence from record of evidence on question of defendant's negligence, that court considered that evidence did not prove defendant negligent.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Charles E. Donnatin against the Union Hardware & Metal Company. Verdict for plaintiff, and from an order denying a motion to set aside part of the verdict fixing damage at $1 and to grant a new trial of the issue as to damage sustained, plaintiff appeals. Affirmed.

Horace S. Wilson and Frank G. Tyrrell, both of Los Angeles, and W. W. Middlecoff, of Visalia, for appellant. John Murray Marshall and James S. Bennett, both of Los Angeles, for respondent.

SHAW, J. Plaintiff, alleging that he was injured as the result of defendant's negligent operation of an automobile, sued to recover damages for such injuries. The answer of defendant denied that it was guilty of negligence, alleged contributory negligence on the part of plaintiff, and denied that he suffered damage in any sum whatsoever. Upon the issues so joined the case was tried before a jury, which rendered a verdict in favor of plaintiff, wherein his damage was assessed at $1, and judgment was entered in accordance therewith.

In due time, and pursuant to notice given, plaintiff moved the court to set aside and vacate that part of the verdict only wherein the jury fixed the amount of his damage at $1 and grant him a new trial of the issue as to the damage sustained as the result of defendant's negligence, which motion was based upon the ground that the sum so fixed was grossly inadequate and that the evidence was insufficient to justify the verdict in so far as it was found that plaintiff's damage was $1 and no more. The motion was made upon the minutes of the court, and all the evidence touching the issue as to damage only, omitting therefrom evidence as to other issues, is embodied in a statement thereof settled and allowed by the court and presented in support of the appeal prosecuted by plaintiff from the order of court denying the motion so made by plaintiff.

[1, 2] The verdict of the jury in favor of plaintiff implied findings adverse to the de-

fendant upon the issue as to its own negligence and plaintiff's alleged contributory negligence. By its failure to appeal or ask for a new trial, these implied findings, if fairly made, must be deemed a final determination of such issues as fully as though defendant, after filing its answer, had stipulated to the facts so found. As to the amount of plaintiff's damage, the finding was likewise adverse to defendant, but plaintiff, being dissatisfied therewith, asks that as to this finding, or part of the verdict, it be set aside and a new trial granted as to such issue.

[3, 4] Assuming, as found by the jury, that defendant was legally liable therefor, the award of $1 made to plaintiff as damage for the injury sustained is, upon the evidence presented, grossly inadequate, and there is no room for controversy as to the fact that inadequacy of damage in a suit of this character may constitute ground for the granting of a new trial of the case on its merits. It may likewise be conceded, upon numerous authorities in this and other jurisdictions (see Duff v. Duff, 101 Cal. 4, 35 Pac. 437; San Diego Land, etc., Co. v. Neale, 78 Cal. 64, 20 Pac. 372, 3 L. R. A. 83; Lake v. Bender, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74; Simmons v. Fish, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D, 588; Doody v. Boston & M. R. R. Co., 77 N. H. 161, 89 Atl. 487, Ann. Cas. 1914C, 846), that where there has been an erroneous trial of a litigated issue, which is disconnected and separable from other issues, in the trial of which it is made to appear there was no error, a new trial may be granted as to the specific issue affected by the error committed. "The guiding principle is that, although a verdict ought not to stand which is tainted with illegality, there ought to be but one fair trial upon any issue, and that parties ought not to be compelled to try anew a question once disposed of by a decision against which no illegality can be shown." Simmons v. Fish, supra.

[5, 6] An application for a new trial in any case, however, is addressed to the sound discretion of the trial court, and its action thereon will not be disturbed by an appellate court, unless an abuse of such discretion is affirmatively shown. In the instant case the amount of $1 awarded plaintiff as damages for the injuries sustained, if the facts were such as to render defendant legally liable therefor, is, upon the evidence presented, so grossly absurd that it furnishes convincing proof that in order to reach an agreement the verdict was the result of unwarranted concessions of convictions made by each of two opposing factions of the jury, one of which conscientiously believed that defendant should prevail in the action, and the other equally conscientious in the opinion that plaintiff should recover damages commensurate with the injuries sustained. It is apparent, we think, that those jurors entertaining the opinion that defendant was not guilty of the negligence charged nevertheless agreed to surrender their views in consideration of other jurors consenting to the trifling award made.

As shown by the evidence, there was no contest as to the extent of plaintiff's injuries; hence the real subject of the trial was the question of defendant's alleged negligence, as to which there was no justifiable verdict. Nevertheless the verdict rendered against defendant was so insignificant in amount that, had it moved for a new trial, no action by any court, other than a denial of such motion, is conceivable. Hence it would work a grave injustice upon defendant to force it to a new trial of the issue as to damages only, with the issue as to liability, upon which no verdict other than in name had been rendered, forever closed against any inquiry. "An examination of all the evidence relating to the injury and its cause and the conduct of the plaintiff, as well as of defendant's agents, might show that it is so interwoven with that relating to damage that to fairly ascertain what is a just compensation the plaintiff should receive, if he is entitled to recover at all, can best be determined by trying the whole case before one judge and one jury instead of 'splitting it up' between different judges and different juries." Norfolk Southern R. Co. v. Ferebee, 238 U. S. 269, 35 Sup. Ct. 781, 59 L. Ed. 1303.

[7-9] Every intendment must be indulged in support of the ruling made by the trial court. If in its opinion the evidence, considered as a whole, was of a character to clearly establish the fact that defendant was not guilty of negligence, and hence not liable for any damage (and in the absence from the record of all evidence touching the question of defendant's negligence, we must so assume), then it constituted no abuse of discretion for the court to deny plaintiff's motion for a new trial, made upon the ground of inadequacy of the amount awarded.

The order is affirmed.

We concur: CONREY, P. J.; JAMES, J.

178 Cal. 802

PEOPLE v. NEGRETE. (Cr. 2172.)

(Supreme Court of California. Sept. 13, 1918.)

HOMICIDE ⊂=332(2)—APPEAL—AFFIRMANCE.

The evidence abundantly supporting the verdict, and the proceedings below having been in all respects fair and in conformity to law, conviction of murder in the first degree without recommendation will be sustained.

In Bank. Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Jose Negrete, indicted as Jesse Negrete, was convicted of murder in the first degree, and he appeals. Affirmed.

George E. Foote, of Sacramento, for appellant. U. S. Webb, Atty. Gen., for the People.

ANGELLOTTI, C. J. An indictment was found against defendant, under the name of Jesse Negrete, by the grand jury of Sacramento county, for the crime of murder, in the unlawful killing of one M. Castellano. A trial was had resulting in a verdict of guilty of murder in the first degree, without recommendation. We have here an appeal from the judgment pronounced upon such conviction.

No brief has been filed or oral argument made on behalf of the appellant on this appeal. The matter has been submitted on the record. In view of the fact that this is a capital case, we have carefully examined the record, for the purpose of ascertaining whether there was any substantial error in the proceedings in the superior court. We find that the evidence abundantly supports the verdict, and that the proceedings in the trial court were in all respects fair and in full conformity to the law. Nothing appears therein as to which any claim of substantial error could well be made.

The judgment is affirmed.

We concur: SHAW, J.; WILBUR, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.; RICHARDS, Judge pro tem.

178 Cal. 792

Ex parte TANNER. (Cr. 2199.)

(Supreme Court of California. Sept. 5, 1918.)

CRIMINAL LAW ⊂=1216(1)—TERM OF IMPRISONMENT—ESCAPED PRISONER—CONFINEMENT IN OTHER PRISON.

Where escaped prisoner of one state, upon completion of a term of imprisonment in another state for another crime, was held by authorities of latter state upon request of authorities of former state pending arrival of officers to take him back to former state, the 6 months and 18 days he was so held cannot be credited towards his uncompleted term.

In Bank. Application by Bert Tanner for a writ of habeas corpus against James A. Johnston, Warden of State Prison at San Quentin. Denied.

Bert Tanner, in pro. per.

PER CURIAM. The petition sufficiently shows that the term of imprisonment in the state prison, which petitioner was lawfully adjudged to suffer, has not expired, unless he is entitled to be credited with certain time during which he was confined in the Ohio state prison at Columbus. It appears that while imprisoned in the California state prison at San Quentin under the judgment, he was released on parole, but that his parole was subsequently revoked, and he was declared an escaped prisoner, because he had left the state of California without permission. Subsequently, upon conviction of a crime in Ohio, he was adjudged to a term of imprisonment in the Ohio state prison at Columbus. Upon the completion of his term of imprisonment there, he claims that he was held a prisoner in that institution for 6 months and 18 days further, upon request of the California authorities, waiting the arrival of California officers to take him back to the California state prison to there complete his term. It is this 6 months and 18 days that he claims should be taken into consideration as constituting imprisonment in partial satisfaction of the judgment of imprisonment in the California state prison. Assuming the situation to have been as alleged by him, it is clear that petitioner was not, while in the Ohio prison, imprisoned in execution of the California judgment, and that he cannot be credited with any portion of such time.

The application for a writ of habeas corpus is denied.

38 Cal. App. 36

PEOPLE v. EMRICK. (Cr. 600.)

(District Court of Appeal, Second District, California. Aug. 2, 1918.)

HOMICIDE ⊂=300(5) — SELF-DEFENSE — INSTRUCTIONS.

A charge in a homicide case *held* not misleading as to the right of defendant to use a weapon when attacked.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Harry L. Emrick was convicted of murder in the second degree, and he appeals. Affirmed.

Robert M. Clarke, of Los Angeles, and Martin H. Buck, of Santa Barbara, for appellant. U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn, Deputy Atty. Gen., for the People.

JAMES, J. The defendant appeals from a judgment directing his imprisonment after conviction of the crime of murder in the second degree. Appeal is also taken from an order denying a motion for a new trial.

At the time of the alleged homicide, defendant was residing at Carpinteria with his wife and stepchildren. On the day of the killing, defendant's wife had, in company

with the wife of Weiler, the deceased, visited the city of Santa Barbara, a short distance away. Defendant's wife returned home about 6:30 o'clock. Defendant, upon entering the house, engaged in an exchange of angry words with his wife and one of his stepsons, and left the house with a revolver in his possession. Some time thereafter Weiler and his wife came to the defendant's house, Weiler remaining for the most part upon the porch of the house, while his wife held some conversation with Mrs. Emrick. It reasonably appears from the testimony that defendant was somewhat under the influence of liquor at all of the times before mentioned. Later on, and before the shooting occurred, the defendant secured a bottle of whisky. Some of the witnesses testified that when he learned that Weiler was there he declared that he intended to kill him. He met Weiler near the main-traveled highway at about the front of the house, Weiler being accompanied by his wife. It also appears that a brother of defendant endeavored to pacify the man. It nowhere appears in the evidence that Weiler was armed, although the brother of the defendant testified that just before the shot was fired he thought he saw something passed by Weiler to the latter's wife, and that he notified the defendant of his belief in that regard. Little question can be made under the evidence but that defendant was at the time intoxicated and was withal threatening and boisterous. He displayed the gun, which he held in his hand, openly. There was some testimony that Weiler addressed him and asked him to put up the gun, telling him that, if he wanted to fight, he would fight him that way, but not with a gun. As between Mrs. Weiler and her husband, the former seems to have been more outspoken and active in the part which the Weilers took in the affair. Just before the shot was fired, by the testimony most favorable to the defendant, it would appear that Weiler pulled his wife back and advanced toward the defendant, whereupon the defendant shot and killed him. As we have before noted, we can find no testimony tending to show in the slightest degree that Weiler on the night in question was armed. After the shooting had occurred, blood was seen upon the back of the head and neck of the defendant, and it was claimed that this was caused by the attack of Mrs. Weiler, some of the witnesses expressing the view that defendant was so attacked by Mrs. Weiler before he fired the shot, while the evidence for the prosecution was to the effect that, after her husband had been shot to the ground, Mrs. Weiler made an attack with her hands and fists upon the defendant. No briefs were filed in support of this appeal, but at the oral argument our attention was called to a certain instruction given to the jury, as constituting the chief ground of error claimed. That instruction had to do with the right of self-defense. We may add to the statement of the testimony, that by some of the evidence for the defendant it was said that Mrs. Weiler, when she attacked the defendant, had something "shining" in her hand. The court, among other instructions, gave the following:

"The jury are instructed that, though the right to take life, or to use a deadly weapon, in self-defense, is unquestionable, yet one on whom another is making a mere assault with the fist, not with intent to kill, or to do great bodily harm, and who is not deceived as to its character, is not justified in taking life, or in using a deadly weapon in self-defense."

It is contended that by this instruction the court advised the jury, first, that an assault with the fist would in no case justify the use of a deadly weapon in repelling such assault, and, second, by the instruction it was intimated to the jury that the only assault made upon the defendant by the Weilers was one with the fist. We do not think that the objection to the instruction is well taken. We find upon examining the charge, in other of its statements, as the court gave it, that the jury was very fully advised as to the right of a person assaulted to repel the assault with force, even to the extent of using a deadly weapon. By instruction 49 the jury was told:

"To justify a homicide committed by one in resisting or repelling an assault or battery committed or attempted to be committed upon his person by another, it must appear to the slayer as a reasonable man that the danger threatened, if any, was immediate and sufficient to excite the fears of a reasonable person that he was in danger of receiving death or great bodily harm, and that he acted under the influence of such fears and not in a spirit of revenge; and it must further appear that the degree of resistance was not clearly disproportionate to the nature of the injury offered or given—that the force used in repelling or resisting the assault or battery was not clearly greater than necessary."

Under this instruction, the jury must plainly have understood that the court intended to advise it that even an assault or battery might, under proper circumstances, sufficiently defined, furnish justification for the use of a deadly weapon and the killing of the assailant. Instruction 51 enumerated specifically the various conditions under which homicide is justifiable. In our view of the case, the instructions were full and fair and not misleading.

No other alleged error is called to our attention which warrants particular discussion.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

38 Cal. App. 39

## DE LAVAL DAIRY SUPPLY CO. v. TALBOTT. (Civ. 1819.)

(District Court of Appeal, Third District, California. Aug. 2, 1918.)

1. APPEAL AND ERROR ⟸1039(1), 1050(1) — HARMLESS ERROR—DAMAGES.
Defendant failing to establish warranty and its breach, rulings adverse to him on pleadings and evidence relative to damages for its breach were harmless.

2. EVIDENCE ⟸397(2)—PAROL EVIDENCE — VARYING WRITING.
A written contract which by provision of Civ. Code, § 1625, supersedes all negotiations or stipulations concerning its matter, may not, when importing to be a complete expression of the agreement, be added to by parol.

3. APPEAL AND ERROR ⟸1011(1)—REVIEW—FINDINGS ON CONFLICTING EVIDENCE.
Findings of fact on conflicting evidence, there being sufficient substantial evidence to support them, cannot be disturbed.

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Action by the De Laval Dairy Supply Company against Fred Talbott. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Collier & McNamara, for appellant. C. J. Luttrell, of Yreka, for respondent.

CHIPMAN, P. J. This is an action upon two certain promissory notes, executed by defendant to plaintiff, both of which were dated June 30, 1914, one for $200, due December 15, 1914, and the other for $175, due March 15, 1915, and both recited that they were given on account of the purchase price of a certain 20 horse power Stickney gas engine sold and delivered by plaintiff to defendant. The notes also provided for reasonable attorney's fees in case of suit brought to enforce collection. Included in the action was a claim for goods furnished amounting to $8.48. In his answer defendant denied that said notes were made on June 30, 1914, but alleged that they were executed about October 18, 1914; admitted nonpayment. For a further defense "and by way of counterclaim," defendant alleged: That in May, 1913, he contracted with one Lloyd Collar, agent of plaintiff, to purchase a 20 horse power Stickney gas engine for the sum of $750. "That before the making of said sale the said defendant caused the said agent of plaintiff to visit the mine where defendant was working and where the said engine was to be installed." That defendant then and there informed said agent of all the facts surrounding the situation of said work and that all of these facts became known to plaintiff, who thereupon "agreed that it would furnish to defendant a Stickney gas engine that would develop 20 horse power and would not hammer, and the said plaintiff expressly warranted to said defendant that plaintiff would furnish and install such engine, and he expressly warranted that the same would work in said altitude and that the same would develop sufficient power to crush said ores and that the same would run on a small amount of oil, viz. one-half pint per horse power per hour, all of which this defendant relied upon." It is then alleged that said engine would not and did not do the work that plaintiff warranted it would do, setting forth in the answer with much particularity wherein the said engine failed to meet said warranty and mentioning several defective parts of said engine and its failure to develop more than 14 horse power; that, on many occasions before the bringing of this suit, defendant requested plaintiff "to fix the said engine so that it would work" and to make good its warranty, but plaintiff neglected and refused to do so; that in January, February, and June, 1914, defendant offered to return the said engine to plaintiff; that, "under the first agreement with plaintiff herein, he executed to the plaintiff two promissory notes on July 30, 1913, each for the sum of $375; and that the $200 note and the $175 note set out in plaintiff's complaint were given in October, 1914, for the second $375 note that defendant had executed to plaintiff in 1913." It is then alleged that defendant paid the first $375 note and interest; that he paid out for freight on said engine $86.38, and hauling the same to the defendant's mine, $45. Defendant also claims damages for various amounts, namely, $53 for storage of said engine; for lost time, $816; for the purchase and operating of a substitute engine and for certain necessary work, $1,850. These last two items went out of the answer on demurrer. The cause was tried by the court without a jury, and plaintiff had findings and judgment in its favor. Defendant appeals from the judgment and from the order denying his motion for a new trial.

The execution and delivery of the two promissory notes mentioned in the complaint are not disputed; they were, however, not delivered at the date they bore, but were delivered October 18, 1914, and the complaint was amended to conform to the evidence; and, as alleged by defendant in his answer, these two notes were given to take the place of the second of the notes for $375, falling due in December, 1914, as the evidence showed, for defendant's accommodation and to extend the time of payment. In point of fact, the defense to the action depended entirely upon defendant's maintaining his alleged counterclaim.

[1] Defendant calls attention to certain alleged errors of law committed by the court. It is claimed that it was error to sustain plaintiff's demurrer to that part of the answer alleging lost time, etc., by reason of the defect in the said engine by which he was precluded from making proof of his result-

ing damages; that it was error to sustain an objection to the question put to defendant as a witness, "Were you then compelled to go out and purchase another engine?" as the result of the failure of said engine to do its guaranteed work; that it was error to strike out defendant's testimony to the effect that the said engine "was not fit for the purpose of operating the machinery defendant then had on the mine." Obviously, if defendant failed to establish the alleged warranty and failed to prove, to the satisfaction of the court and by a preponderance of the evidence, that the said engine was defective in respect of the particulars pointed out by him and failed to show that the said engine would not and did not develop 20 horse power—in short, if he failed to establish the facts constituting his alleged counterclaim—the errors complained of became immaterial and nonprejudicial.

Defendant was permitted to testify and did testify to the representations by plaintiff's agent made to him when negotiating for the purchase of the said engine, which were, as he testified, substantially as set out in his answer. He testified also to the existence of the numerous defects in the engine as alleged in his answer; that by reason of these defects he was unable to keep the engine running; that he could not at any time make it develop more than 14 horse power; and that it was incapable of doing the work intended to be done by it which said agent guaranteed it would do. His testimony tended to show that the engine was worthless for his purposes and would not do his work; that he had frequently so informed plaintiff and requested plaintiff to take the engine away. Defendant's testimony was in some degree corroborated by that of other witnesses who had seen the engine in operation at different times. Neither defendant nor any of his corroborating witnesses was familiar with the construction and operation of gas engines, nor could either be said to have been in any sense experts or competent to express expert opinion upon the capacity or working condition of this engine. It appeared that defendant was attempting to run two stamps or ore crushing mills with this engine and doing the work without any assistance; that he had himself installed the mills, though not a millwright or familiar with machinery; that the foundations of these mills were not as secure as they should be, and the alignment of the shafts and the setting of other parts of the machinery were such as to waste power. Defendant admitted that he did not know what horse power was required efficiently to operate his mills; that he never had tested the horse power of the gas engine sold to him and did not know how to make such test; that he had never before attempted to run a gas engine, had never taken one apart or put one together. He testified:

"Q. And really, up to the time that you acquired this engine that is in controversy here, you really never knew anything about these gas engines, did you? A. No."

Such was the character of the testimony submitted in support of defendant's counterclaim.

It appeared from the evidence submitted by plaintiff in reply to defendant's evidence in support of his counterclaim: That, subsequently to the negotiation between defendant and plaintiff's agent to which defendant testified, defendant signed an order on plaintiff for a 20 horse power Stickney engine. This document contains the terms and conditions upon which the purchase and sale were made and sets forth specifically the warranty given by plaintiff in making the sale and under which defendant received and used the engine. This was that plaintiff "warrants that each Stickney or St. Paul engine purchased under this contract shall be tested before leaving the factory and shall have developed the full rated horse power. They also warrant the engine to be made of good material. Parts proving defective in workmanship and material (except batteries) will be replaced for the period of one year f. o. b. factory, free of charge." Among the conditions found in this contract are the following:

"In the event of any engine's alleged failure to fulfill the above warranty, written notice shall be given the De Laval Dairy Supply Company, stating wherein it failed to fulfill warranty, and the De Laval Dairy Supply Company reserves the right to send a man to test the same and if found defective in material or workmanship" the company will pay all expenses of the test, "but if the failure lies with the fault of operating the engine, then the purchaser agrees to pay such expense."

The contract contained the following provision:

"No agreements, stipulations or conditions, oral or otherwise, save those mentioned in this order, will be recognized, and it is agreed that the original order is held by the De Laval Dairy Supply Company, and shall govern settlement."

[2] The principle of law applicable is found in section 1625 of the Civil Code:

"The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

We had occasion to apply the rule in the somewhat similar case of J. I. Case Threshing Machine Co. v. Copren Bros., 32 Cal. App. 194, 162 Pac. 647, which may be consulted for a discussion of the question. The contract here involved by its terms "imports on its face to be a complete expression of the whole agreement—that is, contains such language as imports a complete legal obligation"—and, as was said in Harrison v. McCormick, 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469:

"It is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the

writing contains nothing on the particular one to which the parol evidence is directed."

Defendant at no time complied with the provision in the contract that he was to give notice in writing of any failure to fulfill the warranty, but he did notify plaintiff that the engine was not satisfactory and that he was unable to make it do his work. Plaintiff sent its expert engineer, Mr. Workman, and its general superintendent, Mr. Zirbel, to inspect the engine and report its condition. They arrived at defendant's mine on June 18, 1914. Mr. Workman testified that he had had 17 years' experience with gas engines and was perfectly familiar with their construction and operation. His qualification to testify knowingly was not disputed. Mr. Zirbel sufficiently qualified himself to testify as an expert. Approaching the mine they heard the engine "shooting" and apparently running all right, and on reaching the mine witness Workman testified that it was "running both the stamp and the Lane mill." He testified that defendant explained to him his troubles. Witness testified:

"We told him we were going to blank the head end of the piston connecting rod and the main base, and this would shove the piston closer to the compression head. * * * Q. What was that for? A. To take care of the altitude"—which, he explained, affected the air pressure.

They stayed there most of the day, the engine running all right, and on the next day made the adjustment proposed. He testified that they tested the power of the engine by the recognized method and at different speeds and found that "at the speed she was running we would develop 22 horse power." He weakened the springs of the carbureter—"the springs were a little too stiff for the high altitude. The igniter, we had no trouble with that whatever." They remained at Yreka five or six days, visiting the mine, 12 miles distant, every day, and, with the exception of a casting breaking which was replaced the next day, the engine worked all right without more than temporary interruption. Workman's testimony was that there was nothing the matter with the engine and that it developed the full 20 horse power guaranteed. His testimony was corroborated by that of witness Zirbel. Both of these witnesses testified to the insecure foundations of defendant's mills and the defective alignment of shafting, which, in their opinion, resulted in a loss of power. The evidence was that defendant had paid the first note of $375, which fell due in September, 1913. It appeared that he executed the two notes in question in October, 1914, in lieu of the second $375 note. It also appeared that on June 30, 1914, defendant wrote to plaintiff as follows:

"I have tryed the engine 5 day and am satisfied with it now so if you will send the old note to your attorney to Yrek I will go in about the 16 or 18 of July and will draw new note to be made in too payments Dec. 15, 1914, $200.00, March 15, 1915, $175.00. Yours truly, Fred Talbott."

These were the two notes which later, October 18, 1914, were signed by him and are now in suit.

[3] Without pursuing the evidence further, it is quite apparent that the court was justified in its findings and in its judgment. We are unable to discover any just ground upon which defendant can claim error. Having expressed his satisfaction with the engine in a letter to plaintiff after a trial, having paid one of the notes several months after the purchase without objection, and having executed the notes in question more than a year after he accepted the engine without objection, it would seem rather late now to urge a right to rescind or to claim want of consideration. Upon the essential facts the evidence was conflicting, and, as there was sufficient substantial evidence to support the findings, we cannot interfere with the court's decision.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

---

38 Cal. App. 46

## PEOPLE v. BROWN. (Cr. 789.)

(District Court of Appeal, First District, California. Aug. 15, 1918.)

1. CRIMINAL LAW ⟸274—CHANGING PLEA—DISCRETION OF COURT.
Where an old offender first pleaded "not guilty," then changed his plea to "guilty," speculating upon the anticipated clemency of the judge, court did not abuse its discretion in not granting a motion to be allowed to again change his plea to "not guilty."

2. CRIMINAL LAW ⟸1149—REVIEW—CHANGING PLEA—DISCRETION OF COURT.
A motion to change a plea of "guilty" to "not guilty" is addressed to the discretion of the court, and a denial will not be set aside except for abuse of discretion.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

James Brown was charged with having violated Pen. Code, § 476a. From the judgment and from an order denying his motion to change his plea, defendant appeals. Affirmed.

Fred W. Moore, Jr., of Oakland, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. This is an appeal from a judgment of conviction and from an order of the court denying defendant's motion to change his plea from "guilty" to "not guilty." The defendant was charged by information with having violated the provisions of section 476a of the Penal Code, a prior conviction of felony also being charged. Upon this information he was duly arraigned, and admitted the prior conviction, but entered a

plea of "not guilty" to the charge set forth in detail in the information; whereupon his case was set for trial. At the time set for the hearing, the defendant appeared in court, withdrew his plea of "not guilty," pleaded "guilty," and asked for probation. The court thereupon dismissed the charge of prior conviction, but denied the request for probation, and continued the case for four days for sentence. When the case was again called, the defendant, through new counsel, requested permission to withdraw his plea of "guilty" and to plead "not guilty." This request was denied. Whether such denial constituted error is the sole question presented for determination.

[1, 2] According to the showing made by the prosecution upon the hearing of this motion, the defendant had confessed that he was guilty of the offense charged, and it also appears from the record that he was an old offender; that in the matter of changing from "not guilty" to "guilty" he had not been imposed upon in any way, and realized fully the consequence of his act. It is clear that he speculated upon the anticipated clemency of the trial judge, and it was not until he learned that his expectation in this behalf would not be realized that he attempted to retract his plea of "guilty." The motion was addressed to the discretion of the court, and, under the circumstances of the case, it not being shown that there was any abuse of discretion, the action of the court must stand. People v. Dabner, 153 Cal. 398, 95 Pac. 880; People v. Miller, 114 Cal. 10, 45 Pac. 986; State v. Cimini, 53 Wash. 268, 101 Pac. 891.

The judgment and order are affirmed.

---

38 Cal. App. 15

## LAURENCE v. PACIFIC OIL & LEAD WORKS. (Civ. 2431.)

(District Court of Appeal, First District, California. July 31, 1918.)

1. CONTRACTS ⊜313(1)—BREACH—PLEADING IN PRIOR ACTION.
Plaintiff's cause of action for defendant's failure to deliver oil in violation of oral agreement immediately arose upon his categorical denial, in answer in prior action between same parties, of any right or interest of plaintiff in the oil.

2. LIMITATION OF ACTIONS ⊜201—FINDING AS TO STATUTE.
Where facts found show that action is barred by statute of limitations, it is not necessary that court find expressly as to statute.

3. APPEAL AND ERROR ⊜1170(10)—REVERSAL—TECHNICAL GROUNDS.
Appellate court will not reverse judgment for defendant on purely technical ground there was no finding as to statute of limitations, it being evident that trial court made its findings in response to issue of statute.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by C. R. Laurence against the Pacific Oil & Lead Works. From judgment for defendant, plaintiff appeals. Affirmed.

Powell & Dow, of San Francisco, for appellant. Pillsbury, Madison & Sutro and A. D. Plaw, all of San Francisco, for respondent.

PER CURIAM. The plaintiff brought this action to recover from the defendant damages for failure and refusal to deliver a certain quantity of oil in violation of an oral agreement. The answer, among other defenses, set up that the action was barred by subdivision 3 of section 338 of the Code of Civil Procedure, requiring an action for the taking, detaining, or injuring of goods to be brought within three years; and also subdivision 1 of section 339 of said Code, limiting to two years the time in which suit may be brought upon an obligation or liability not founded upon an instrument in writing. The complaint was filed on June 4, 1915. The court found, evidently in response to the issue of the bar of the statute, that prior to the 24th day of April, 1912, the defendant had wholly failed and neglected to deliver said oil upon the order of plaintiff; and also that on the 23d day of April, 1912, the defendant refused to deliver said oil to plaintiff's order, and notified plaintiff in writing of such refusal, and these findings are supported by the evidence. The court further found that the plaintiff was not injured by defendant's refusal to make the demanded delivery, and gave judgment in defendant's favor, from which plaintiff appeals.

[1] The appellant claims that there is no evidence to support the finding of defendant's refusal in writing to deliver the oil; but the evidence is found in the sworn answer of the defendant in a previous action between the same parties concerning the same oil, in which the ownership by plaintiff of the oil or any interest therein was specifically denied, and it was also alleged that the merchandise belonged to another party, to whom it had been actually delivered by the defendant. This evidence was introduced by the plaintiff himself. His cause of action against the defendant immediately arose upon this categorical denial of any right or interest of the plaintiff in the merchandise.

[2] The point is made by appellant that the court failed to find in terms upon the plea of the statute of limitations, which was a material issue in the case, and that it is not sufficient to find facts from which the bar of the statute may be inferred, citing the case of Duff v. Duff, 71 Cal. 513, 12 Pac. 570, in support of this contention. While it is true that the judgment in that case was reversed, the reversal was not had upon this ground, and later cases considerably weaken the force of what is said in the opinion in that case upon this point. In Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379, there

was no finding in terms upon the plea of the statute; but the court said that:

"Where 'probative facts are found, and the court can declare that the ultimate facts necessarily result from the facts which are found,' the finding is sufficient."

This principle was again announced in McCray v. Burr, 125 Cal. 636, 58 Pac. 203; and in Woodham v. Cline, 130 Cal. 497, 62 Pac. 398, it was said:

"It is not necessary that the court find expressly as to the statute of limitations, where the facts found or admitted show that the action is not barred."

We take it that the same principle must apply where the facts found show that the action is barred. And in the case last mentioned the court also said that:

"A party cannot be heard to complain of the absence of a finding upon a material issue if the finding must have been against him upon the record as presented."

[3] It is quite evident from the present record that the trial court made the findings above recited in response to the issue of the statute of limitations; and it would be idle for this court to reverse the judgment for the purpose of requiring the trial court to make a formal finding in terms upon the bar of the statute, when the fact of the bar is plainly covered by the findings as made. Such a reversal would be purely upon technical grounds, and out of harmony with the trend of recent decisions made under the authority of constitutional amendments designed to affect matters of procedure of the kind now under consideration.

In view of our conclusion upon this point, it is unnecessary to discuss other contentions made by the appellant.

The judgment is affirmed.

---

38 Cal. App. 17

## McCREARY v. TORONTO MIDWAY OIL CO., Limited, et al. (Civ. 1746.)

(District Court of Appeal, Third District, California. Aug. 1, 1918.)

1. MINES AND MINERALS ⟸112(1) — LABOR ON OIL WELL—STATUTE.
Code Civ. Proc. § 1183, subd. 2, as amended by St. 1911, p. 1313, giving persons who perform labor in any mining claim a lien, is only statute on mechanics' liens applicable to an oil well.

2. MINES AND MINERALS ⟸114—CLAIM.
So far as a mining lien is concerned, claimant's case can be no stronger than is set forth in his claim of lien.

3. MINES AND MINERALS ⟸114 — COMPLIANCE WITH LAW.
Though all provisions of lien law are to be liberally construed to protect and promote legitimate interests of laborers and materialmen, there must be substantial compliance with law to enforce remedy against property.

4. MINES AND MINERALS ⟸114—CLAIM.
Under Code Civ. Proc. § 1187, claim for lien on oil well, totally omitting to allege claimant performed manual labor thereon, does not support judgment foreclosing lien.

5. MINES AND MINERALS ⟸113—CLAIM OF SUPERINTENDENT.
Claim for lien of superintendent of oil well as such is not subject to lien, not coming within Code Civ. Proc. § 1187.

6. MINES AND MINERALS ⟸114 — CLAIM — PREMATURE FILING.
Under Code Civ. Proc. § 1187, claim for lien filed while claimant was still employed on work, as shown by allegations, was premature, and conferred no right of lien.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by F. E. McCreary against the Toronto Midway Oil Company, Limited, the Pioneer Midway Oil Company, and others. From judgment for plaintiff, and an order denying motion for new trial, the Pioneer Midway Oil Company and others appeal. Judgment and order reversed.

Edmund Tauzsky, of San Francisco, and George E. Whitaker and T. N. Harvey, both of Bakersfield, for appellants. S. Wyman Smith, of Bakersfield, for respondent.

BURNETT, J. The action was to foreclose a mechanic's lien, and the appeal is from the judgment in favor of plaintiff and from an order denying a motion for a new trial. Respondent has made no appearance in this court, and it is fair to assume that he has abandoned the case. His attorney in the court below died after the appeal was taken, and respondent failed to secure other counsel to represent him. The points made here for a reversal seem to have been urged at the trial and on the motion for a new trial, and we regret that we have not been furnished with the views of respondent and of the trial judge on the questions herein presented. However, we have given the record careful examination, and we are satisfied that respondent's claim for lien cannot be maintained.

The second subdivision of section 1183 of the Code of Civil Procedure, as amended in 1911 (St. 1911, p. 1313), gives persons who perform labor in any mining claim a lien for the value of the labor done, and it provides that the superintendent shall be considered the agent of the owner for the purposes of the Mechanic's Lien Act.

[1] This is the only statute on the subject applicable to an oil well. Berentz v. Belmont Oil Mining Co., 148 Cal. 577, 84 Pac. 47, 113 Am. St. Rep. 308. Plaintiff in his claim of lien stated:

"That since May 1, 1911, the claimant has been employed continuously by the Toronto Midway Oil Company, Limited, and is still so employed, and no part of claimant's salary has been paid since March, 1912, and that the claimant at all times since the 1st day of April, 1912, up to date, has been employed continuously by the Toronto Midway Oil Company, Limited, as superintendent of the oil operations of the Toronto Midway Oil Company, Limited."

[2] It is to be observed that nothing therein indicates that he performed manual labor.

It appears that the duties of superintendent were to supervise and direct the oil drilling operations for the purpose of developing and improving the premises. It is true that in his deposition plaintiff testified as follows:

"My duties were looking after the things and handling the properties and in case of fishing jobs or anything like that helping the men at the well. All the men—four men steady and sometimes more—were under me; I hired them and laid them off, seen to and O. K.'d all orders and bills for work and material used in and about the premises. After the well was cemented, I pumped one tower for twelve hours, testing the well to see what it would do. I did this for several days. I had general control of all the property about the lease."

The foregoing language may indicate that he did some actual labor on the mine, but even that was incidental to his main duty, which was of supervision and direction. But we may concede that there is sufficient evidence to show that he did manual labor, and in that respect that there is support for the allegation of the amended complaint, "that as such superintendent he did supervise and direct the oil drilling operations of said company, and in connection with such supervision and direction he performed manual labor." Yet, as far as the lien is concerned, his case can be no stronger than is set forth in his claim of lien, and in that, as we have seen, there is no statement as to manual labor. Section 1187 of the Code of Civil Procedure provides that the claimant must file a claim of lien "containing a statement of his demand after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, also the name of the person by whom he was employed, or to whom he furnished the materials, with a statement of the price, if any, agreed upon for the same and when payable, and of the work agreed to be done and when the same was to be done, if agreed upon, and also a description of the property to be charged with the lien, sufficient for identification."

[3-5] While all the provisions of the lien law are to be liberally construed with a view of protecting and promoting the legitimate interest of the laborer, or materialman, there must, of course, be a substantial compliance with the requirements of the law in order to enforce the remedy against the property. Assuredly, a total omission of the essential element of a lien, the performance of manual labor, leaves the claim too fragile to support any such judgment as was awarded herein. The claim of superintendent, as such, is not subject to lien, since it does not come within the purview of section 1187. Durkheimer v. Copperopolis Copper Co., 55 Or. 37, 104 Pac. 895. We conclude therefore, for the reason stated, that the claim of lien was fatally defective.

[6] We think, also, that the claim of lien was prematurely filed. This was filed at 12:15 p. m. of August 22, 1912; but the claimant declared therein that he was still employed as superintendent, and in his amended complaint he alleged that he was so employed between April 1, 1912, and August 23, 1912, and that his services were concluded on or about August 22d. His employment had not ceased, therefore, before his notice of lien was filed. But the statute, section 1187 of the Code of Civil Procedure, provides that every person save the original contractor shall file his claim of lien within 30 days after he has ceased to labor. This necessarily means that the last day on which he labored must have passed before he can file his claim. His employment having terminated on August 22d, the first day on which he could file his claim was the 23d.

When a claim of lien is prematurely filed, it confers no right for a lien. Davis v. McDonough, 109 Cal. 547, 42 Pac. 450; Santa Monica Lumber & Mill Co. v. Hege, 119 Cal. 376, 51 Pac. 555; Marchant v. Hayes, 120 Cal. 137, 52 Pac. 154; Baker v. Lake Land Canal & Irrigation Co., 7 Cal. App. 482, 94 Pac. 773.

Other considerations which seem to possess merit are called to our attention by appellants, but we think it unnecessary to notice them specifically.

The judgment and order are reversed.

We concur: CHIPMAN, P. J.; HART, J.

---

38 Cal. App. 28

## PEOPLE v. BAKER. (Cr. 447.)

(District Court of Appeal, Third District, California. Aug. 2, 1918.)

1. INTOXICATING LIQUORS ⊂⊃159(1)—SALE TO INFANTS.

Though, as concerns Pen. Code, § 397b, declaring the offense of selling intoxicants to persons under 18 sales to minors over that age are legal, they may constitute the offense under Juvenile Court Law, § 21, of doing an act causing or tending to cause a minor to become a delinquent.

2. INTOXICATING LIQUORS ⊂⊃159(1)—SALE TO INFANTS.

Sale of beer to minor leading a more or less idle, dissolute, or immoral life, though it was taken from him by another, *held* to warrant conviction under Juvenile Court Law, § 21, of doing an act causing or tending to cause a minor to become a delinquent.

3. INTOXICATING LIQUORS ⊂⊃159(2)—SALE TO INFANTS—INTENT.

Relative to the offense under Juvenile Court Law, § 21, of doing an act causing or tending to cause a minor to become a delinquent, intent in selling beer to the minor is immaterial.

4. CRIMINAL LAW ⊂⊃372(1) — EVIDENCE — OTHER OFFENSES.

On a prosecution under Juvenile Court Law, § 21, based on sale of beer to a minor, for doing an act tending to cause him to become a delinquent, sales to him in the saloon on prior occasions are admissible to show his tendency to become a delinquent, though not to show the sale complained of.

Appeal from Superior Court, Humboldt County; George D. Murray, Judge.

Peter Baker was convicted of violation of the Juvenile Court Law, and from the judgment and an order denying a new trial, he appeals. Affirmed.

James W. Henderson, of Eureka, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. By information filed by the district attorney of Humboldt county it was charged as follows:

"That the said defendant, Peter Baker, did then and there, to wit, in said certain saloon, barroom, and place in said city of Eureka, county of Humboldt, state of California, on said 23d day of December, 1917, willfully, knowingly, and unlawfully sell, furnish, and give to Frank Mahan, who was then and there a minor under the age of 21 years, to wit, of the age of 18 years, intoxicating liquor, to wit, beer. That said act by said defendant, Peter Baker, did then and there manifestly cause, tend to cause, encourage, and contribute to the said Frank Mahan, then and there a minor under the age of 21 years, to wit, of the age of 18 years, to become and remain a person coming within the provisions of section 1 of the Juvenile Court Law of the state of California., to wit, a person under the age of 21 years who habitually uses intoxicating liquors, and who is leading or is in danger of leading an idle, dissolute, lewd, and immoral life; contrary," etc.

Tried by a jury, the verdict was guilty as charged in the information, and defendant was sentenced to pay a fine of $300 and in default of payment to serve imprisonment in the county jail for the period of one day for each $2 of said fine until the same be paid or satisfied. Defendant appeals from the judgment and order denying his motion for a new trial.

The following quotation from the defendant's opening brief will obviate the necessity of stating at length the testimony:

"There was sufficient evidence introduced to justify the jury in believing that the defendant sold the two bottles of beer to Frank Mahan, and that Frank Mahan was over the age of 18 and under the age of 21; therefore I do not propose to question those facts. There was sufficient evidence introduced to justify the jury in believing that Frank Mahan was a person likely to become addicted to the use of intoxicating liquors, or who was leading or in danger of leading an idle, dissolute, lewd, or immoral life; therefore I do not propose to question that fact. I make no attack on the credibility of the witnesses for the prosecution, and I shall treat these three facts as abundantly established by the evidence. However, I do propose to question the proposition that there was sufficient evidence to justify the jury that the act of the defendant in selling these two bottles of beer to Frank Mahan caused or tended to cause Frank Mahan to become or remain a person who was leading or in danger of leading an idle, dissolute, lewd, or immoral life, or a person who was likely to become addicted to the use of intoxicating liquor. In doing so I shall refer only to the evidence introduced by the prosecution, and shall take it at its face value, making no attack on its credibility."

The argument that as matter of law the evidence was insufficient to justify the conviction is based upon the following propositions: (1) That the sale of beer to Frank Mahan, a person over the age of 18 and under the age of 21, was lawful under the state liquor law, to wit, section 397b of the Penal Code; (2) the act of selling the beer, in and of itself a lawful act, could only become unlawful under the Juvenile Court Law if it caused or intended to cause Frank Mahan to become a delinquent; (3) the sale of beer to Mahan did not cause or tend to cause him to become or remain a delinquent for the reason that he did not consume even the smallest portion of the beer.

[1] Defendant's attorney contends that because section 397b of the Penal Code makes it a crime to sell intoxicating liquor to a person under the age of 18 years there is an implied right given and it is perfectly lawful to sell such liquor to any person over the age of 18 years, and hence the Juvenile Court Act cannot be given effect without holding that it works the repeal of section 397b. Section 21 of the Juvenile Court Law (Stats. 1915, p. 1246) provides that:

"Any person who shall commit any act or omit the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of twenty-one years to come within the provisions of any of subdivisions 1 to 13 inclusive of section one of this act, or which act or omission contributes thereto, * * * shall be guilty of a misdemeanor. * * *"

There is no conflict between the two statutes, nor are they irreconcilable. The section of the Penal Code is intended to reach specific offenses, to wit, sales of intoxicating liquors to minors under the age of 18 years. The Juvenile Court Act is designed to protect all persons under the age of 21 years from suffering the consequences of any act which causes or tends to cause or encourages such persons to become addicted to the use of intoxicating liquor or to lead idle, dissolute, or immoral lives. If under certain circumstances it may reasonably be held that selling intoxicating liquor to any person under the age of 21 years might or would have such tendency, the act of selling such liquor comes clearly within the statute and is punishable as a misdemeanor. That this particular act is punishable in a given case under another statute, namely, where the purchaser is a person under the age of 18 years, can in no wise limit or affect the operation of the Juvenile Court Act. It does not follow that, because the selling of intoxicating liquor to a person under the age of 18 years is made a crime, it is therefore lawful under all circumstances to sell such liquor to a person over the age of 18 years and under 21 years. The Penal Code contains many sections denouncing as crimes various acts which when committed upon or with a minor would invariably cause or tend to cause such minor to lead an idle, dissolute, or immoral life. Yet those acts may properly be punishable as crimes independently of their effect as contributing to the delinquency of minors and thus violating the Juvenile Court Law. For instance, the Penal Code makes it a fel-

ony to be guilty of lascivious conduct with a minor child. Section 288, Pen. Code. Notwithstanding the existence of such statute, the guilty person may be prosecuted under the Juvenile Court Act because of the tendency of such conduct to cause the minor to lead a dissolute and immoral life.

In the case of the sale of intoxicating liquor to a person under the age of 18, the sale alone, regardless of its consequences, constitutes the crime under section 397b of the Penal Code. But where the sale might not of itself alone constitute the offense denounced by the Juvenile Court Act, the act must be accompanied by circumstances tending to show that it would cause the minor to lead an immoral, idle, or dissolute life. When these circumstances sufficiently appear, an offense is made out different from that referred to in section 397b of the Penal Code and may be punished under the Juvenile Court Act. As we understand defendant's position, he concedes that such is the law.

[2, 3] It is urged, however, that the facts in this case show that the consequences contemplated by the Juvenile Court Act by the sale charged could not have followed, nor could the sale have had any tendency to cause the prosecuting witness, Mahan, to lead an idle, dissolute, or immoral life for the simple reason that he did not even taste of the beer; that all he did was to purchase the two bottles of beer and pass them over to witness McKay immediately after leaving defendant's saloon. If this was all that appeared it might well be doubted whether there was sufficient evidence to support the verdict.

There was evidence that the boy, Frank Mahan, had been under observation by the juvenile court officers for some time; that he was a frequenter of saloons and billiard rooms where the liquor was sold; that he had been in the saloon frequently where defendant was in charge as barkeeper and had purchased and drunk liquor there; that he and another boy had been drinking beer the earlier part of the day charged and that he went to this saloon purposely to purchase more beer with the intention of drinking it; that he put the bottles in his pocket and was on his way to the rendezvous to meet his boy friend when he was accosted by witness McKay, who was in the employ of the district attorney to discover violations of the law, and the bottles were taken from Mahan and were proved to be bottles of beer. It appeared also that Mahan was afterwards adjudged a delinquent under the Juvenile Court Law. He was, in fact, shown to be the very kind of person whom the statute was designed to protect and reform and who by being allowed to purchase beer would be encouraged to drink it and thus contribute to the more or less idle, dissolute, or immoral life he was shown to be leading. The intent moving defendant to sell him the beer is immaterial. It is the effect of selling and the tendency in selling to cause the minor to become a delinquent that the law contemplates, and not the motive or intent of the seller. Under the facts and circumstances here shown we think the jury were justified in reaching the verdict as rendered.

Defendant relies much upon expressions of the court in deciding the case of the People v. De Leon, 170 Pac. 173, in which it is stated that the act or omission of the defendant must amount to "the breach of a definite duty, and is of such nature and tendency as to affect directly the welfare of such minor." Also reliance is placed upon expressions in People v. Bergotini, 172 Cal. 717, 158 Pac. 198, wherein it was said:

"The statute must have contemplated some offense having not merely a possible, but an inevitable, effect upon the minor."

Again:

"If this information were to be upheld it would be impossible to foresee what application juries might make of this law to persons having some remote possible connection with the delinquency or dependency of minors."

These observations of the court must be read in connection with the facts of the cases.

We do not understand the court to hold by the use of the terms "breach of a definite duty" in the De Leon Case, that the accused party must be shown to have violated some duty defined by statute or some particular obligation towards the minor. It may very properly be said that a definite duty is owed by all persons to abstain from doing any act having a tendency to cause a minor to become a delinquent or dependent. The court explains what is meant by the terms referred to in adding that the act must be "of such nature and tendency as to affect directly the welfare of such minor." Where the court, in the Bergotini Case, speaks of an "inevitable effect" which the act must have, the context shows that what is meant is that it is not sufficient to show that the act might have "some remote possible connection with the delinquency or dependency of the minor." We do not think the court intended to hold nor do we think it should be held that the effect of the act complained of must have an absolutely certain and unmistakable tendency to cause the minor to lead an idle, dissolute, or immoral life. The jury, in interpreting the facts, may apply the teachings of human experience. It is common knowledge that minors are susceptible to harmful influences more readily than are adults; that their power to resist such influences and to discriminate between good and evil or to comprehend the subtle effect which yielding to temptation may have upon their lives is much less. The laws of all civilized nations recognize the deficiencies of minors in respect to their mental and moral faculties and have thrown around them the protection which their immature years demand. These laws have always been given the most liberal construction in effectuating their object. The Juvenile Court

Law is one of the more modern devices of our reformatory statutes calculated to conserve and strengthen the moral forces of our youths and to protect them from the dangers and follies attending their immaturity.

The concrete question here is whether or not it may reasonably be said that the sale of beer to this boy, Mahan, in view of his character and habits and associates, would tend to cause him to lead or continue to lead an idle, dissolute, and immoral life. We feel justified in expressing the opinion that such sale did have this tendency.

[4] The prosecuting witness, Mahan, was recalled for further direct examination and the following proceedings occurred:

"Mr. Nelson (District Attorney): Q. Frank, how many times have you been in the Myrtle bar? A. About a dozen times. Mr. Henderson: I object to that, incompetent, irrelevant, and immaterial, and has no bearing upon the particular offense charged here. The Court: The objection is overruled; you may answer. A. About a dozen times. Q. Have you ever purchased and consumed liquor in that saloon? A. Yes, sir. Mr. Henderson: We object to that under the former ruling of the court. The Court: I believe that will be sustained. Mr. Nelson: The object is to show that the last sale, the sale of the two bottles to Frank Mahan, encouraged him to remain a person who was likely to be an habitual user of intoxicating liquors. If we can show the liquor this lad has consumed in this saloon at previous times, I think we are entitled to do that, we are entitled to show that he was a frequenter of this saloon. It all shows his remaining or being encouraged or induced to remain a lad who was habitually or frequently using intoxicating liquors in that saloon or any other saloon. It is for that purpose only. The Court: It is for that particular purpose only? Mr. Nelson: Yes. (Argument.) The Court: It is not offered for the purpose of showing or tending to show that this defendant sold the two bottles of beer to Frank Mahan. It is not offered for that purpose at all. It is simply offered for the purpose of showing that Frank Mahan was addicted to the use of intoxicating liquors, and he would be likely to become a habitual drunkard. Mr. Henderson: I think the purpose of it is to bolster up their case by showing other events and other times, other places. I don't think it is competent. The Court: They are entitled to have it for the purpose of showing that Frank Mahan was a user of intoxicating liquors before the event, they are entitled to have it. Mr. Henderson: Do I understand the court, if the evidence is allowed, it is allowed for just that purpose? The Court: It is offered solely for that purpose, and is admitted solely for that purpose. Mr. Henderson: And only for that purpose? The Court: For that purpose only. Mr. Henderson: I wish to object to the introduction of such evidence even for the limited purpose on the same ground as my previous objection. The Court: Certainly, the objection will be overruled. * * * The jury will understand though from what I have said that the question asked this witness is allowed to be answered by him upon the theory that the evidence might tend to show that this boy was a person who was in danger of becoming a habitual drunkard, and it is offered for that purpose, and for that purpose alone, not offered for the purpose of attempting to prove the main charge in the case, that is that this defendant sold 2 bottles of beer to this witness."

The admissibility of this kind of evidence and the reasons for admitting it in cases arising under the Juvenile Court Act were discussed by Justice Hart in People v. Oliver, 29 Cal. App. 576, 579, 156 Pac. 1005. We think the testimony was for like reasons admissible in the present case.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

---

38 Cal. App. 21

GERO et al. v. RICHEY et al. (Civ. 1764.)

(District Court of Appeal, Third District, California. Aug. 1, 1918.)

1. INTEREST ⊜44—DEFERRED PAYMENTS.
Under a contract of sale of land, naming the purchase price and providing that it be paid in certain amounts at specified time, grantors are not entitled to interest on the deferred payments until due, under Civ. Code, § 1917.

2. CUSTOMS AND USAGES ⊜16 — EVIDENCE ⊜461(1)—DEFERRED PAYMENTS—INTEREST—PAROL EVIDENCE.
A contract of sale of land providing for deferred payments in certain amounts at specified times, interest not being mentioned, cannot be shown by parol to have been intended to give grantor interest on the deferred payment, the intent being indicated by the language of the instrument, nor was evidence of custom admissible to so show.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by Kasper Gero and another against W. H. Richey and others. From a judgment, granting only part of the relief demanded, plaintiffs appeal. Affirmed.

Ben Berry and George F. McNoble, both of Stockton, for appellants. O. B. Parkinson and Parkinson & Parkinson, all of Stockton, for respondents.

BURNETT, J. The appeal is from a final judgment in favor of plaintiffs for the sum of $226.98, they being dissatisfied with the amount awarded. The controversy is over the question whether they should have been allowed interest on deferred payments under a contract of sale of real property. The matter was presented to the court on a motion to strike out certain portions of the complaint, and there is no objection to the form of the procedure, it being admitted by appellants that:

"The sole point in dispute in the case was and is whether, under the said contract of sale, the plaintiffs, as vendors of the land described in the contract, had a right to collect interest on the deferred payments from the vendees mentioned therein. If they had that right under said contract properly interpreted, the judgment of the lower court ought to be reversed. If they had not that right, the said judgment ought to be affirmed."

Said contract was as follows:

"This agreement, made and entered into this 12th day of October, 1915, by and between Kasper Gero and Margaret Gero (his wife), of

the county of San Joaquin, state of California, the parties of the first part, and W. H. Richey, Josie Richey, E. A. Richey, and W. H. Richey, Jr., of the county and state aforesaid, parties of the second part, witnesseth: That the said party of the first part for and in consideration of the covenants and agreements on the part of the said party of the second part hereinafter contained, agrees to sell and convey unto the said party of the second part, and said party of the second part agrees to buy, all of that certain lot or parcel of land situated in the county of San Joaquin, state of California, and being more particularly described as follows, to wit: The west thirty-three (33) acres of the northwest quarter (N. W. ¼) of the northeast quarter (N. E. ¼) of section thirty-three (33), township two (2) north, range eight (8) east, lying north of the county road, containing thirty-three (33) acres more or less for the sum of five thousand eight hundred ($5,800.00) dollars, gold coin of the United States of America, to be paid in the following manner, as follows, to wit: Three hundred fifty ($350.00) dollars upon the execution ond delivery of this agreement, receipt whereof is hereby acknowledged; two hundred ($200.00) dollars on or before the 12th day of October, 1916; five hundred ($500.00) dollars on or before October 12, 1917; five hundred ($500.00) dollars on or before October 12, 1918; seven hundred fifty ($750.00) dollars on or before October 12, 1919: one thousand ($1,000.00) dollars on or before October 12, 1920; and the balance of twenty-five hundred ($2,500.00) dollars to be paid on or before October 12, 1921. It is hereby agreed by the parties hereto that upon the payment of the amounts above stated, amounting to five thousand and eight hundred ($5,800.00) dollars, the said parties of the first part agree to execute a bargain and sale deed to the above described property free and clear of all incumbrances, and further agree to furnish to the said parties of the second part a certificate of title or abstract to said property. And it is further understood and agreed that the said parties of the second part shall have the privilege to pay to the said parties of the first part the sum of two hundred ($200.00) dollars at any time upon this agreement, providing that the time the said payments are made that the parties of the second part will pay all interest due on said agreement to that date. And the said parties of the first part agree to accept the full amount of this agreement at any time upon the payment by the parties of the second part of the full amount to the said parties of the first part, and the parties of the first part agree to execute a bargain and sale deed to said property. And the said parties of the second part agree to pay all state and county taxes or assessments, whatsoever nature, which are or may become due on the premises above described. In the event of failure to pay the said installments, or any of them, by the said party of the second part, as said installments shall become due, the said parties of the first part shall be released from all obligations in law or in any equity to convey said property, and the said parties of the second part shall forfeit all right to all payments made upon this agreement. Time shall be the essence of this agreement, and it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, and assigns of the respective parties hereto, and that the said parties of the second part are to be let into and have immediate possession, and hold peaceable possession so long as they comply with the terms of this agreement. Upon failure of said parties of the second part to comply with the terms of this agreement, they agree to yield peaceable possession to the said parties of the first part. In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written."

[1, 2] We are entirely satisfied that the lower court was right in holding that appellants were not entitled to interest on said installments before they became due. This follows from the express agreement of the parties themselves. The contract provides that the consideration for the land is the sum of $5,800, to be paid in the manner specified. There is no element therein of ambiguity or uncertainty. As far as the sum to be paid is concerned, the contract is complete, and there is no room for parol evidence. The effect of such evidence, if permitted to show that the intention of the parties was that an additional sum was to be paid, would be to vary the terms of a written agreement, which needs no addition nor explanation. The statement that $5,800 is the sum to be paid for the land has the same significance as if the parties had provided that said sum and *no more* was the consideration. The recital of the amount carries, of course, the necessary implication that it is exclusive of any other sum. Other provisions of the contract confirm the view that interest on the deferred payments was not contemplated. For instance, the agreement states that:

"In the event of failure to pay the said installments, or any of them, by the said parties of the second part, as said installments shall become due, said parties shall be released from all obligations," etc.

If interest had been intended, it would have been provided:

"In the event of failure to pay the said installments, or any of them, *or any accrued interest thereon*, by the said parties of the second part, as said installments and interest shall become due."

Also, the other covenant in reference to the execution of the deed would have read:

"Upon the payment of the amounts above stated, amounting to five thousand and eight hundred dollars, *together with interest accrued and unpaid thereon*, the said parties of the first part agree to execute," etc.

To interpret the language used by the parties, so as to uphold the contention of appellants, would be to interpolate a covenant into the contract, and to ignore the significance of the terms they have chosen to express their intention. If we may look beyond the contract itself, we find that the decisions in this state uphold the view that, unless the parties to such an agreement provide otherwise, interest is allowed only from the time the debt becomes due. In City of Los Angeles v. City Bank, 100 Cal. 22, 34 Pac. 512, it is said:

"In the absence of an express contract, the law only awards interest upon money from the time it falls due. Civ. Code, § 1917."

This language is quoted with approval in the case of Hayt v. Bentel, 164 Cal. 685, 130 Pac. 432. The principle is recognized, also, in other decisions, among which we find the case of Taber v. Piedmont Height Building

Co., 25 Cal. App. 222, 143 Pac. 319, decided by this court.

But the point is made that it inferentially appears that interest was to be allowed on the deferred payments, or, at least, that an inconsistency is created, so as to render parol evidence admissible, by virtue of the provision that the parties of the second part shall have the privilege of paying the sum of $200 at any time, providing that, at the time the said payments are made, they "will pay all interest due on said agreement to that date." This manifestly extended a favor to respondents in allowing smaller partial payments; but, to take advantage of it, they were required to pay whatever interest might be due. It was probably contemplated that some of the installments called for in the former clause of the contract might be delinquent. If so, and they desired to pay only $200 of the consideration at one time, the parties of the second part were also to pay interest on said payment or payments that had become due. This clause must, of course, be construed in connection with what goes before, so as to give effect, if possible, to the language of the whole contract. It should not be given a meaning that will nullify or vary the entire covenant to which we have alluded. We need not quote the familiar rules embodied in the provisions of the Civil Code for the interpretation of written instruments. These rules are all designed to aid in ascertaining the intention of the parties. That the intention was such as we have indicated, we think, follows necessarily from the very language of the instrument.

Of course, if, as appellants contend, "by clerical, misprision, inadvertence, or typist's error, the usual clause reading substantially as follows, 'interest on all deferred payments herein at the rate of 6 per cent. per annum', was left out or omitted from the memorial or typewritten evidence of the contract," under proper proceedings the instrument might have been reformed; but with that consideration we are not concerned in this action. We may add that, if the question involved a loan of money, the case would be governed by the special rule provided in section 1914 of the Civil Code, as follows:

"Whenever a loan of money is made, it is presumed to be made upon interest, unless it is otherwise expressly stipulated at the time in writing."

But, manifestly, we are not dealing with a loan, but with a contract for the sale and purchase of real estate. Nor is there any greater reason for holding that by virtue of section 1917 of the Civil Code appellants are entitled to interest on the deferred payments. That section provides:

"Unless there is an express contract in writing, fixing a different rate, interest is payable on all moneys at the rate of seven per centum per annum *after they become due*, on any instrument of writing, except a judgment, and on moneys lent, or due on any settlement of account, from the day on which the balance is ascertained, and on moneys received to the use of another and detained from him."

Said deferred payments were not *due*, they do not involve money *lent* or *due* on any *settlement* of *account* on which a balance has been ascertained. Assuredly, these terms are so well understood as to require no argument or citation of authority to demonstrate that we have before us no such case.

We think it is equally plain that evidence of custom as to the payment of interest under such circumstances was not admissible. Usage is admissible only as an instrument of interpretation. Subdivision 12, § 1870, Code Civ. Proc.; Loyalton Electric Light Co. v. Cal. Pine Box Co., 22 Cal. App. 75, 133 Pac. 323. Herein the contract needs no extraneous aid, as its express terms plainly provide (1) that the purchase price is $5,800; (2) how and when that amount is to be paid, without mentioning the payment of interest; (3) that upon the payment of said amount the said parties of the first part agree to execute a deed; and (4) that the parties of the second part may have the option to pay the principal in smaller installments, provided that they also pay any interest that may be due. In none of the cases cited by appellants do we find anything opposed to the views herein expressed.

In Wagner v. Eustathiw, 169 Cal. 663, 147 Pac. 561, the contract expressly provided that interest should be paid at the rate of 7 per cent. per annum, and the court very naturally and properly held that the date of payment of interest would be supplied by custom. The contract, of course, was incomplete in that respect, and the omitted term was therefore added.

In Ehrenstrom v. Phillips (Del. Ch.) 77 Atl. 81, the contract provided that interest should be paid, and also the rate, but omitted to specify the term of payment, whether annually or semiannually. It also recited: "Terms of mortgage to be arranged satisfactorily." The court properly held that it could be shown by parol evidence that the parties intended that the mortgage should be in the usual form providing for the term of payment of interest.

In Burns v. Sennett & Miller, 99 Cal. 363, 33 Pac. 916, the contract was oral and general in its character, and the court held that:

"So far as the offered testimony involved proof of the usage, if any such there were, which entered into a general employment to load or unload a ship, in the absence of a special contract, it should have been admitted."

In Standard American Dredging Company v. Oakland, 30 Cal. App. 237, 157 Pac. 833, this court held that the evidence of usage admitted by the trial court was harmless, even if the ruling was erroneous, and it was said:

"In making its findings, we think the court was justified in disregarding the evidence as to usage, as we infer it did in not making any finding on that question."

The foregoing cases, and others which might be referred to, are illustrative of the familiar practice of allowing evidence of custom to supply an omission from a contract, which contract is incomplete and uncertain; but, for reasons already stated, we do not consider them applicable herein.

While appellants have made an able and interesting argument against the decision of the lower court, we cannot avoid the conclusion that respondents are right in the following contentions:

"(1) The contract in question does not anywhere provide expressly that interest should be paid upon deferred installments of principal as contended by appellants. (2) The contract as concluded is a complete, workable, and unambiguous instrument, which does not require the addition of any terms in regard to interest to enable it to be carried out according to the expressed intention of the parties, and therefore does not require either evidence of usage or implication of law to interpret it or carry it into effect. (3) The contract is a contract for the sale of land, upon which there was, at the time of bringing action, no portion of the principal *due* and unpaid of which tender in full had not been made to the plaintiff; that under the general principles of law no interest is allowed upon moneys not yet due under such contract, where the contract itself does not provide for interest. (4) The allegations in the complaint to the effect that interest on deferred installments was due under the terms of the contract were therefore in direct conflict with the contract itself, which was set forth in full in the complaint, and were therefore properly stricken out of the complaint as conclusions of law, and also redundant and contradictory to the contract's provisions."

We think the judgment should be affirmed; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

---

38 Cal. App. 66

## PEOPLE v. ZAVALA. (Cr. 445.)

(District Court of Appeal, Third District, California. Aug. 13, 1918.)

HOMICIDE ⊂=191 — ACTS OF DECEASED—EVIDENCE.

In trial for homicide, wherein defendant claimed that deceased was always angry and chased everybody away, and when intoxicated would chase his wife away, evidence that wife filed complaint against deceased for assault was not competent proof that deceased at another time had struck defendant.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Francisco Zavala was convicted of murder in the first degree, and from the judgment and order denying a new trial, he appeals. Affirmed.

H. W. Coale and John R. Cronin, of Stockton, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendant was convicted of murder in the first degree, the jury fixing the punishment at imprisonment for life in the penitentiary. The appeal is from the judgment and the order denying defendant's motion for a new trial.

In the brief of appellant, while it is stated that there are several grounds demanding a reversal of the case, specific attention is directed to only one, and that possesses no merit whatever. Consideration is invited to the fact that the assistant district attorney introduced in evidence a statement by the defendant made a day after the homicide in which the following questions and answers appear:

"Were you over in the brewery yesterday evening or the afternoon? Yes; I was at the brewery; the man at the brewery struck me here in the eye. What did he hit you for? He is a man he is always angry; he chases everybody away; he even chases—whenever he is under the influence of liquor, he even chases his wife away from there."

It is claimed by appellant that he afterwards sought to prove that the portion thereof relating to the brewery was in fact true, and for this purpose called George Frerichs, city recorder of the city of Tracy, Ernest Gieseke, constable of Tulare county, wherein Tracy is located, and George Chidester, constable of Stockton township. The method by which appellant sought this corroboration is shown by the following question addressed to the said city recorder:

"Mr. Frerichs, has Mrs. Schmidt, wife of Henry Schmidt, ever filed a complaint in your court against Henry Schmidt for disturbing her peace and assaulting her there at any time?"

In other words, the position is that testimony that the wife had filed a complaint against Schmidt charging him with assaulting her is evidence that Schmidt at a different time had struck the defendant. Of course, the statement of the proposition is a sufficient refutation of its soundness. It is equally apparent that the reputation of the witness could not thus be assailed.

In justice to counsel for appellant it is fair to say that they content themselves with merely stating the contention. They make no argument, as indeed no argument is possible, in support of the admissibility of such incompetent and irrelevant testimony.

We have examined the record sufficiently to be entirely satisfied that the defendant was justly convicted and that no error was committed.

The judgment and order are affirmed.

We concur: CHIPMAN P. J.; HART, J.

---

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

38 Cal. App. 48

DOUGHTY v. MOORS et al. (Civ. 1806.)

(District Court of Appeal, Third District, California. Aug. 12, 1918.)

1. CORPORATIONS ⟸398(3)—REPRESENTATION —SOLE OWNER.
As against the purchaser of the real and personal property of an insolvent corporation, the right of the corporation to the portion of the purchase price not paid to the corporation is not affected by the fact that stockholder who, with his wife, owned all the stock of the corporation had previously agreed with the purchaser that the purchaser might pay such portion of the price by assuming and paying indebtedness of such stockholder and another.
2. CONSPIRACY ⟸6—INJURY.
To support action for conspiracy to defraud a corporation, there must be injury or damage to the corporation as a result of the conspiracy.

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by E. W. Doughty, as trustee of the Electric & Garage Company, a corporation, a bankrupt, against Frank Moors and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Wallace Rutherford, U'Ren & Beard, and E. L. Webber, all of Napa, for appellant. George Clark, of San Francisco, for respondents.

HART, J. A demurrer, interposed to plaintiff's amended complaint, was sustained, plaintiff declined further to amend and judgment was entered in favor of defendants, from which judgment plaintiff appeals.

The allegations of the amended complaint are: That the Electric & Garage Company was a corporation. That C. W. Crouch "was the owner of a large majority of, and all but one of, the issued and outstanding shares of the capital stock of" said corporation, "and he was its president and general manager. That the remaining shares" stood upon the books of the corporation in the name of S. Grace Crouch, who was the secretary of said corporation and the wife of said C. W. Crouch. That on the 18th of October, 1915, certain creditors of the corporation filed, in the United States District Court, a petition in involuntary bankruptcy, and that, on the 3d of January, 1916, said court made an order adjudging said corporation a bankrupt and referred the matter to the referee in bankruptcy. That on the 15th day of February, 1916, the creditors elected and appointed plaintiff as trustee of the estate of said corporation, which action was approved by the referee, and plaintiff duly qualified as such trustee. It is alleged: That on the 19th day of June, 1915, and for more than one year prior thereto, the corporation was the owner of certain real estate in the town of Calistoga, Napa county, and of certain personal property, consisting of machinery, tools, etc., used by the corporation in carrying on the business of an automobile repair shop and garage. That said corporation, prior to the 19th day of June, 1915, entered into an agreement with said defendant Frank Moors, whereby the corporation agreed to sell and said Moors agreed to buy said real and personal property for the sum of $9,192.93. That said Moors agreed to assume and pay a mortgage upon said real property amounting to $3,692.93, and to pay the balance of $5,500 in cash. "That on the 19th of June, 1915, and for more than six months prior thereto, the defendants C. W. Crouch and J. R. Clark were indebted to the James H. Goodman & Co. Bank" of the city of Napa "in the sum of $1,500." That on or about said date "all of the defendants herein combined and conspired to defraud the Electric & Garage Company and to prevent" its creditors from collecting their claims, "in this: That on or about said date said Frank Moors, C. W. Crouch, and J. R. Clark entered into an agreement whereby Frank Moors agreed to assume and pay to" said bank said sum of $1,500 "as part consideration to be paid for said real and personal property belonging to" said corporation, and said Moors did thereafter pay said sum to said bank. "That by reason of said agreements and the payment of said indebtedness, it was understood and agreed among said defendants that said Frank Moors would be released from the payment of $1,500 in cash to said" corporation "to fulfill his said agreement of the purchase of said property * * *" for the purpose of defrauding the creditors of the corporation "and to have the said indebtedness of J. R. Clark and C. W. Crouch paid and canceled with the proceeds of said real property so belonging to the" corporation. "That at the time said deed to said real property and the bill of sale of said personal property were delivered to said Frank Moors, said Moors, first, delivered to C. W. Crouch two checks aggregating the sum of $1,850; second, assumed and agreed to pay and thereafter did pay said note of $1,500 due by said C. W. Crouch and J. R. Clark; third, surrendered to C. W. Crouch and S. Grace Crouch their promissory note for $2,000; and, fourth, assumed and agreed to pay the mortgage on said real property as and in fulfillment of his agreement to pay said sum of $9,192.03 for said real and personal property." It is next alleged: That on or about the 23d day of June, 1915, the corporation executed and C. W. Crouch, as president and manager, delivered to the defendant Moors a deed to said real property and a bill of sale transferring

said personal property, "and said defendant Frank Moors ever since has claimed to be the owner of said real and personal property. That said defendants, on or about said 19th day of June, 1915, and prior thereto, had reasonable cause to know and believe that the said" corporation "was insolvent, and had such knowledge thereof as would put a reasonable man upon inquiry." That by reason of the above-stated facts the corporation "was deprived of the sum of $1,500 which the said Frank Moors should have paid in cash" to said corporation as part of the consideration for said real and personal property, "and by reason of said transaction the creditors of said" corporation "have been deprived and defrauded of the said sum of $1,500" and judgment was prayed for that amount.

The demurrer interposed to the amended complaint specified all the grounds allowed by the code, but respondents particularly rely upon the grounds of uncertainty and ambiguity, the improper joining of parties defendant, and the want of facts to constitute a cause of action.

[1, 2] The assumption upon which the action proceeds is that the sale of the corporation's property to Moors constituted a perfectly valid transaction—that is to say, that the sale was made in good faith and free from any element of fraud as against the corporation or its creditors or stockholders—and, therefore, the essential gist of the action is that the payment by Moors, as a part of the consideration for the purchase of the said property, of the private obligation of Crouch and Clark to the bank was the culmination of a fraudulent conspiracy between all three defendants to defraud the insolvent corporation and its creditors of so much of its assets as is represented by the amount so paid by Moors to the bank. But, assuming it to be true, as the complaint charges, that the transaction whereby the individual obligation of Crouch and Clark was extinguished by Moors out of the money due the corporation for the property sold by it to Moors was fraudulent or conceived and executed by the three defendants for the purpose of defrauding the corporation and its creditors, still it is clear that the complaint fails to state a cause of actionable fraud against the defendants. There is no allegation showing that the corporation or its creditors suffered any injury or damage as the result of the alleged fraudulent act of the defendants. The original contract—that is, the contract whereby Moors purchased the property of the corporation from the corporation itself—being in all respects valid, Moors is still indebted to the corporation for the unpaid balance of the purchase price of the property. The fact, if it be a fact, that out of the money due the corporation from him for the property he paid the private debt of Crouch and Clark, upon an understanding and agreement between him and Crouch and Clark that he would thus be released from the payment to the corporation of the amount so paid, cannot have the effect of releasing him from the full payment to the corporation of the balance due on the purchase price of the property. Indeed, the Crouches and Armstrong, not being parties to the contract of sale between Moors and the corporation, could not release Moors from any part of his obligation to the corporation. This proposition is not disputed by the plaintiff. Nor does the fact that Moors paid the individual obligation of Crouch and Clark out of the money he owed to the corporation, even though said transaction was initiated and carried out by the three defendants with the intent thus to defraud the corporation or its creditors of the sum of money so paid, make Crouch and Clark either jointly with Moors or otherwise liable to the corporation or its creditors for said money. As already suggested, to sustain the action as against the defendants upon the theory that the superseding agreement—that is, the agreement whereby Moors agreed to and did pay the individual debt of Crouch and Clark as a part of the consideration for the sale to and purchase by him of the corporation's property—was the result of a fraudulent conspiracy to deprive the corporation or its creditors of money belonging to it and constituting a part of the assets of the insolvent concern to which its creditors were entitled, it is necessary to show that the corporation or its creditors were damaged by that transaction, and, as stated, the complaint does not make such a showing. It is not alleged that Moors is himself insolvent, and that, therefore, the debt he owes to the corporation cannot be paid by him, or that the enforcement of its payment by him through the appropriate judicial proceeding cannot be had. And as to him it may be added that nowhere does the complaint allege that any demand upon him for the payment of the full amount of the balance he owes the corporation on the purchase price of the property was ever made, or that he ever refused to pay the corporation all that was coming to it from him.

Our conclusion is that the complaint fails to state a cause of action against any of the defendants; that, at any rate, the defendants, Crouch and Clark are improperly joined with Moors in the action; and that, therefore, the order sustaining the demurrer to the complaint cannot be disturbed.

The foregoing considerations are decisive of this appeal and render unnecessary consideration of other points made against the complaint upon the special grounds of uncertainty and ambiguity.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

38 Cal. App. 53

## DOUGHTY v. MOORS et al. (Civ. 1807.)

(District Court of Appeal, Third District, California. Aug. 12, 1918.)

CORPORATIONS ⟸398(3) — SOLE OWNER OF STOCK — INSOLVENCY — SALE OF PROPERTY —PURCHASER'S LIABILITY.

Where one stockholder, with his wife, owns all the stock of an insolvent corporation, that purchaser of real and personal property of the corporation pays private debts of the stockholder upon agreement that such payment would release the purchaser to the extent thereof from his obligation to the corporation for the purchase price, does not affect his liability for the full purchase price, unaffected by such payment.

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by E. W. Doughty, as trustee of the Electric & Garage Company, bankrupt, against Frank Moors and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Wallace Rutherford, U'Ren & Beard, and E. L. Webber, all of Napa, for appellant. George Clark, of San Francisco, for respondents.

HART, J. A demurrer to the amended complaint filed in this action was sustained, and, plaintiff declining further to amend, judgment was entered in favor of defendants, from which judgment plaintiff prosecutes this appeal.

We have this day filed an opinion affirming the judgment in an action, Civil No. 1806, wherein the plaintiff here was plaintiff and Frank Moors, J. R. Clark, and C. W. Crouch were defendants. 175 Pac. 273. The allegations of the amended complaints in both actions are the same, except that in lieu of the averments in No. 1806 respecting an indebtedness to the James H. Goodman & Co. Bank, the following is set forth in the case under review: "That on said 19th day of June, 1915, and for more than six months prior thereto, the defendants C. W. Crouch and S. Grace Crouch were indebted to the defendant Frank Moors in the sum of $2,000 upon a promissory note made and executed by them"; that in April, 1915, "the defendant E. L. Armstrong, by an instrument in writing, guaranteed the payment to said Frank Moors" of said promissory note; that on or about said 19th day of June, 1915, the defendants entered into an agreement whereby said Frank Moors canceled and surrendered to the defendants Crouch said promissory note and released the defendant Armstrong from his guaranty to pay said note, "and all of said transactions were had for the purpose of enabling said Frank Moors to surrender to said C. W. Crouch and S. Grace Crouch their said promissory note in his favor as a part of and in part settlement of the purchase price to be paid by him for said real and personal property, and to enable said Frank Moors to apply said sum of $2,000 so due him towards a settlement of the amount he agreed to pay for said property." Judgment was prayed for the sum of $2,000, the amount of said promissory note, and interest.

The demurrer to the amended complaint was similar to that filed in action Civil No. 1806.

This case was submitted for decision on the briefs filed in Civil No. 1806, supra. As stated, the above allegation makes the only difference between the two cases, so far as the complaint is concerned. The note which it is herein alleged was canceled by Moors as part of the consideration for the purchase of the corporation's property is, so far as the complaint shows, the individual note of Crouch and his wife, Armstrong being a guarantor of the payment of said note.

What we have said in Civil No. 1806 applies with equal pertinency and force to the instant case. It is obvious that the complaint does not show that the Crouches and Armstrong are liable to the corporation or the trustee, representing both the insolvent corporation and its creditors, for the debt or any part thereof which Moors may owe the corporation for the property bought by him from it. As is said in the opinion in Civil No. 1806 of the transaction therein considered, so it is to be said of the transaction upon which this action is based, that, while it may be assumed to be true that Crouch, his wife, Armstrong, and Moors were guilty of a conspiracy to defraud the corporation and its creditors by the extinguishment of the note in question here, out of money due from Moors to the corporation as the consideration for the sale to him (Moors) of the property of the corporation, yet there is nothing in the complaint disclosing that damage resulted to the corporation or the creditors thereof or to the plaintiff by reason of said transaction. The obligation of Moors to pay his full indebtedness to the corporation created by his purchase of the property still exists, and, so far as the complaint shows to the contrary, he is or was, at the time of the commencement of this action, solvent and able to meet it. It is very clear that his payment of the note referred to in the complaint, even if made under an agreement with the makers and the guarantor for the purpose of defrauding or with the fraudulent intent to deprive the corporation and its creditors of the sum required to extinguish the obligation, cannot have the effect of making the Crouches and Armstrong jointly with Moors or otherwise liable to the corporation or to the trustee in bankruptcy, who is vested with the legal title to all the insolvent corporation's assets, for the debt due from Moors to the corporation arising by reason of his purchase of the latter's property. In other words, the fact that Moors might have

paid the private debts of a stockholder of the corporation upon the agreement between him and such stockholder that such payment would release him to the extent thereof from his obligation to the corporation would not have the effect of binding the stockholder to said obligation, in the absence of an agreement to that effect by all the parties, including the corporation itself. As to Moors, the complaint does not show that he has ever refused to pay the corporation or the trustee all that is due from him on the purchase price of the property. But we have sufficiently stated our views of the situation as it is presented in the complaints in both actions in the opinion in Civil No. 1806.

We doubt not that the demurrer to the complaint in this action was properly sustained on the grounds that no cause of action is stated against any of the defendants, and that there is an improper joinder of parties defendant.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

38 Cal. App. 68

PEOPLE v. OUBRIDGE. (Cr. 789.)

(District Court of Appeal, First District, California. Aug. 15, 1918.)

WITNESSES ⟸337(5) — IMPEACHMENT — DEFENDANTS.

The defendant, as a witness, is subject to the same rules for testing his credibilty before the jury, by impeachment or otherwise, as any other witness, and may be asked if ever convicted of felony without violating Pen. Code, § 1025, relating to evidence of previous conviction, and section 1323 limiting defendant's cross-examination.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Harry Oubridge was convicted of attempting to pass a fictitious check, and he appeals. Affirmed.

Fred W. Moore, Jr., of Oakland, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was charged by information with the crime of attempting to pass a fictitious check and with a prior conviction of forgery. He was tried, convicted, and sentenced under the indeterminate sentence law.

The only point urged for reversal is that the court erred in permitting the district attorney to ask defendant, who had taken the stand in his own behalf, upon cross-examination if he had ever been convicted of a felony. It has been held that:

"Where a defendant, though admitting the charge of prior conviction upon arraignment, becomes a witness in his own behalf, he may be asked if he has ever been convicted of a felony. Such conviction may be proved as affecting his credibilty as a witness." People v. Martini, 21 Cal. App. 743, 132 Pac. 1069.

When the defendant offers himself as a witness he becomes subject to the same rules for testing his credibility before the jury, by impeachment or otherwise, as any other witness. In the case of People v. Oliver, 7 Cal. App. 601, 95 Pac. 172, the court said:

"It is clear that it was not the intention of the Legislature, by the re-enactment of section 1025 (Penal Code), any more than it was by the enactment of section 1323, to give to a defendant the opportunity of making any statements upon his direct examination that he might choose, and preclude the prosecution from testing the truth or falsity of such statements, or to prevent the people from impeaching the defendant's testimony by the same rules applied to the testimony of other witnesses."

Judgment and order affirmed.

38 Cal. App. 69

PEOPLE v. HART. (Cr. 805.)

(District Court of Appeal, First District, California. Aug. 16, 1918.)

CRIMINAL LAW ⟸1043(2)—EVIDENCE—GENERAL OBJECTION.

A general objection to the admissibility of impeaching evidence is insufficient for review of a specific objection to the questions.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Frank T. Hart was convicted of robbery, and he appeals. Affirmed.

Edward W. Parker, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. Defendant together with Stanley J. Fink and Gus Hinos were charged by information with the crime of robbery. The charge against Hinos was dismissed. Fink pleaded guilty, while the defendant pleaded not guilty, relying upon an alibi. After trial he was convicted and sentenced to imprisonment. This is an appeal from that judgment and from orders denying defendant's motions for a new trial and in arrest of judgment.

The evidence amply supports the verdict. During the trial however, the prosecution called a witness to the stand for the purpose of impeaching Stanley J. Fink, a witness for the defendant; and as the proper foundation for the question, as provided in section 2052 of the Code of Civil Procedure, had not been laid, the defendant asserts that the judgment of conviction should be reversed. This might or might not be true if the defendant had interposed a seasonable or any objection to the question; but while he stated that he objected to the question he did not give or attempt to give the grounds of his objection, nor did he move to strike out the answer to the question. A general objection to the admissibility of evidence is insufficient. People v. Nelson, 85 Cal. 421, 24 Pac. 1006. A party objecting to evidence must specify the grounds

of his objection, and if he does not, there is no error in overruling it. People v. Chee Kee, 61 Cal. 404.

Appellant makes no other point warranting special mention.

The judgment and order are affirmed.

---

38 Cal. App. 56

MAGINESS v. WESTERN SECURITIES CORPORATION et al. (Civ. 1839.)

(District Court of Appeal, Third District, California. Aug. 13, 1918. On Petition for Rehearing, Sept. 12, 1918; Denied by Supreme Court Oct. 10, 1918.)

1. CORPORATIONS ⊂=116—SALE OF STOCK—FRAUD.

Misrepresentations, by stock salesmen, as to amount of such stock subscribed, and statements that wealthy and influential men had each subscribed for $10,000 worth of stock, whereas they had only one share which was unpaid for, were fraudulent as to purchasers of stock on strength thereof.

2. CORPORATIONS ⊂=117 — SALE OF STOCK — RESCISSION.

Under Civ. Code, § 1691, subd. 1, exacting prompt action in case of rescission, buyer of stock *held* precluded from rescinding his contract on ground of fraud, where action to rescind was brought more than six months after the discovery of the fraud and of about ten months after knowledge of a part of the fraud and of his right to rescind, where there was no legal justification for such delay.

3. CORPORATIONS ⊂=117 — SALE OF STOCK — RESCISSION.

Where a person who purchased stock in reliance on misrepresentations, after having discovered the fraud, discharged a note he had given in payment of stock, and entered into new contract with agents of the corporation for the resale of his stock, he ratified his contract of purchase of stock and could not thereafter rescind.

4. EQUITY ⊂=65(2)—MAXIMS—CLEAN HANDS.

Where buyer of stock, after discovering fraud, makes contract for resale and brings action for rescission, equity will regard his claim for relief with disfavor, since he is endeavoring to impose upon an innocent person the burden of fraud.

5. CORPORATIONS ⊂=117—SALE OF STOCK—RESCISSION—RESTORATION.

Buyer of stock suing for return of consideration and cancellation of notes is not entitled to judgment, where he did not rescind contract prior to commencement of action by restoring whatever of value he had received, as required by Civ. Code, § 1691, subd. 2.

6. CORPORATIONS ⊂=117—SALE OF STOCK—RESCISSION—TENDER.

Where purchase of stock is complete, though certificate has not been delivered to buyer, buyer, to effect rescission, must offer to surrender and have canceled his interest in the stock upon condition of similar action by seller as to note given in payment for stock.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by S. H. Maginess against the Western Securities Corporation and others. Judgment of nonsuit, and plaintiff appeals. Affirmed.

L. T. Hatfield, of Sacramento, for appellant. Dunn & Brand, of Sacramento, for respondents.

BURNETT, J. [1] The appeal is from a judgment of nonsuit. From the complaint it appears: That on August 16, 1912, plaintiff purchased 1,000 shares of the capital stock of the California Guarantee Life & Accident Insurance Company, paying therefor the sum of $2,000, and thereafter received the certificate of stock. That subsequently, on November 23, 1912, he entered into an agreement for the purchase of 3,200 additional shares at the rate of $2.50 per share, and, in payment therefor, he executed and delivered to said company two promissory notes, one for $3,000, and the other for $5,000. That on the 21st day of July, 1913, plaintiff paid off the $3,000 note and executed a new note for $5,000 on the same day and delivered it to said company, which note is still outstanding. By the action plaintiff sought the return of the $5,000 paid by him and the cancellation of the said note for $5,000 and of the balance due on his subscription. The ground for his claim is found in the allegation of certain false and fraudulent statements and representations made by the agents of the company, relying upon which plaintiff was induced to make said purchases. It is not disputed that the facts alleged constitute "fraud" as that term is contemplated by the Code and the decisions of the courts. As to that, the allegations and proof are sententiously stated by appellant as follows:

"They (the agents) represented that the company was fully organized. Capital stock, $350,000. All but $40,000, actually sold. Large numbers of wealthy, influential men, subscribers and directors with $10,000, stock each. Begin business early in 1913. Very profitable. Facts established: Never had $250,000 of stock subscribed. Never did begin business. Never earned or paid a dividend. The actually wealthy men reputed stockholders and directors had only one share each and never paid for that."

It is apparent that some of the representations were mere matters of opinion and could hardly constitute the basis of rescission of the contract, but misrepresentation of existing facts was sufficiently alleged and shown to make a case of gross and wicked imposition and fraud. The agents seem to have acted in the transaction with unconscionable greed, and the directors, who were men of wealth and prominence in the community, by the pretext and artifice of a mere nominal investment and the assumption of an important relation to the company became parties to a questionable practice that was likely to result, and which undoubtedly did result, in loss and injustice to many innocent purchasers of stock. We believe these directors had no intention of participating in any fraud, but the fact of their connection with the company induced others to invest money which they could illy afford to lose. Men of high standing in the community should be reluctant to thus lend the prestige of their names and influence to an interprise in which they

have not sufficient confidence to risk their own money. In consequence of similar action on the part of prominent men in this state, many unsophisticated persons have been led to embark, to their financial loss, in unsafe and fraudulent schemes which have had the alluring recommendation of such persuasive indorsement.

However, notwithstanding the nefarious conduct of the agents and the moral wrong suffered by plaintiff, there are several reasons why the lower court could not legally grant them any relief in this action and why we are constrained to uphold the decision of the trial judge. They were stated in the motion for nonsuit, and some of these grounds we proceed to notice.

[2] First, it may be said that the plaintiff failed to comply with the requirement of subdivision 1 of section 1691 of the Civil Code exacting prompt action in case of rescission. To take advantage of this remedy, he must act immediately when he discovers the facts that entitle him to rescind and he is aware of his right to rescission. He cannot speculate upon the chance of profit notwithstanding the fraud, and thereafter rescind the contract. He is put to his election whether to stand upon the contract, and, if he delays in making his choice, it must be amply excused, or else he is deemed to have waived his right to have the contract avoided. The allegations of plaintiff's complaint show that he did not comply with the established rule in that respect, and no facts are averred that relieve him from compliance. He alleges that on the 1st day of July, 1913, he was convinced that the representations as to the solvency and efficiency of the said company were false in fact. It also appears that as early as March of that year he became dissatisfied with his transaction and "notified said defendant, California Guarantee Life & Accident Insurance Company, that he would not receive and pay for said undelivered shares of stock, and that any right he might have in that behalf would be abandoned by him, and that he desired to abandon and rescind his right to such shares and to receive back his said notes."

If he had maintained this position and brought his action immediately, his attitude might have received favorable consideration at the hands of the court. But on July 21st he paid off one of the notes, and, with knowledge of the fraud and his right to rescind, he executed a new note for $5,000 and entered into another agreement with the agents for a resale of his stock. Then the action was not brought until January 31, 1914, a delay of more than six months after the full discovery of the fraud and of about ten months after knowledge of a part of the fraud and of his right to rescind. There is no attempt in the pleadings to excuse this delay, and we find no legal justification in the evidence. It is true that plaintiff testified that he had communications with the president of the company and with other interested parties who explained why the company had not begun business, and who promised and assured plaintiff that this condition would soon be remedied. But these conversations cannot be considered to excuse his delay in rescission for the reason that they did not relate to the facts that constituted the basis of this action. The fraud consisted in the misrepresentations as to the existing condition of the company, and not as to its future operation. It is true that there is a reference in the complaint to a promise that the company would begin business at a certain time, but there is no allegation that this was made with the intention of deceiving plaintiff. It cannot therefore be regarded as an element of the fraud, and it is quite apparent that any renewed promise as to that matter could not legally excuse plaintiff from promptly deciding whether he would rescind in consequence of the false statements of fact that induced the contract.

The necessity for prompt rescission with the alternative of the loss of the right or privilege is declared and illustrated in a large number of cases, many of which are cited by counsel herein. One of the latest is Garstang v. Skinner, 165 Cal. 721, 134 Pac. 329, wherein it was held:

"That notice of facts and circumstances which would put a man of ordinary prudence and intelligence on inquiry is, in the eyes of the law, equivalent to knowledge of all the facts a reasonably diligent inquiry would disclose."

This case is stronger than that in so much as it appears from the complaint herein that plaintiff had actual knowledge of the fraud and of his right to rescind many months before suit was brought.

In Marten v. Burns Wine Co., 99 Cal. 355, 33 Pac. 1107, it was held that a delay of three months was too long.

In the case of Bailey v. Fox, 78 Cal. 389, 20 Pac. 868, it was held that:

"A delay of four months after the discovery of fraud in a partnership contract, during which business is carried on as usual under the contract, is fatal to a claim of right to rescind the contract for the fraud."

"A party cannot wait until time shall determine whether the contract sought to be rescinded turned out to be good or bad." Hammond v. Wallace, 85 Cal. 522, 24 Pac. 837, 20 Am. St. Rep. 239.

Moreover, at least as to the second cause of action, we must entirely eliminate the consideration of said fraudulent representations. This follows for the reason that the complaint shows that, after the contract was executed, plaintiff, with knowledge of the fraud, and being under no disability, voluntarily acquiesced in and ratified said contract and entered into a new agreement with said agents for the resale of said stock. The particular allegations in question are:

"That plaintiff paid off and discharged said note maturing July 1, 1913, amounting to $3,000, and received back said note. That plaintiff entered into a new agreement with said defendant, California Guarantee Life & Accident Company, and its agents, Morgan, Allen, and

Whisner, whereby said agents Morgan and Allen were to sell and dispose of plaintiff's rights to said stock and the whole thereof and to continue said original agreement for the subscription for such stock provided plaintiff would execute a new note, dated July 21, 1913, for $5,000, payable on or before March 1, 1914, with interest at the rate of 6 per cent. per annum from date until paid, and that said Whisner, representing himself to be in control of said note, agreed to withhold said new note from sale until the 1st day of December, 1913. That plaintiff accepted such proposition, and on the 21st day of July, 1913, executed and delivered to said agents for California Guarantee Life & Accident Insurance Company, his promissory note for $5,000, payable on or before March 1, 1914, with interest at the rate of 6 per cent. per annum from date until paid, and the same is now outstanding and unpaid."

The controlling principle in such a situation was carefully considered in Oppenheimer v. Clunie, 142 Cal. 313, 75 Pac. 899, and the court quoted with approval the clear enunciation of the doctrine in section 897 of Pomeroy's Equity Jurisprudence that:

"If, after discovering the untruth of the representations, he (the party defrauded) conducts himself with reference to the transaction as though it were still subsisting and binding, he thereby waives all benefit and relief from the misrepresentations."

The court also approved of the following from Grymes v. Sanders, 93 U. S. 55, 23 L. Ed. 798:

"Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract as if the mistake or fraud had not occurred."

[3] Here, as already seen, the plaintiff was more than silent. He virtually admitted the validity of the contract, and he deliberately entered into another agreement upon the basis and understanding that he was the owner of the stock. He thereby elected to stand upon the original contract and he could not thereafter disaffirm and rescind it. If the remedy of rescission was still available, it must necessarily be confined to said agreement of July 21, 1913. But as to that agreement there is an entire absence of an allegation of any fact constituting fraud. It appears to have been an entirely voluntary arrangement, plaintiff executing the note upon the consideration that the agents would sell the stock and divide the profits with the former. No false statements are charged, nor is it alleged that any promise was made with the intention of deceiving or defrauding plaintiff. In fact, we can perceive therein no ground for rescission.

[4] It may be said, further, that the conduct of plaintiff in entering into said contract for the sale of the stock after he had knowledge of the financial insecurity of the company would incline a court of equity to look with disfavor upon his claim for relief. His conduct in reference to the whole transaction must be free from reproach if he expects a court of conscience to restore him to his former condition. Of course, a litigant does not meet the requirement of "clean hands" where it appears that he is endeavoring to impose upon an innocent person the burden of the fraud which he himself has suffered. If his conduct has been inequitable in reference to the same subject-matter, his plea to a court of equity will fall upon deaf ears.

[5] Aside from the foregoing, it is clear that plaintiff was not entitled to judgment for the reason that he failed to effect a rescission prior to commencing suit. Indeed, the complaint itself is totally insufficient in its failure to set forth such allegation, and the evidence does not supply the defect.

Subdivision 2 of section 1691 of the Civil Code provides that:

"He must restore to the other party, everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so."

The only reference to restoration in the complaint is found in this allegation:

"Plaintiff comes now and tenders return of the certificates for 1,000 shares of stock issued to him as set forth herein and consents to the cancellation of all agreements and obligations created or intended to be created hereunder."

In the second count there is no reference whatever to any offer to restore.

It has, however, been settled by the decisions of the Supreme Court that, with the exceptions specified in said section of the Code, rescission must be effected prior to the commencement of the action, and that such rescission must be alleged in the complaint and, if denied, it must be proved at the trial. The early case of Gifford v. Carvill, 29 Cal. 589, considers the question at length, and it was held that, in order to justify a court in setting aside the sale of certain mining stock for fraud, it was necessary for the vendee to allege that he "rescinded the contract and returned or made a tender of the stock," unless it appeared that the stock was of no value. It was further held that to excuse the absence of such allegation as to rescission the burden was upon the vendee to allege and show that the stock was valueless.

In Herman v. Haffenegger, 54 Cal. 161, the complaint seems to have been sufficient in this respect, but it was held that the proof failed to show that the defrauded party before the trial had returned or offered to return what he had received of value, and the court held that he was properly nonsuited.

In Hammond v. Wallace, 85 Cal. 522, 24 Pac. 837, 20 Am. St. Rep. 239, it is said:

"Moreover, there is neither averment nor proof that plaintiff ever made any attempt to rescind or made any tender, or offer to return, anything of value received from defendant previous to the filing of complaint, or any tender at all. The only averment upon the subject is that plaintiff is 'willing and able to return to the defendant all the money which she paid to

him on the purchase of the property and all the moneys which she has lawfully or legitimately paid out or expended on account of the purchase of said property and now offers to do so.' This is not sufficient."

Then, after citing the earlier cases, the court concludes that "this defect in plaintiff's case is fatal."

The latest decision of the Supreme Court, concerning whose controlling effect herein there can be no doubt, is Fairchild v. Western Securities Corporation et al., 169 Pac. 363. The complaint therein was essentially the same as the first count of the complaint here. Indeed, both represent a series of cases involving a similar situation and prosecuted by the same attorney. In the Fairchild decision it was held that the complaint failed to state a cause of action because there was no averment that the stock was valueless or that defendants were able to or had upon tender thereof refused to return the $500, so received by them as the purchase price therefor. It was also held that the averment, "Plaintiff comes now and tenders return of the certificates for 250 shares of the stock issued to her, * * * and consents to the cancellation of all agreements and obligations created or intended to be created hereunder," did not constitute a compliance with the requirement of the statute in regard to restoration; the court saying:

"In the absence of anything pleaded excusing plaintiff from so doing, it was her duty, upon declaring that it was not her property, to restore or offer to restore to defendants upon condition that they repay to her the $500, so paid therefor, thus prior to bringing suit affording them an opportunity to join in the act of rescission."

As to this decision, the learned counsel for appellant admits that "the same language as to tender was involved for the same reason as this suit is being prosecuted." However, he declares that:

"With all due respect to the Supreme Court Justices who united in the opinion in department and to the court in banc, which refused a rehearing, that decision is against law, good morals, and is not sound."

The opinion of the counsel on any question of law is not to be lightly regarded; but, of course, we are constrained to accept the opinion of the Supreme Court, although the attorney for appellant may consider it entirely erroneous.

[6] The second count of the complaint presents a little different aspect, in that the certificate of stock was not delivered. The allegations show, however, that the purchase was complete, that appellant was the owner of said stock and was in a position to demand the delivery of the certificate. He was under the same legal necessity of offering to surrender and have canceled his right and interest in and to the stock upon condition of a similar action on the part of respondents as to the note. This question was fully considered by this court in the case of Majors v. Girdner, 31 Cal. App. 47, 159 Pac. 826, wherein it was said through Justice Hart that the duty to restore or offer to restore everything of value was imperative, and "to do this it was not requisite * * * that he should have previously had issued to him or had in his possession the certificate for the stock, which is, as suggested, the mere physical evidence of the interest he owned in the capital stock of the corporation."

There is, indeed, in the second count of the complaint the allegation of the offer of rescission in March, 1913, as already stated; but it was withdrawn and nullified by the subsequent action of appellant. It does not appear to have been renewed, and therefore the sufficiency of the allegation we need not consider.

As a matter of pleading, it is thus apparent that appellant's case is vitally defective.

If it had been tried upon the theory, however, that the complaint was sufficient and evidence received without objection that the proper tender was made or that the stock was of no value, it might be held, according to the familiar rule, that the defect was cured. But such is not the situation, as we view the evidence. The showing by plaintiff added nothing to the efficacy of his allegation, and the same infirmity appeared on the motion for nonsuit.

We think the judgment should be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

On Petition for Rehearing.

PER CURIAM. Appellant's counsel has misconstrued certain expressions used in the opinion filed in the case. The court has nothing but the highest respect for his ability and sincerity, although, like many other good men, he is at times somewhat intemperate in his criticism and denunciation of opinions adverse to his own. We adhere to our former opinion, as we believe that under the decisions the judgment must be upheld.

The petition for rehearing is denied.

179 Cal. 32

DONOVAN v. STEVENS. (L. A. 4597.)

(Supreme Court of California. Sept. 24, 1918. Rehearing Denied Oct. 23, 1918.)

PUBLIC LANDS ⊂=39(5)—TOWN-SITE TRUSTEE—MONEY COLLECTED BY MISTAKE—EVIDENCE.

Evidence *held* to show that defendant, as Nevada town-site trustee, under mistake as to authority, fixed and collected of grantees of lots greater fees for attorney obtaining patent than statute authorized; and so, as to excess, is, under Civ. Code, § 2224, trustee, not for plaintiff, the attorney, but for the grantees, who but for the mistake would have it.

Department 2. Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by James Donovan against Theron Stevens. Judgment for plaintiff, and defendant appeals. Reversed.

Geo. B. Watson, Riley & Heskett, and James G. Pfanstiel, all of San Diego, for appellant. William Ogden, of Los Angeles, for respondent.

MELVIN, J. Defendant appeals from a judgment in favor of plaintiff by which it was determined that $3,500 on deposit with the American National Bank of San Diego, Cal., in the name of Theron Stevens, trustee, and $4,480.35 on deposit with the John S. Cook & Co. Bank of Goldfield, Nev., in the name of Theron Stevens, trustee, are held in trust for said plaintiff, James Donovan, and also directing said Theron Stevens individually or as trustee to assign, transfer, and set over to said plaintiff all right, claim, and interest therein.

According to the allegations of the complaint, plaintiff is an attorney at law, admitted to practice in all the courts of Nevada. In April, 1905, the people constituting the inhabitants of Goldfield, Nev., and occupants of public lands embraced within the said town of Goldfield and South Goldfield, assembled in public meeting and organized the "Squatters' Association of Goldfield, Nevada," for the purpose of procuring and defending an application for the public lands so occupied by them as a town site under sections 2387, 2388, and 2389 of the United States Revised Statutes (Comp. St. 1916, §§ 4791–4793), and for the purpose of contesting certain alleged mineral claims purporting to cover some of said lands. By law the judge of the district court of Esmeralda county was constituted trustee for the inhabitants of the town and occupants of the public lands for the purpose of making such application. He made and filed a certain amended application (which had been prepared by plaintiff) for the entry of the lands embraced within Goldfield and South Goldfield, naming respondent in such application as his attorney. About the month of May, 1907, the said "Squatters' Association," in mass meeting assembled, by unanimous vote, authorized a committee then and there named to enter into an agreement with the plaintiff, whereby he would undertake as attorney for applicants to procure a townsite patent for the lands embraced within Goldfield and South Goldfield. The inhabitants, on their part, agreed to pay plaintiff $10 per lot for the issuance of such patent. There were, approximately, 4,300 lots in the tract involved. Plaintiff prosecuted the applications and contested the mineral claims, fully performing his contract, and in November, 1909, the United States issued a patent to the land embraced within the town site. In January, 1909, defendant was appointed judge of the district court of Esmeralda county and thereafter continued the administration of the trust for the inhabitants of Goldfield and South Goldfield. On the issuance of the patents, plaintiff presented his contract for $10 a lot to the trustee, who, believing the amount was excessive, suggested a modification of the agreement with the result that four arbitrators were appointed, two by plaintiff and two by the trustee, who, after considering the matter thoroughly, determined that the value of plaintiff's services was $15,000, or $3.45 per lot assessed against 4,342 lots. The complaint contains the allegation that:

"Under and by virtue of said compromise and agreement of arbitration and in acceptance of said award said defendant collected from each and every person the sum of three dollars and forty-five cents ($3.45) for each lot, which said defendant issued deeds for up to or about the first of February, 1911, and that there was issued up to the said date and deeds delivered for twenty-six hundred and three (2,603) lots, and that the amount received by said defendant from the recipients of said deeds to and for the use of this plaintiff was the sum of eight thousand nine hundred and eighty dollars and thirty-five cents ($8,980.35), all of which money was paid by the inhabitants and occupants of lands and lots as aforesaid, and by each and every thereof freely and voluntarily for the purposes aforesaid, upon the delivery of the deeds to the respective lot claimants."

It is further alleged that in February, 1910, defendant paid plaintiff $1,000, but has refused to surrender to him the remaining $7,980.35.

After unsuccessfully demurring to the complaint, defendant answered, admitting many of the allegations of the complaint, and alleging that, after apportionment to each lot of $3.45, defendant, as trustee, assessed that sum against each of the lots, together with all other costs and charges in connection with the execution of his trust, believing he had power so to do under section 7 of an act of the Legislature of Nevada (Comp. Laws, § 345) prescribing rules and regulations for the execution of a trust arising under an act of Congress (Act March 2, 1867, c. 177, 14 Stat. 541) entitled "An act for the relief of the inhabitants of cities and towns upon the public lands, approved March second, eighteen hundred and sixty-seven." In delivering deeds to the claimants, defendant, as he al-

leged in his answer, demanded, as a condition precedent to said delivery, that the claimants should each pay all costs and charges, including the amount assessed as attorney's fee, which, however, was not separately itemized as such. It is also alleged that, after the payment of $1,000 to plaintiff by defendant, certain actions were brought which caused defendant to refuse further payments until the court should determine the respective rights of the plaintiff and the inhabitants of the town site; that by its decision in the case of Jennett v. Stevens, 34 Nev. 128, 116 Pac. 601, the Supreme Court of Nevada held that under section 7 of the statute, in accordance with which defendant believed he had been acting, he was not authorized as trustee to assess and receive the fees to be paid over to plaintiff in accordance with the pleaded contract; and that by that decision the maximum charge which could be made by the trustee was $5.50 per lot, which had been collected by defendant as trustee for proper and legal items, exclusive of attorney's fees. The answer also contains allegations that the money on deposit in the state of Nevada is withheld from defendant's possession and control by virtue of an injunction issued in a suit still pending; and that, the Nevada courts having assumed jurisdiction and control of the trust and of the fund collected thereunder, the courts of California are without jurisdiction in the matter.

The court found in favor of the plaintiff on all material issues. The theory upon which the learned judge of the trial court decided the case is revealed, we believe, in the findings:

That defendant collected the aggregate and unitemized sum of $9.50 per lot; "that said money was paid with the understanding that the said defendant claimed a lawful right to demand of said lot claimants the said sum of $3.45 per lot for the use of plaintiff, and that the plaintiff claimed the right to recover the said sum; that the said defendant then received said money for the benefit of this plaintiff and as a matter of convenience to the parties in interest, and that the collection of said money was not involved within his duties as trustee nor as judge of the district court of the state of Nevada in and for the county of Esmeralda, and that he had full power and authority to receive said collections outside of his duties as trustee and judge as aforesaid."

To sustain these findings, without which the judgment against the defendant personally—not as trustee, for he is not sued in that capacity—cannot be supported, it is necessary to hold that Judge Stevens acted, not in his official and fiduciary capacity under the law of Nevada, but that he collected the fees for plaintiff as the latter's agent. Yet no agency is alleged in the complaint.

It is the theory of respondent (and the superior court accepted that view) that although the Supreme Court of Nevada, in the interpretation of the statute governing the power of the trustee, has decided, in Jennett v. Stevens, supra, that "a fee may not be paid which, together with moneys expended in the acquisition of the title and the administration of the trust and for reasonable charges for the services of the trustee, will exceed $1.00 per lot," nevertheless an additional sum could be levied and collected by the trustee, because of a collateral contract between the attorney and the lot owners. In pursuance of this theory, it is alleged in the complaint that each lot owner freely and voluntarily paid the amount assessed for plaintiff's fee. The court found, however, that a large number of the "assessments" for plaintiff's fees were paid by the lot owners "without protest or objection," but that some of them were paid "under protest and upon the representations by said trustee that the amount would be repaid to such claimants if it should be decided that the collection thereof was unlawful; but the evidence does not disclose what payments or what proportion of the payments, if any, were so paid under protest or upon objection." Obviously, such amounts as were paid under protest must have been collected by Judge Stevens under color of his official power as trustee, and it does not follow, merely because the sums assessed against other lot owners (which did not reveal by itemization the purposes to which the component parts were to be devoted) were paid without protest, that therefore they were delivered to and received by the trustee, not in the supposed execution of the trust, but partly in compliance with a contract involving the payment of larger fees than those allowed by the statute for the services of an attorney.

The court also found:

"That the evidence does disclose that adverse claims have been made upon said fund now on deposit in Goldfield, Nev., and a restraining order issued purporting to be on behalf of certain of said lot claimants in the courts of Nevada against the payment of said fund on account of plaintiff's claim for attorney fees."

The court found that the trustee refused to recognize the original contracts whereby plaintiff demanded $10 per lot, and that after arbitration which was satisfactory to plaintiff said trustee, pursuant to said arbitration, "apportioned and assessed" $3.45 against each lot. There is no pleading nor finding that this modification of the contract was ratified by the lot owners, yet it is found that they paid the exaction, not to the trustee under compulsion, but to him personally in compliance with the agreement, as matter of convenience, so that he might deliver the money to their attorney. Respondent's theory and contention is that by accepting the services of the attorney and by paying the amount assessed the lot owners ratified the new contract made for them by the trustee and the attorney. Yet there is no pleading nor finding that the lot owners even knew of the arbitration. When they paid less than $10 a lot, they must have known that no collection was being made under the original contract. They are presumed to have known that under the statute the trustee might

make a charge for attorney's fees. How could they know, when they paid either with or without protest the amount "assessed" by the trustee against their lots, that they were executing a new contract made by arbitrators whom they did not appoint and ratified by those having no authority to act for them? To ask the question answers it.

All of the evidence tends to show that defendant acted at all times under the belief that he was executing the trust imposed upon him by statute. The federal statute (section 2387, U. S. Rev. Stats.) provides that the state Legislature must create machinery for the execution of the trust "as to the disposal of the lots in such town, and the proceeds of the sales thereof," and under the Nevada law Judge Stevens undoubtedly was the trustee for both purposes. There is no support for the finding that the money was paid "with the understanding that said defendant claimed a lawful right to demand of said lot claimants the sum of $3.45 per lot for the use of plaintiff." And we find nothing in the record to support the finding that the defendant "had full power and authority to receive said collections outside of his duties as trustee and judge as aforesaid."

The evidence shows that the trustee refused to recognize plaintiff's right to collect $10 a lot for his fee. The arbitration was not the making of a new contract between the attorney and his alleged clients. It was merely the fixing of an amount which the trustee recognized as a just compensation and which he believed he had the power to assess under the statute. The manner of assessment without segregation of the items corroborates his own testimony in this regard that he fixed the attorney's fee as trustee believing that the statute authorized him so to do. He was mistaken in this and collected too great a sum of money. This makes him an involuntary trustee as to the excess, not for plaintiff, but for the inhabitants of Goldfield and South Goldfield. Civ. Code, § 2224.

This conclusion makes it unnecessary for us to pass upon the contention of appellant that the courts of California have no jurisdiction of the controversy.

The judgment is reversed.

We concur: WILBUR, J.; LORIGAN, J.

---

179 Cal. 24

## HENEY v. JORDAN, Secretary of State.

(S. F. 8875.)

(Supreme Court of California. Sept. 24, 1918.)

1. ELECTIONS ⟸21—DIRECT PRIMARY—VALIDITY OF STATUTE.

Direct Primary Law of June 16, 1913, § 23, as amended in 1917, precluding a candidate who failed to receive the highest number of votes cast for a nomination by the party with which he was affiliated 35 days before election, as evidenced by his affidavit of registration, from being the nominee of another party, is constitutional under Const. art. 2, § 2½, authorizing the Legislature to prescribe tests and conditions for candidates at primary election.

2. CONSTITUTIONAL LAW ⟸50—LEGISLATIVE POWERS—PRIMARY ELECTION LAW.

The question of what provisions of Direct Primary Law of June 16, 1913, as amended in 1917, are essential to attain the objects contemplated by Const. art. 2, § 2½, authorizing enactment of primary election laws, is one peculiarly within the domain of the Legislature.

3. CONSTITUTIONAL LAW ⟸48—PRESUMPTION OF VALIDITY.

In determining whether any provision of Direct Primary Law of June 16, 1913, as amended in 1917, is violative of Const. art. 2, § 2½, authorizing enactment of primary election law, the presumption is in favor of validity.

4. CONSTITUTIONAL LAW ⟸48—DETERMINATION OF VALIDITY—JUDICIAL AUTHORITY.

If there is any theory upon which the Legislature could have concluded that a provision of Direct Primary Law of June 16, 1913, as amended in 1917, is essential to attain objects contemplated by Const. art. 2, § 2½, authorizing enactment of primary election laws, courts will not declare such provision invalid.

5. ELECTIONS ⟸21—PRIMARY ELECTIONS—STATUTES—CANDIDATES.

The Legislature, under Const. art. 2, § 2½, may prescribe tests and conditions for primary election candidates as well as for electors.

6. ELECTIONS ⟸126(4)—PRIMARY ELECTIONS—CANDIDATE.

Candidate for nomination of Governor at primary election who received the highest vote by the Democratic party, but failed to receive the highest vote for such nomination by Republican party with which he was affiliated 35 days prior to date of election, could not become Democratic nominee in view of Direct Primary Law of June 16, 1913, § 23, as amended in 1917.

7. ELECTIONS ⟸126(1)—INELIGIBILITY OF CANDIDATE RECEIVING HIGHEST VOTE—RESULT.

Where candidate receiving the highest number of votes is ineligible, the candidate receiving next highest vote is not elected, in absence of statutory provision to the contrary, with the result that there is no election.

8. ELECTIONS ⟸126(1)—PRIMARY ELECTIONS—QUALIFICATIONS OF CANDIDATES.

Where primary election candidate receiving highest vote for Democratic nomination for Governor did not become Democratic nominee in view of Direct Primary Law of June 16, 1913, § 23, as amended in 1917, because of failure to get highest vote of Republican party with which he was affiliated 35 days before election, there was no nomination by Democratic party.

9. ELECTIONS ⟸135—PRIMARY ELECTIONS—STATUTES—"VACANCY."

The word "vacancy," in Direct Primary Law of June 16, 1913, § 25, as amended in 1917, prohibiting the filling of any vacancy on a party ticket by party committee, except where caused by death occurring after primary election, refers to any case where for any cause there is no nominee of the party for an office.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Vacancy.]

10. ELECTIONS ⟸135—PRIMARY ELECTION—FILLING OF VACANCY BY CENTRAL COMMITTEE.

Where candidate receiving largest vote for Democratic nomination for Governor did not become Democratic nominee in view of Direct Primary Law of June 16, 1913, § 23, as amended in 1917, because of failure to get highest Republican vote, with which party he had affiliated 35 days before election, the Democratic

State Central Committee was precluded by section 25 as amended in 1917 from filling the vacancy.

11. Elections ⊂=22 — Primary Election — Filling of Vacancies—Validity of Statute.

Direct Primary Law of June 16, 1913, § 25, as amended in 1917, prohibiting the filling by party committee of any vacancy on a party ticket except where caused by death occurring after primary election, is not unconstitutional.

In Bank. Application by Francis J. Heney for writ of mandate directed to Frank C. Jordan, as Secretary of State of the State of California. Order to show cause discharged, and the proceeding dismissed.

Joseph H. Call and Daniel Simms, both of Los Angeles, and Bert Schlesinger and John O'Gara, both of San Francisco, for petitioner. U. S. Webb, Atty. Gen. (Wm. H. Jordan, of San Francisco, of counsel), for respondent. Isidore B. Dockweiler, of Los Angeles, and Garret W. McEnerney, of San Francisco, for Democratic State Central Committee.

ANGELLOTTI, C. J. This is a proceeding in mandate which has been submitted for decision upon the petition and a demurrer interposed thereto.

The material facts as stated by the petition are as follows: At the recent primary election, petitioner and Thomas Lee Woolwine, who were each affiliated with the Democratic party for 35 days and more before the date of the primary election as shown by their affidavits of registration, were candidates for the Democratic nomination for Governor of the state of California, as was also James Rolph, who was so affiliated with the Republican party, as shown by his affidavit of registration. Said James Rolph, together with certain others, including Governor Wm. D. Stephens, were candidates for the Republican nomination for Governor. Mayor Rolph failed to receive the highest number of votes for the nomination of the Republican party, Governor Stephens winning that nomination. He did, however, receive the highest number of votes for the nomination of the Democratic party, the petitioner receiving the next highest number of votes for such nomination. Petitioner claims that, under our primary law, Mayor Rolph, by reason of his failure to win the Republican nomination, cannot be the nominee of the Democratic party, and that he (petitioner), by virtue of having the next highest vote, is the Democratic nominee. He further claims that, in the event that a vacancy has been caused by the disqualification or ineligibility of Mayor Rolph, he is the nominee of the Democratic party by reason of having been selected by the Democratic State Central Committee to fill the vacancy. His petition alleges, and it is conceded by the demurrer thereto, that such committee has assumed to designate him to fill such vacancy, if, in fact, a vacancy existed. He has demanded of respondent that he issue to him a certificate of nomination and that he certify his name as that of the nominee of the Democratic party for the office of Governor at the coming general election, and respondent has refused to do so. Hence this application for a writ of mandate.

In view of the proximity of the day fixed by law for the holding of the general election, and the fact that to nominate any independent candidate or candidates for the office of Governor under the provisions of section 1188, Political Code, it is essential that the nomination papers therefor be presented to county clerks and registrars not later than September 26th, 1918, we deem it imperative, in the exercise of common fairness to all concerned, to announce at once the conclusion of the court upon the various questions presented by this application. It will be impossible in the short time afforded for the preparation of an opinion to do more than to state very briefly the reasons for those conclusions.

1. Section 23 of our Direct Primary Law of June 16, 1913 (Stats. 1913, p. 1404), as amended in 1917 (Stats. 1917, p. 1356), declares that except as to judicial, school, county, township, or municipal officers, "the person receiving the highest number of votes, at a primary election as the candidate for the nomination of a political party for an office shall be the candidate of that party for such office, and his name as such candidate shall be placed on the official ballot voted at the ensuing election"; provided he has paid a filing fee, and, "provided, further, that no candidate for a nomination for other than a judicial, school, county, township or municipal office who fails to receive the highest number of votes for the nomination of the political party with which he was affiliated 35 days before the date of the primary election, as ascertained by the Secretary of State from the affidavit of registration of such candidate in the office of the county clerk of the county in which such candidate resides, shall be entitled to be the candidate of any other political party." This proviso was added by the amendment of 1917. It is plain and unambiguous in its terms, and the language is susceptible of only one construction. If it be a valid enactment, and, of course, it is such unless violative of our state Constitution, Mayor Rolph, owing to his failure to receive the highest number of votes for the Republican nomination for the office of Governor, cannot be the candidate of the Democratic party for that office at the general election.

[1-4] We are entirely satisfied that there is no good ground upon which the courts may declare this provision to be violative of our Constitution. The Constitution itself declares as follows:

"The Legislature shall have the power to enact laws relative to the election of delegates to conventions of political parties; and the Legislature shall enact laws providing for the

direct nomination of candidates for public office, by electors, political parties, or organizations of electors without conventions, at elections to be known and designated as primary elections; also to determine the tests and conditions upon which electors, political parties, or organizations of electors may participate in any such primary election. It shall also be lawful for the Legislature to prescribe that any such primary election shall be mandatory and obligatory." Section 2½, art. 2.

It is in pursuance of this provision that the Legislature has enacted our direct primary law. There can be no doubt that the object and effect of the laws enacted by the Legislature was to make primary elections mandatory and obligatory in so far as political parties are concerned, and to preclude a nomination by a political party made in any other way than that allowed by the act. In considering whether any particular provision of that act is violative of our Constitution, it must be borne in mind that the question as to what provisions are essential to attain the objects contemplated by section 2½, art. 2, of the Constitution, is one peculiarly within the domain of the legislative department, which is practically given plenary power in the matter; that the presumption is in favor of the validity of any provision made; and that, if there is any theory upon which the provision might reasonably have been concluded by the Legislature to be essential, the courts may not interfere. As was said in Re Spencer, 149 Cal. 400, 86 Pac. 897, 117 Am. St. Rep. 137, 9 Ann. Cas. 1105, quoting approvingly from a prior decision:

"The delicate act of declaring an act of the Legislature unconstitutional and void should never be exercised unless there is a clear repugnancy between the statute and the organic law. * * * In a doubtful case the benefit of the doubt is to be given to the Legislature."

[5] We regard the opinion in the case of Socialist Party v. Uhl, 155 Cal. 776, 103 Pac. 181, as practically disposing of what we conceive to be the principal claim of those attacking the provision which here disqualifies Mayor Rolph. The essential thing there decided, in so far as any question here involved is concerned, was that it was competent for the Legislature, under section 2½, art. 2, of the Constitution, to prescribe any test not only for electors voting at the primary, but also for candidates for a party nomination, which had any reasonable relation to the maintenance of the integrity of political parties, which was held to be one of the obvious and authorized purposes of the primary law. The precise question there under discussion was as to the validity of a provision of the primary law which precluded any one from being a candidate for a party nomination at a primary and practically precluded the party from nominating him, unless he filed with his nomination papers an affidavit showing that he affiliated with the party at the last preceding election and that he had either not voted at all, or had voted for a majority of the candidates of that party. Substantially the Legislature had thus said that only one affiliated with a party could be a candidate for nomination by it, and that the reasonable method of determining whether one was so affiliated was the one prescribed, the manner in which he voted at the last preceding election as stated in his own affidavit. The matter was very fully considered by the court and the provision was sustained. In this respect the decision was expressly approved in the later case of Hart v. Jordan, 168 Cal. 321, 143 Pac. 537; the court saying: "Under this section (2½ of art. 2, Const.), the Legislature may prescribe tests and conditions for candidates as well as for electors." We regard this matter as definitely settled by our decisions. In so far as is material to the question of power and reasonableness, there is no real difference between the provision involved in Socialist Party v. Uhl, supra, and the provision here assailed. A person affiliated with one party is precluded from nomination by any other party at the primary only when he fails to receive nomination at the hands of his own party, and the matter of his party affiliation is to be determined in a different way. As to the condition rendering him ineligible in the event of his failure to obtain his own party nomination, the Legislature may well have concluded that it would not be conducive to the integrity of parties that one who has failed to obtain nomination for a certain office by his party should be allowed to avail himself of the nomination of an opposing party for that office in opposition to the successful nominee of his own party; or that such opposing party should be allowed to have him as the nominee under such circumstances. We certainly cannot say that this was an unreasonable conclusion, or that in providing against such a situation the Legislature was exceeding its power. Nor can we say that the test prescribed by the Legislature for determining the party affiliation in such a case is unreasonable. Doubtless other tests might have been adopted, some of which might appear to us, if we were sitting as legislators, more reasonable than the one prescribed. But the Legislature adopted the one stated in the provision. The theory apparently was that it was reasonable to accept the sworn avowal of allegiance of a person to a party, standing of record 35 days before the primary, as constituting the best and only evidence of such real and permanent affiliation with a party for all the purposes of the ensuing primary, as would make desirable such a provision as the one here involved.

We have considered the many other minor objections made by learned counsel to this provision, and are of the opinion that none of them is sufficient to warrant us in declaring the provision violative of the Constitution.

[6] The claim of petitioner that Mayor Rolph, who received the highest vote at the primary for the nomination of the Democratic party for the office of Governor, cannot

be the candidate of that party in view of this provision of the primary act, a claim not disputed by respondent, must be held good.

[7] 2. We are satisfied that, under the circumstances we have stated, petitioner cannot be held to have been nominated at the primary election, or to be the candidate of the party by virtue of such primary election. There is nothing in the primary law to authorize such a construction of the act as would lead to such a conclusion. Indeed, the provision is explicit, that, as to party nominations, "the person receiving the highest number of votes at a primary election as the candidate for the nomination of a political party for an office shall be the candidate of that party for such office," etc. The petitioner did not receive the highest number of votes cast for such nomination, but only the next highest, It is a rule approved by the overwhelming weight of authority in this country, and expressly affirmed several times in this state, that, where the one receiving the highest vote at an election is for any reason ineligible, the candidate receiving the next highest vote is not elected, in the absence of statutory provision to the contrary, with the result that there is no election. See Saunders v. Haynes, 13 Cal. 145; Crawford v. Dunbar, 52 Cal. 36; People v. Rodgers, 118 Cal. 396, 46 Pac. 740, 50 Pac. 668; Campbell v. Free, 7 Cal. App. 151, 93 Pac. 1060; note to State v. Bell, 124 Am. St. Rep. 211; note to Sanders v. Rice, L. R. A. 1918C, 1157.

[8] We can see no good reason why this rule is not applicable to primary elections. There is support in some authorities for an exception to this rule to the effect that in a case where votes are cast by voters for an ineligible candidate with full knowledge on their part of his ineligibility, or for one who is dead with full knowledge of his death (see State v. Frear, 144 Wis. 79, 128 N. W. 1068, 14 Am. St. Rep. 992), they may be disregarded altogether, and treated as nullities, with the result that the person receiving the next highest vote may be held to have received the highest number of lawful votes. But this exception is necessarily and avowedly based on a theory that the votes are knowingly cast under such circumstances that they may fairly be held to be mere nullities—cast with full knowledge that they cannot be effective for any purpose. We have no such situation in this case. Those of the Democratic party who voted for Mayor Rolph voted for one whose name was lawfully on the primary ballot and who was conditionally eligible to receive the Democratic nomination. In view of the law, of course they must be presumed to have known, as is alleged in the petition, that he could receive the Democratic nomination only in the event that he was also nominated by the Republican party; but they nevertheless chose to vote for him as the law contemplated they might lawfully do. To our minds we would not be warranted in disregarding their votes as mere nullities. The result necessarily is that as to the office of Governor there was no nomination made by the Democratic party at the primary election.

[9-11] 3. As to the claim that petitioner is entitled to be the nominee of the Democratic party by virtue of his selection by the Democratic State Central Committee: Prior to the amendments made to the primary act of 1917, a party committee was empowered to fill vacancies on the ticket of the party occurring after the holding of the primary election in all but two specific cases. In 1917 section 25 of the act was so amended as to prohibit the filling of any vacancy on a party ticket, resulting from any cause whatever, except in the single case of a vacancy by reason of the death of the candidate occurring after the holding of the primary election. In such a case only is the party committee authorized to select a candidate of the party for the general election. The language of the section, which is one devoted wholly to the matter of "vacancies," is such as not to fairly admit of any other construction. It is expressly provided that "the vacancy created," among other things, "by reason of the failure of a party to nominate any candidate for the office at the primary election, or for any other cause except the death of the candidate occurring after the primary election, shall not be filled." It is clear that the term "vacancy," as used in this section, refers to any case where, from any cause, there is no nominee of the party for an office. It seems plain to us that, if this provision is a valid enactment, it must be held that the party committee was without authority to make petitioner the nominee of the party. It is claimed by learned counsel that it is violative of our Constitution. We are of the opinion that it cannot fairly be so held. The plain object of the provision was to prevent any departure from or evasion of one of the main purposes of the primary law, that of requiring all party nominations to be made directly by the members of the party at a primary election. Authorization to the party committee to fill a vacancy was therefore confined to the single instance of the death of the candidate after the primary election. Certainly we cannot hold that the Legislature was not warranted in concluding that the provision was a reasonable and necessary provision to make in this behalf.

We can see no warrant for disregarding the plain terms of the primary law that are involved in this proceeding. To any complaint that is made concerning their practical effect we can only say that they are a part of the law of the land, authorized by the Constitution itself, which embodies the will of the people of the state expressed directly by the popular vote on the proposition.

From what we have said, it follows that the respondent properly refused to comply with the demand of the petitioner.

The order to show cause is discharged, and the proceeding dismissed.

We concur: SHAW, J.; LORIGAN, J.; SLOSS, J.; WILBUR, J.; MELVIN, J.; RICHARDS, Judge pro tem.

---

(179 Cal. 811)

RODGERS v. JORDAN, Secretary of State. (S. F. 8870.)

(Supreme Court of California. Sept. 24, 1918.)

In Bank. Application for writ of mandate by Frank N. Rodgers against Frank C. Jordan, as Secretary of State of the State of California. Order to show cause discharged, and proceeding dismissed.

Sullivan & Sullivan, Theo. J. Roche, and Cullinan & Hickey, all of San Francisco, for petitioner. U. S. Webb, Atty. Gen. (Wm. H. Jordan, of San Francisco, of counsel), for respondent. O. K. Cushing, of San Francisco, Isidore B. Dockweiler, of Los Angeles, and Garret W. McEnerney, of San Francisco, for Democratic State Central Committee.

PER CURIAM. This is an application for a writ of mandate.

According to the petition, the allegations of which are admitted by the demurrer, the material facts are as follows: At the recent primary election, petitioner Rodgers, who was affiliated with the Republican party for 35 days or more before the date of the primary election, as shown by his affidavit of registration, was a candidate for both the Republican and Democratic nominations for the office of member of the assembly for the Thirty-Second assembly district, as was also one George W. Warren. Petitioner failed to receive the highest number of votes for the Republican nomination, being defeated therefor by said Warren. He, however, received the highest number of votes for the nomination of the Democratic party, defeating said Warren therefor. He therefore claims to be the nominee of the Democratic party for such office and has demanded of respondent, Secretary of State, that he certify his name as that of the nominee of the Democratic party for such office at the coming general election, and respondent, basing his action on provisions of our primary law, has refused to so certify; hence this application.

What we have said as to the question presented by these facts in the matter of Heney v. Jordan, as Secretary of State (S. F. No. 8875), 175 Pac. 402, disposes of the claim of the petitioner.

It is ordered that the order to show cause be discharged and the proceeding dismissed.

---

(179 Cal. 1)

COUSINO et al. v. WESTERN SHORE LUMBER CO. (S. F. 7987.)

(Supreme Court of California. Sept. 20, 1918. Rehearing Denied Oct. 18, 1918.)

1. PRINCIPAL AND AGENT ⟸103(8) — JOINT POWER OF ATTORNEY—HUSBAND AND WIFE —CONVEYANCE OF SEPARATE PROPERTY.

A joint power of attorney executed by husband and wife, and authorizing conveyance of land "which we now own or which we may hereafter acquire or become seized of," authorized the attorney to convey the wife's separate property.

2. ADVERSE POSSESSION ⟸17—TIMBER LAND —PATROLLING LAND.

Where timber land was valuable chiefly, if not solely, for the timber, possession thereof by lumber company claiming title under written instrument, consisting of patrolling the land for prevention of trespassing and for protection against fire, in doing of which trails were laid out, a cabin built, and bodies of fire fighters used, *held* sufficient, where continued for statutory period, to constitute adverse possession under Code Civ. Proc. § 323, subd. 3, such occupation being for the ordinary use of the occupant.

Department 1. Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by John Cousino and others against Western Shore Lumber Company in which defendant filed cross-complaint. Judgment for defendant, and plaintiffs appeal. Affirmed.

Francis G. Burke, of Los Angeles, for appellants. McCutchen, Olney & Willard, of San Francisco, for respondent.

RICHARDS, Judge pro tem. This action was brought to determine the adverse claim of the defendant to 480 acres of land in San Mateo county under the provisions of section 738 of the Code of Civil Procedure. The defendant denied title in the plaintiffs to any portion of the property, and in a cross-complaint asserted ownership of the property in itself. The facts of the case are practically without conflict, and are briefly these:

Mary Huot, a Sioux mixed blood Indian woman, was born on the Lake Pepin Reserve, in Minnesota, in the year 1850. Pursuant to an act of Congress passed July 17, 1854 (10 Stat. 304, c. 83), there was issued to her and in her name Sioux half-breed scrip entitling her to locate for herself lands of the public domain. The scrip was delivered by the United States government to John Huot, the father of Mary Huot, for her use and benefit, on March 25, 1857. On January 22, 1864, said John Huot was appointed his daughter's guardian by the county court of Pierce county, Wis., where she then resided, and on the same day and as such guardian he executed to one Wm. S. Chapman a power of attorney, by which he authorized said Chapman to locate said scrip upon public lands. On October, 19, 1868, said Chapman, acting under said power of attorney, located the scrip upon the lands involved in this action in the name of Mary Huot, and patents therefor were issued to her on January 20, 1874, which patents were recorded in the county of San Mateo on September 16, 1881. Mary Huot married John Cousino, also spelled Cosineau, on June 17, 1864, in the state of Wisconsin, where she continued to reside until 1876, when she and her husband removed to the state of Minnesota, where they lived until the year 1888, when they took up their residence at Grant's Pass, Or., where she died on May 28, 1894, leaving as her heirs her hus-

band and seven children, who constitute the plaintiffs in this action, basing their claim of title upon their heirship of Mary Huot.

The defendant bases its claim of ownership of the lands in question upon several grounds, the first of these being that of an alleged conveyance by Mary Huot and her husband to Wm. S. Chapman, dated July 26, 1871, by whom the premises were conveyed to the defendant. The deed from Mary Huot and her husband to Wm. S. Chapman was executed on their behalf by one Henry T. Welles, purporting to act as their attorney in fact under a certain power of attorney executed by them on May 20, 1871, by which Mary Cosineau, formerly Mary Huot, and John Cosineau, her husband, of the county of Pierce, state of Wisconsin, constituted and appointed said Henry T. Welles their true and lawful attorney—

"for us, and in our names, places, and stead, to enter into and upon and take possession of any and all pieces and parcels of land or the timber and other material therein in the state of Minnesota and in any state or territory of the United States, which we now own or which we may hereafter acquire or become seised of, or in which we may now or hereafter be in any way interested, and we further authorize and empower our said attorney to grant, bargain, sell, demise, lease, convey, and confirm said land or any part thereof * * * to such person or persons and for such prices as to our said attorney shall seem meet and proper," etc.

The first point urged by the appellants herein is that said power of attorney was not sufficient in its grant of powers to have authorized said Henry T. Welles, as the attorney in fact of Mary Cosineau, formerly Mary Huot, to convey her separate property, their particular contention being that said power of attorney, being joint in its terms, must be construed as having reference only to the joint property of the parties executing the same, or, at most, to such property as both of the parties "now own" or "may hereafter acquire or become seized of," or "may now or hereafter be in any way interested" in; and that since the property with respect to which the power was attempted to be exercised was situated in California, and was the separate property of the wife, in which the husband had no present or prospective interest, it was not covered by the terms of the power. Whatever the rule may be in other jurisdictions, we are constrained to hold that from an early date in the judicial history of California it has been the rule that conveyances and powers of attorney joint in form are to be construed as conveying or authorizing the conveyance of whatever interest both or either of the parties have in the property to be affected by the instrument under consideration. In the early case of Castro v. Tennent, 44 Cal. 253, the instrument in question was a conveyance wherein the grantors undertook to convey all of the undivided half of the right, title, and interest of the said parties of the first part of, in, and to that certain tract and parcel of land, etc. In construing this clause in said conveyance the court said:

"It has been suggested in argument that such a description includes only the joint estate or interest of the grantors, but this construction is hypercritical and is too narrow and technical. In a large majority of cases such a construction would defeat the real intention of the parties. If there be several adverse claimants to separate undivided interests in a tract of land, and if all the claimants unite in a joint deed to a stranger, conveying all their right, title, and interest in and to the lands, it would not be seriously contended, I apprehend, that nothing passed by the deed because the grantors had no joint interest in the land."

In the case of Douglas v. Fulda, 50 Cal. 77, the instrument in question was a power of attorney given by a husband and wife, joint in form, authorizing one Calderwood to lease a certain lot, and under which he undertook to execute a lease of the lot, which was the separate property of the wife. The court said:

"The power of attorney was sufficient. In Castro v. Tennent, 44 Cal. 253, a similar question arose upon the construction of a deed executed by the husband and wife jointly, and purporting to convey their joint interest in the land. It was contended that the separate estate or interest of the wife did not pass by the conveyance. But this court said that this construction was hypercritical and too narrow and technical, and held that the separate estate of the wife passed by the deed. The question now presented is substantially the same. It was undoubtedly the intention of the parties to confer upon Calderwood the power to deal with the separate property of Elizabeth Douglas, and that power was conferred by the instrument, as we construe it."

The rule of construction declared in these two cases has never been departed from or criticized in any later cases, and has, therefore, we think, become a rule of property in this state which should not now be changed.

In addition to this, however, the Supreme Court of the United States has declared the same rule for the construction of powers of attorney joint in form. In the case of Holladay v. Daily, 19 Wall. 606, 22 L. Ed. 187, involving the validity of a transfer of the separate property of the husband under a joint power of attorney executed by the husband and wife, Mr. Justice Field, in sustaining such conveyance, said:

"A power of attorney created by two or more persons possessing distinct interests in real property may, of course, be so limited as to prevent a sale of the interest of either separately; but in the absence of qualifying terms, or other circumstances, thus restraining the authority of the attorney, a power to sell and convey real property, given by several parties, in general terms, as in the present case, is a power to sell and convey the interest of each, either jointly with the interests of the others, or by a separate instrument."

[1] The chief reliance of the appellants herein is upon the case of Gilbert v. How, 45 Minn. 121, 47 N. W. 643, 22 Am. St. Rep. 724, in which a power of attorney substantially in the form of the power under review in this case was held to be insufficient to authorize the donee of the power to convey lands in which only one of the donors of the power

was interested. That this case is in conflict with the rule laid down in the foregoing California cases and also with the statement of the rule by the Supreme Court of the United States in the case above cited was pointed out by Mr. A. C. Freeman in his notes to the case of Gilbert v. How, as reported in 22 Am. St. Rep. 724. It is also to be noted that the rule announced in the case of Gilbert v. How has been very much modified by the courts of Minnesota in three later cases, viz. Tuman v. Pillsbury, 60 Minn. 520, 63 N. W. 104, Snell v. Weyerhauser, 71 Minn. 57, 73 N. W. 633, and Roy v. Harrison Iron Mining Company, 113 Minn. 143, 129 N. W. 154, in each of which later cases powers of attorney in almost the precise phraseology of that under review herein were held to be sufficient to support conveyances of the separate property of the husband, in which at most the only interest of the wife was an inchoate right of dower. In each of these last-named cases the Supreme Court of Minnesota lays special emphasis upon the clause in the power authorizing the donee thereof to convey any lands, wherever situated, in which the donors of the power "may now or hereafter be in any way interested"; holding that these words must be given a broadening effect so as to take these cases out of the rule laid down in Gilbert v. How. The same precise phrase occurs in the power in question here. We are therefore of the opinion that for all of the foregoing reasons the power of attorney given by Mary Cosineau, formerly Mary Huot, and her husband, John Cosineau, was sufficient to have authorized the execution of the conveyance of the lands in question to Wm. S. Chapman, and hence to sustain the defendant's title derived through such conveyance.

[2] The respondent further supports its claim of title to the premises by the plea and proof of adverse possession, and we think its claim in that behalf should also be sustained. The lands in question are rough mountain timber lands valuable chiefly, if not solely, for the timber thereon, which consists of a heavy growth of redwood, fir, and oak. From a period not long after the defendant received the conveyance of these lands from Chapman it began patrolling the same for the prevention of trespassing and for the protection of the timber against fires. In connection with both of these purposes trails were laid out and constantly maintained through various portions of the property from a time shortly after the conveyance to it of the property down to the date of the inception of this action, and which were made use of constantly by the agents of the defendant to keep hunters, fishers, campers, and other trespassers off the property, and to protect all portions thereof against fires. A cabin for the use of the patrols was built and maintained upon the premises, and from time to time as fires occurred within or threatened to invade the property bodies of fire fighters were used in preserving its timber from destruction. It is conceded that the defendant paid the taxes assessed against the property during all these years. The lands, as we have seen, were timber lands. The defendant, who was thus the occupant of said lands, was a lumber company, and the ordinary and eventual use to which said lands were to be put was that of the cutting, logging, and milling of the timber thereon; and this being so, we think the possession of the defendant, as indicated by its foregoing assertion of control over said property, based as it was upon a claim of title founded upon a written instrument, was sufficient to constitute adverse possession for the required statutory period under subdivision 3 of section 323, of the Code of Civil Procedure. Coryell v. Cain, 16 Cal. 567; Wolf v. Baldwin, 19 Cal. 306; Brumagim v. Bradshaw, 39 Cal. 24; Spotts v. Hanley, 85 Cal. 155, 24 Pac. 738; Webber v. Clarke, 74 Cal. 11, 15 Pac. 431.

The other points made upon the appeal do not require discussion.

Judgment affirmed.

We concur: SHAW, J.; SLOSS, J.

---

178 Cal. 803

## PEOPLE ex rel. JONES v. ZEMANSKY et al.

(S. F. 8872.)

(Supreme Court of California. Sept. 16, 1918.)

1. ELECTIONS ⊜156—RIGHT TO CERTIFICATE OF NOMINATION—PRIMARY ACT.

Under Primary Act, § 23, as amended by St. 1917, p. 1356, two candidates for judge of superior court of city and county of San Francisco were not entitled to certificate of nomination, where neither was "majority candidate" under section, that is, one receiving majority of all votes cast in San Francisco at primary election, and there were not four such majority candidates nominated at primary.

2. CONSTITUTIONAL LAW ⊜43(2)—VALIDITY OF STATUTE—ESTOPPEL TO RAISE QUESTION.

Where establishment of claim of petitioner for writ of mandate to compel respondents to issue certificate of nomination to her, that the whole primary act is unconstitutional, would bar her from receiving certificate of nomination sought, Supreme Court need not consider points made by petitioner as to unconstitutionality of act.

In Bank. Application for writ of mandate by the People of the State of California, on the relation of Charlotte F. Jones, against J. H. Zemansky and others. Application denied.

Charlotte F. Jones, of Seattle, Wash., for petitioner.

PER CURIAM. [1, 2] Notwithstanding its title, this proceeding in so far as it can be considered by us, is in effect simply one by Charlotte F. Jones to obtain a writ of mandate compelling respondents to issue certificates of nomination to her and another, as candidates for judges of the superior court of

the city and county of San Francisco, by reason of the votes received by them respectively at the recent primary election. As to neither herself nor the other candidate, who does not join in or assent to the petition, are sufficient facts alleged to make a prima facie case for relief, in that it is not made to appear that either was a "majority candidate" under the provisions of section 23 of the Primary Act (St. 1913, p. 1404, by St. 1917, p. 1356), that is, one receiving a majority of all the votes cast in San Francisco at said primary election, and that there were not four such "majority candidates" nominated at said primary. If this was the situation, neither she nor the other candidate named in her petition was entitled to a certificate of nomination, in view of certain provisions of said section 23 as to the validity of which provisions we can perceive no serious question. Furthermore, as to herself, her name not having been printed on the primary ballot and her 49 votes having been received from persons writing in her name on the ballot, it is not made to appear that she received a sufficient number of votes to equal the number required for a nomination paper, so as to entitle her to a certificate of nomination, under a provision of subdivision 9 of section 5 of the Primary Act.

[3] It is further claimed by petitioner that the whole Primary Act is violative of our Constitution. The establishment of any such claim would effectively bar her from receiving the certificate of nomination sought, and it is therefore unnecessary to consider the points made by her in that regard.

The application for a writ is denied.

---

179 Cal. 38

## NOAKES v. CITY OF LOS ANGELES et al. (two cases). (L. A. 4574.)

(Supreme Court of California. Sept. 24, 1918.)

1. PLEADING ⊂⊃403(4)—CURING OF DEFECTS — DEFECTIVE COMPLAINT — ANSWER — EVIDENCE.

Where demurrer was overruled, failure to allege that employers failed to provide safe place for work, and that he should have known place was unsafe, was cured by answer raising such issues, and by evidence and requested instructions relating thereto.

2. MASTER AND SERVANT ⊂⊃289(35)—INJURY TO EMPLOYÉ—ACTIONS—JURY QUESTION.

In employé's action against city for injuries sustained in water main excavation, caused by caving in of walls, whether city had provided safe place for work, which had been made unsafe by disobedience of orders by injured employé, *held* for jury.

3. MASTER AND SERVANT ⊂⊃286(19)—NONSUIT —CONFLICTING EVIDENCE.

In city employé's action for injuries sustained in water main trench, where evidence as to whether city had provided employés safe place in which to work was conflicting, there was no error in denying motion for nonsuit.

4. MASTER AND SERVANT ⊂⊃107(5)—INJURY TO SERVANT—SAFE PLACE.

Rule requiring employer to provide safe place for work applied, where actual construction of trench was completed before injured employés entered it.

Department 2. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Actions by William T. Noakes and by George B. Noakes against the City of Los Angeles and others. From judgments for plaintiffs, and orders denying new trials, defendants appeal. Affirmed.

Albert Lee Stephens and Charles S. Burnell, both of Los Angeles, for appellants. Harriman, Ryckman & Tuttle, of Los Angeles, and Hyman Levin, of San Francisco, for respondents.

MELVIN, J. Defendants appeal from two certain judgments against them for damages and from the orders denying their motions for new trials. The plaintiffs, who are brothers, were both injured August 14, 1913, while at work in a trench excavated for the purpose of laying water pipes in Sixteenth street in the city of Los Angeles. They were workmen employed by the defendant board of public service commissioners of the city of Los Angeles. The other defendants were the city of Los Angeles, E. R. Flores, foreman in charge of the work, and the individuals composing the board of public service commissioners. Plaintiffs were nonsuited as to their asserted causes of action against the members of the board. The two complaints were essentially the same; the only differences arising from the fact, as pleaded, that one brother was more seriously injured than the other. There was a general demurrer to each complaint, which was overruled in each case. Appellants contend that the court erred in failing to sustain the demurrers, in refusing to grant a motion for nonsuit in each case, and because of error in one of the instructions to the jury.

The complaint in each instance alleged that the city was engaged in the business of selling and supplying water to its inhabitants; that the board of public service commissioners was the administrative branch of the government in charge of the water system; that on August 14, 1913, said board was excavating a trench on Sixteenth street and installing therein a main for use in its business of distributing water; that the plaintiff was working in said trench as a laborer, and as a servant of the city and its said board, under the immediate direction and control of defendant Flores; that while plaintiff was so employed the sides of the trench suddenly fell upon him, crushing and injuring him in a manner and to an extent specified; and "that said injuries and damage and said falling of the walls of said trench were and are due to the negligence of defendants in failing to take proper, or any, precautions to prevent said walls from cav-

ing in, and in leaving them in an unsafe, insecure, and dangerous condition."

It is contended that the demurrer in each case should have been sustained, because of lack of averment in the complaint that the injury was the natural and proximate result of the negligence of defendants; because said pleading does not, if taken as true, show that defendants failed to exercise reasonable care to provide a safe place to work; because it fails to set forth any facts showing that defendants knew, or should have known with exercise of reasonable care, that the place was unsafe; and because the "safe place" rule has no application in cases like these (citing in support of the last point Thompson v. California Construction Co., 148 Cal. 35, 82 Pac. 367).

[1] But we need not follow counsel for appellants in their discussion of the alleged infirmities of the complaints, because by their answers, their proposed instructions, and the testimony offered they put squarely in issue the matters which, according to their present contention, were not set up by the complaints. They alleged in the answer that they instructed the plaintiffs and other workmen to leave a bench of earth unexcavated along the line of said trench at every 10 feet, so that no greater distance than 10 feet of said trench should be in process of excavation at any one point; that this order was given to insure the safety of the workmen; and that it would have been effective for that purpose if the plaintiffs, in willful violation of instructions, had not dug out one of the "benches." This was in effect the pleading of compliance with the rule requiring employers to furnish a reasonably safe place in which to work. The testimony and offered instructions followed the same lines. Therefore any deficiency in the complaint was cured by the conduct of defendants. Boyle v. Coast Improvement Co., 27 Cal. App. 714, 151 Pac. 25; Slaughter v. Goldberg, Bowen & Co., 26 Cal. App. 318, 147 Pac. 90.

[2, 3] The facts as related by the foreman himself emphasize the justice of discarding the rule applicable in cases where the laborer is engaged in preparing the very place in which he is to work, and is therefore under the same obligations as his master to look for and guard against dangers. Flores, the foreman, said that the trench was dug down to grade at the point where the accident occurred, that it was practically completed, and that the men were just leveling up the bottom of the trench. Plaintiffs had been employed there less than half an hour when they were injured. The cases were evidently tried upon the theory, so far as defendants were concerned, that they had provided a safe place which plaintiffs made unsafe by disobeying orders. Of course, it was for the jury to determine whether or not such defense was supported by the evidence, there being a substantial conflict. There was, therefore, no error in denying the motion for nonsuit.

[4] The instruction criticized by appellants is denounced merely because it was predicated upon the rule requiring an employer to provide a safe place for his workmen. As the actual construction of the trench was completed before plaintiffs entered it, the applicability of the instruction is obvious. Ryan v. Oakland Gas, Light & Heat Co., 21 Cal. App. 14–21, 130 Pac. 693.

The judgments and orders are affirmed.

We concur: LORIGAN, J.; WILBUR, J.

---

178 Cal. 805

## CRAWFIS v. EDWARDS, BREWSTER & CLOVER et al. (S. F. 7949.)

(Supreme Court of California. Sept. 17, 1918.)

1. BILLS AND NOTES ⊂=525 — BONA FIDE PURCHASERS—EVIDENCE.

In mortgagor's suit to cancel a mortgage and the nonnegotiable notes secured thereby, with intervention by purchasers of the notes before maturity, evidence *held* to sustain a finding that interveners purchased with full knowledge that the loan was a building loan, payable to mortgagor or his contractor, as building contract was performed, and charged with knowledge of outstanding equities.

2. CANCELLATION OF INSTRUMENTS ⊂=31 — HOLDERS OF MORTGAGE NOTES.

As all defenses in a foreclosure suit could have been urged against purchasers of nonnegotiable mortgage notes before maturity with knowledge of outstanding equities between mortgagor and mortgagee, such purchasers in the mortgagor's action to cancel the mortgage and notes would stand in place of the mortgagee.

3. PRINCIPAL AND AGENT ⊂=137(1)—SALE OF NOTES—ESTOPPEL.

That a mortgagor obtaining a building loan executed nonnegotiable notes, knowing that mortgagee would try to dispose of them and that they were more salable than one note, did not amount to an effort to mislead innocent purchasers, so as to estop him to deny that mortgagee was his agent in selling them, where a known related escrow contract required expenditure of $6,000 furnished by mortgagor before use of money secured by mortgage.

4. PRINCIPAL AND AGENT ⊂=123(1)—AGENCY TO SECURE LOAN—PROOF.

That a mortgagor, obtaining a building loan of $12,000, executed 14 nonnegotiable notes, knowing that mortgagee would try to dispose of them and that they were more salable than a single note, did not prove mortgagee's agency to secure the loan, in view of a known related escrow contract providing for the use of $6,000 furnished by mortgagor before use of money secured by mortgage.

Department 2. Appeal from Superior Court, Alameda County; William A. Donahue, Judge.

Suit by George A. Crawfis against Edwards, Brewster & Clover, a corporation, with intervention by C. H. Smith and others. Judgment for plaintiff, and interveners appeal. Affirmed.

Brittain & Kuhl, of San Francisco, and Earl D. White, of Oakland, for appellants.

Edgar C. Chapman, of San Francisco, for respondent Edwards, Brewster & Clover. Wm. F. Rose and Bruce Glidden, both of San Francisco, and Snook & Church, of Oakland, for respondent Crawfis.

MELVIN, J. Plaintiff sued as mortgagor to cancel 14 promissory notes secured by a mortgage and also to cancel the mortgage itself. Edwards, Brewster & Clover, corporation defendant, is the mortgagee, and the interveners, appellants, are persons who acquired the 14 promissory notes prior to maturity, paying for the said notes their face value. Interveners appeal from the judgment in favor of plaintiff.

The facts, about which there is little if any dispute, are as follows:

Crawfis owned certain real property and desired to place a building thereon. Patton, a contractor, undertook to secure a loan for Crawfis, if he, the said Patton, should be given the contract to erect the building on the land belonging to Crawfis. Accordingly, arrangements were made with Edwards, Brewster & Clover, and Crawfis executed the mortgage here in question and 14 promissory notes, aggregating $12,000 in face value. The notes and mortgage were delivered on November 23, 1914, and on the same day and as part of the same transaction Crawfis entered into a contract by which he was required to deposit with the corporation $6,000. By the latter contract it was recited that the "cash received and the notes enumerated," making the sum of $18,000 in all, was to be delivered to G. A. Crawfis in specified installments as progress payments became due on the building to be thereafter erected. The building was constructed and as the work went on the corporation paid $6,060, according to agreement, but failed and refused to pay any further sum, either to Dr. Crawfis or to his building contractor.

Interveners purchased the notes before maturity, and it is not denied by them that these instruments are nonnegotiable in form. It is contended, however, that plaintiff is estopped by his conduct from questioning the validity of the claims of interveners, and that it was the intention of all of the parties to the transaction that the 14 notes should be treated and offered for sale as negotiable instruments. The judgment provided that plaintiff should restore the $60, the amount in excess of the $6,000 deposited by him, which was paid for the purposes of the building by the corporation; but the further contention is made by appellants that, inasmuch as some of the money realized from the sale of the notes came into the hands of Edwards, Brewster & Clover on the very days upon which certain payments were made on the building contract, it is fair to assume that the money so paid, and not a part of the $6,000 deposited by plaintiff, went into the building, and these interveners assert that at the very least they should be entitled to share in the fund of $6,000 in the proportion that the sum of $12,000 bears to $18,000.

The court found that, by reason of the refusal of the corporation to make the next payment on the building following the exhaustion of the $6,000, the consideration for the notes and mortgage failed; that on or about the 15th of January, 1915, and at various subsequent times down to March 3d of that year, Edwards, Brewster & Clover, not acting as agent for Dr. Crawfis, requested the interveners to purchase the notes, and pursuant to such request the instruments were sold for their full face value; that neither at the times of purchase nor at any time did either plaintiff or the corporation represent to the purchasers that said Edwards, Brewster & Clover was the agent of Dr. Crawfis in the sale or distribution of the notes; and that as matter of fact the corporation was not and did not act in any of the transactions as Dr. Crawfis' agent. There was a finding specifically negativing the contention of appellants that the very purpose of issuing 14 notes rather than 1 was to further the success of the alleged agency, and there is a finding:

"That plaintiff, George A. Crawfis, executed said 14 promissory notes, rather than 1, solely at the instance of said defendant Edwards, Brewster & Clover, and without any intention on the part of plaintiff, George A. Crawfis, to authorize said defendant Edwards, Brewster & Clover to sell said notes, or any of them, as the agent of plaintiff, George A. Crawfis."

There were findings that no one of the interveners made any inquiry of plaintiff before purchasing the notes, and that when the sales were made the corporation represented that it was the mortgagee in fact. There was also a finding that:

"Said interveners took said notes and paid the purchase price thereof with full knowledge that the loan contemplated by the plaintiff, George A. Crawfis, from the defendant Edwards, Brewster & Clover was a building loan, and that said building loan was not to be paid by defendant Edwards, Brewster & Clover to plaintiff, George A. Crawfis, or to said Patton, except as the building contract should be performed by said Patton in accordance with its terms and to the satisfaction of defendant Edwards, Brewster & Clover, the mortgagee of said mortgage."

[1, 2] If these findings are sustained by the evidence, the judgment is correct. The finding last quoted is supported by the testimony of Mr. Smith, one of the interveners, whose declarations under oath were by stipulation made binding upon his associates. He said that, when asked by Mr. Edwards, representing the corporation, to buy some of the notes, he investigated the mortgage and the value of the property. It seemed to him that the value was there, so he purchased the notes. Asked if Mr. Edwards said anything to him about a contract between the corporation and Dr. Crawfis, Mr. Smith said:

"Yes; we went over the entire matter. I looked over the mortgage, and he told me about this private contract, and I have the impres-

sion he showed it to me. I would not like to say positively. I think there is a further paper that he told me about; that is, some contract, the building contract."

It will thus be seen that, not only were the purchasers of the nonnegotiable instruments charged with knowledge of outstanding equities, but they knew or had the means of knowing by actual inspection of the contracts that their purchase money was to become a part of a fund into which $6,000 had already been paid and that the full consideration for the notes had not yet passed to the mortgagor. All defenses available in a foreclosure suit in favor of Crawfis against Edwards, Brewster & Clover could have been urged against them, and consequently they stand in the place of that corporation in an action to rescind.

[3, 4] We do not agree with appellants in their theory that respondent, Dr. Crawfis, is estopped by his conduct to deny that the corporation was his agent. The mere fact that he executed 14 notes, instead of 1, does not prove agency; nor does it amount to any effort on his part to mislead innocent purchasers of the notes. He probably did comply with the request of the corporation, knowing that the latter would endeavor to dispose of the notes, and that a number of small notes would be easier to sell than one large note. The mortgagor cannot prevent the mortgagee from disposing of the note or notes supporting the mortgage, even if he so desires. We fail to see how the execution of the small notes furnishes either proof of mere agency on the part of the corporation to secure a loan for Dr. Crawfis or was any part of conduct amounting to an estoppel. It is true that the mortgage recited the receipt of the $12,000, but the contract of escrow between Crawfis and the corporation and the building contract between Crawfis and Patton were parts of the same transaction, and these were not merely available to Smith and the other interveners, but were in fact called to the attention of the purchasers of the notes. There is, therefore, no similarity between this case and such authorities as, for example, National Hardware Co. v. Sherwood, 165 Cal. 1, 130 Pac. 881, in which it was held that Firth could not impeach the recitals in a deed of trust to which he was a party. In that case there was by the record a representation as a fact of something not true, made with the intention that another should act upon it. It would merely prolong this opinion to no good purpose to analyze all the authorities cited by appellants. In each the facts differ radically from those involved in the case at bar. In the one which is "most nearly like the case at bar," according to learned counsel for appellants (Kucher v. Scott, 96 Wash. 317 165 Pac. 82), Robinson & Co., the nominal mortgagee, was held to be an agent of the mortgagor, and the loss occasioned by the dishonesty of its secretary was not visited upon the assignee of the mortgage. But the representative of Robinson & Co., who induced plaintiff and his wife to execute the note and mortgage, informed them that he was getting the money from a man who lived in Portland. Moreover, this was in accordance with the invariable custom of the house of Robinson. In the case at bar there were no such facts. Edwards, Brewster & Clover did not represent any undisclosed principal, nor does it appear that the invariable course of business of that corporation was to negotiate the sale of notes and mortgages for clients.

The conclusion which we have reached, and our conviction that the court properly held the interveners, as purchasers of nonnegotiable instruments, bound by the equities in favor of the mortgagor, makes it unnecessary to discuss the contention that some of the money paid for the erection of the building actually was derived from the sale of notes, rather than from the $6,000 deposited by Dr. Crawfis with the corporation. The appellants were bound to consider the agreement by which the corporation was to expend that fund before any moneys secured by the mortgage should be used, and the plaintiff was under no obligation to inquire the exact source from which the $6,000 actually paid to his contractor was obtained.

The judgment is affirmed.

We concur: LORIGAN, J.; WILBUR, J.

---

179 Cal. 7

SCOTT et al. v. JUNGQUIST. (L. A. 4532.)

(Supreme Court of California. Sept. 23, 1918.)

1. FRAUDS, STATUTE OF ⊂⊃56(9)—PARTNERSHIP AGREEMENT—LAND.

Agreement for inclusion of south half of section of land within written partnership arrangement for acquisition, subdivision, and disposition of north half did not need to be in writing.

2. APPEAL AND ERROR ⊂⊃1058(1) — CURE OF ERROR—EXCLUSION OF EVIDENCE.

Errors in excluding evidence offered by plaintiff were cured by final admission of whole of plaintiffs' offered evidence.

3. APPEAL AND ERROR ⊂⊃1011(1)—REVIEW—FINDINGS ON CONFLICTING EVIDENCE.

Findings of court as to matters whereon evidence was in substantial conflict will not be disturbed.

Department 1. Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by M. D. L. Scott and J. W. Scott against F. A. Jungquist. From judgment for defendant, plaintiffs appeal. Affirmed.

Manning, Thompson & Hoover, of Los Angeles, for appellants. Jones & Weller, of Los Angeles, for respondent.

RICHARDS, Judge pro tem. This is an appeal from a judgment in the defendant's

favor in an action wherein the plaintiffs sought an accounting and division of partnership assets and profits based upon an alleged partnership between the parties, relating to the subdivision and sale of certain real estate. The complaint, in the first paragraph thereof, sets forth an agreement alleged to have been made on July 27, 1912, whereby the parties entered into a partnership for the purchase, subdivision, and sale of the north one half of section 11, township 10 north, range 12 west, San Bernardino B. & M., sharing equally the expenses, profits, and losses thereof. The second paragraph avers that on October 29, 1912, the parties, standing in the relation of copartners as created by their first agreement, further agreed that they would purchase, subdivide, and sell the south half of the foregoing section upon the same understanding as to the division of expenses, profits, and losses. The complaint then proceeds to allege that the plaintiffs have performed their part of each of said agreements, but the defendant, while collecting a large sum of money from the sales of said properties, has failed, refused, and neglected to make or render an accounting thereof, or to allow said plaintiffs access to the books of the copartnership, in order to ascertain the state of its accounts or to deliver to the plaintiffs their due proportion of the proceeds of the copartnership transactions. The complaint not being verified, the answer of the defendant was in the form of a general denial.

Upon the trial, and in support of the averments contained in the first paragraph of their complaint, the plaintiffs presented a written agreement, which fully supported said averments, relating to the formation of the partnership for the purpose of acquiring, subdividing, and disposing of the north one half of the said section of land. As to the introduction of this written agreement the defendant offered no objection, but admitted in open court the making of the same, and that the lands therein referred to had been subdivided and sold according to its terms. The plaintiffs then undertook to establish the averments of the second paragraph of their complaint, relating to the subdivision and sale of the south half of the section, by showing the existence of a later oral agreement covering that portion of the section. To the offered proof of this oral agreement the defendant objected, upon the ground that it was oral and thus within the provisions of the statute of frauds. The trial court was at first disposed to sustain this objection, and, in fact, did so for some time during the trial, but finally apparently became convinced that a partnership for the sale of real estate need not be in writing, but could be shown by parol, and thereafter permitted the plaintiffs to proffer such proof upon the subject as they desired, and their evidence upon the subject of the existence and terms of this alleged parol agreement was then admitted without further objection on the defendant's part. The defendant, however, as a witness in his own behalf, positively denied the existence of any such oral agreement relating to the south half of the section, or any partnership understanding, or to the sale thereof, and his testimony in that regard was supported by that of other witnesses. There was evidence pro and con as to an accounting and settlement having been made between the parties, in so far as the sales within the north half of the section were concerned. The court, in deciding the case, found that the written agreement had been entered into between the parties affecting the north half of the section, and also found that an accounting and settlement had been fully had between them as to the transactions arising out of said written agreement; but the court further found that no agreement had been made between the parties relating to the purchase, subdivision, or sale of the south half of the section, and that the plaintiffs at no time had any interest therein or in the proceeds derived from the sale thereof. Judgment thereon went for the defendant. The plaintiffs moved for a new trial on various grounds, which motion was denied, wherefore they prosecute this appeal.

[1-3] That the trial court in the earlier stages of the trial of the case committed various errors of law in at first excluding the offered evidence of the plaintiffs as to the existence of the oral agreement for the inclusion of the south half of the section of land in question within the terms of their partnership arrangement, there can be no doubt, in the light of the cases holding that such an agreement need not be in writing. Koyer v. Willmon, 150 Cal. 785, 90 Pac. 135; Musick Consol. Oil Co. v. Chandler, 158 Cal. 7, 109 Pac. 613. But it appears from the record that the trial court, having had its attention called to these cases, became convinced of its error, and thereupon and thereafter during the trial permitted the plaintiff to present such evidence as they desired upon the subject, which evidence was admitted without further objection. The appellants do not here claim that they were thus prevented from producing whatever proof they had in support of the averments of this portion of their complaint, and, this being so, whatever earlier errors the trial court committed were cured by its final admission of the whole of the plaintiffs' offered evidence. The only other point urged by the appellants is that of the insufficiency of the evidence to sustain the findings of the court as to the nonexistence of any agreement affecting the south half of the section of land in question, and also as to the fact of a full accounting and settlement having been had between the parties as to the north half thereof. But as to both of these matters the evidence was in substantial conflict, and for that reason the

findings of the court thereon will not be disturbed upon appeal.

Judgment affirmed.

We concur: SHAW, J.; SLOSS, J.

---

179 Cal. 42

## NEWMAN et al. v. CITY OF ALHAMBRA. (L. A. 4471.)

(Supreme Court of California. Sept. 27, 1918.)

1. APPEAL AND ERROR ⊂⊃1002 — REVIEW — VERDICT ON CONFLICTING EVIDENCE.

Appellant's contentions, based on conclusions drawn from conflicting testimony, may not prevail, if the Supreme Court finds any substantial proof in support of the verdict and judgment.

2. MUNICIPAL CORPORATIONS ⊂⊃835 — FLOODING LAND — CHANGING GRADE OF STREET—"ACT OF GOD."

A city, which by changes in grade of ditch and street so changed the drainage of the locality that abutting owners suffered injury from flooding, could not attribute consequences of its engineering to an "act of God," that could not happen by the intervention of man.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Act of God.]

3. MUNICIPAL CORPORATIONS ⊂⊃751(3) — CHANGE IN GRADE OF STREET—LIABILITY OF CITY—FLOODING.

Where contractor, in raising grade of street above a ditch, a change which flooded abutting property, acted under instructions of city engineer, rather than terms of city ordinance or his contract, the city, having accepted street and maintained it, was liable for his act and the flooding.

4. APPEAL AND ERROR ⊂⊃1050(1) — HARMLESS ERROR—EVIDENCE.

In action against city for flooding property by changing grade of a street and ditch, testimony as to conversations between plaintiffs and officers of city regarding its intended action in grading the street *held* harmless to the city.

Department 2. Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by John and Emma Newman against the City of Alhambra, a municipal corporation. From a judgment for plaintiffs, and an order denying its motion for new trial, defendant appeals. Affirmed.

Alfred Barstow and Barstow, Beach & Rowe, all of Los Angeles, for appellant. Frank A. Jeffers, of Los Angeles, for respondents.

MELVIN, J. Plaintiffs recovered a judgment in the sum of $1,250 against the city of Alhambra because of damage by flood to their property, due, as alleged, to the negligence of the municipal corporation in diverting the flow of certain surface water. While stipulating that the amount of the judgment is not an unjust compensation for the injury to their property suffered by plaintiffs, defendant, denying any liability on its part to compensate the Newmans for such damage, appeals from the judgment and from an order denying its motion for a new trial.

It is argued that the evidence did not justify the verdict; that the verdict is against the law; that errors of law were committed in the superior court which should cause a reversal of the judgment on appeal; and that the trial court erred in refusing to grant defendant's motion for a new trial. In support of the first of these points appellant's counsel elaborately analyze the evidence and argue that plaintiffs, after buying a low-lying lot, negligently failed to grade it in such manner as to guard against inundation during the rainy season; that the street, the grade of which, plaintiffs declared, was raised to a height and given a trend that backed water upon their property, was in reality paved according to good engineering practice; that the city did not raise the crown of the street; that the water which caused the injury to the land of plaintiffs came from sources other than those to which it was attributed in the complaint; and that the damage was caused by act of God.

[1] All of these contentions, except, perhaps, the last one, are based upon conclusions drawn from conflicting testimony, and, of course, no one of them may prevail, if we find any substantial proof in support of the verdict and the judgment.

[2] Respondents bought a lot on the south side of Cedar street in Alhambra in the year 1910. The property was immediately adjoining and west of a concrete waterway, without a top, used for drainage purposes and having a cross-section of 35 square feet. Prior to the purchase of the realty by respondents the street had been graded, the curb had been set and the sidewalk had been laid. Respondents graded their land to a level higher than the curb and built a house on the property. The concrete drainage ditch which borders the property of plaintiffs also crosses Cedar street. Appellant maintained the part of this waterway traversing its highway, so that the open ditch had a cross-section of only 24 feet. It was then covered with planks and the low point of the street being at the ditch, the drainage of Cedar street, both from the north and the south, was toward and into said waterway. There was testimony tending to show and sufficient to support the conclusions reached by the jury that prior to 1914, at times of heavy rainfall, the water which the ditch could not carry would follow the planks across Cedar street from the north to the south side of said street and then would be drained by the ditch of greater capacity than that crossing the said highway, thus being made to flow along the border of the property of plaintiffs without any injury to the land or buildings. There was testimony that this was the condition at the time the Newmans bought the land. In 1913 Cedar street

was raised about 22 inches at the ditch by the filling in of earth upon the top of the planks covering the ditch and by crowning it with some hard concrete material. It was the contention of respondents, and their theory was supported by substantial evidence, that when the heavy rains of the season of 1914 came, on two occasions the water filled the ditch to the brim and at such times the smaller caliber of the waterway traversing Cedar street and the raise of 22 inches in the paving of said street over the ditch combined to force upon the land of plaintiffs the flood waters which would have otherwise been harmless.

In view of the evidence rationally supporting such an asserted set of facts, the argument in appellant's brief on this branch of the case amounts merely to an assertion that the jury decided against that which counsel for appellant regard as the weight of the evidence. While the argument is ably and plausibly maintained, we cannot undertake here to pass upon the weight of conflicting testimony. Nor can the appellant under the facts of this case, as the jury was justified under the evidence in finding them, assert that it is exonerated because the detriment to the property of plaintiffs was caused by "the act of God." The owner of property who by unwarranted physical means provides for a change in the drainage of his land so that another must thereby suffer injury may not attribute the logical consequences of his engineering to an act of God. In defining an "act of God," as that term is used in the law, this court long ago, in Polack v. Pioche, 35 Cal. 416–423 (95 Am. Dec. 115), adopted the following language of Lord Mansfield in Forward v. Pittard, 1 T. R. 27:

"Now, what is the act of God? I consider it to mean something in opposition to the act of man; for everything is the act of God that happens by his permission; everything by his knowledge, * * * such acts as could not happen by the intervention of man, as storms, lightnings, and tempests."

In the same paragraph the learned Mr. Justice Sanderson, who delivered the opinion of the court, further expounded the law as follows:

"The expression excludes the idea of human agency, and if it appears that a given loss has happened in any way through the intervention of man, it cannot be held to have been the act of God, but must be regarded as the act of man."

This definition and its application to injuries produced partly by the intervention of man in dealing with the elements has been followed ever since. Chidester v. Consolidated Ditch Co., 59 Cal. 197; Odd Fellows Mutual Aid Association v. James, 63 Cal. 598, 49 Am. Rep. 107; Pope v. Farmers' Union & Milling Co., 130 Cal. 139, 62 Pac. 384, 53 L. R. A. 673, 80 Am. St. Rep. 87; Fay v. Pacific Improvement Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188, 27 Am. St. Rep. 198.

[3] The evidence tended to show that the contractor who raised the grade of the street above the ditch, acting not in accordance with the terms of the contract but under instructions of the city engineer, made the crown of the street higher than the ordinance or his agreement required, and the argument is made that any detriment caused by the act of the contractor may not be attributed to the city. The city accepted the completed street, however, and maintained it at the grade actually established. It therefore is immaterial, say respondents, whether the contractor followed the specifications of his contract accurately or not. Tyler v. Tehama Co., 109 Cal. 618, 42 Pac. 240. But appellant suggests that this case is governed not by the rule in Tyler v. Tehama Co., supra, but by that announced in Sievers v. City and County of San Francisco, 115 Cal. 648, 47 Pac. 647, 56 Am. St. Rep. 153, which holds that a city is not responsible for the remissness of its officers or contractors. In that case no act of the city was shown to have been performed in authorization or ratification of the contractor's act. In this case it was not only stipulated that the city accepted the street as raised in grade and used it, but, moreover, there was a conflict of testimony regarding the repair and consequent raising of Cedar street at the place where the ditch crossed; some of the witnesses declaring that the altitude of the grade at that place was due to repairs made by the city's own workmen and not to the acts of the contractor.

[4] Error is asserted by counsel for appellant because the court permitted testimony regarding alleged conversations between plaintiffs and certain officers of the city government regarding the intended action of the municipality in grading the street. Without reviewing this matter in detail, it is sufficient to say that we find no material injury could have been suffered by defendant because of the admission of this testimony.

The judgment and order are affirmed.

We concur: LORIGAN, J.; WILBUR, J.

---

179 Cal. 20

**In re WATTS' ESTATE. (Sac. 2813.)**

(Supreme Court of California. Sept. 24, 1918.)

1. WILLS ⊂=506(4)—CONSTRUCTION—DEVISE TO HEIRS—STATUTE.

Where testatrix, whose husband had died intestate, devised all her estate, which had been community property, to her heirs for distribution according to law, and neither had left any issue nor surviving father or mother, their brothers and sisters and the children of deceased brothers and sisters were all entitled, under Civ. Code, § 1386, subd. 8, and in view of sections 1327, 1334, to share in distribution.

---

2. WILLS ⟸507—"HEIRS."
The word "heirs" is a technical term, and is used to designate the persons who would by the statute succeed in the real estate, or, in California, estate of any kind, in case of intestacy.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Heirs.]

3. DESCENT AND DISTRIBUTION ⟸1—INHERITANCE—STATUTE.
In California, there is no inherent or natural right of inheritance, independent of the statute of succession.

4. WILLS ⟸440—CONSTRUCTION—MEANING OF LANGUAGE.
A testator's intent must be determined from the language of the will, and where it is clear and unambiguous it must be interpreted according to its ordinary meaning and legal import.

In Bank. Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

In the matter of the estate of Lydia M. Watts, deceased. Proceeding by Ella Gray and others against A. V. Watts and others and Herbert W. Whitten, as executor of Lydia M. Watts, deceased. From a decree of partial distribution, A. V. Watts and others appeal. Reversed.

Lon Bond, Deirup & Deirup, and Samuel J. Nunn, all of Chico, and Samuel M. Shortridge, of San Francisco, for appellants. W. H. Carlin, of Marysville, D. Hadsell, of Sand Francisco, and Guy R. Kennedy, of Chico, for respondent.

SLOSS, J. Appeal from a decree of partial distribution. Lydia M. Watts, the decedent, was a widow. She left a large estate, all of which had been community property of herself and her predeceased husband, Nelson Watts. Nelson Watts had died intestate. The decedent, Lydia M. Watts, left a will. Its first paragraph directs the payment of funeral expenses and debts. The next reads as follows:

"Secondly. I hereby give, devise and bequeath all the rest, residue and remainder of my estate wheresoever situate to my heirs and to be distributed to them according to law."

The third and last paragraph appoints an executor, and directs that no bond be required of him. There was no issue, and no surviving father or mother of either Nelson or Lydia Watts. Lydia M. Watts left brothers and sisters and children of deceased brothers and sisters. The members of this class are the respondents herein. The appellants bear a similar relationship to Nelson Watts. The court below granted distribution to the blood relatives of Lydia M. Watts alone, refusing to recognize the claims of the relatives of Nelson Watts.

[1-3] If Lydia M. Watts had died intestate, one-half of her estate would have passed to the appellants, and the other half to the respondents. Civ. Code, § 1386, subd. 8. The appellants claim that the second paragraph of the will gives them the share they would have taken in case of intestacy. This contention, we think, must be sustained. The will gives the residue, virtually the entire estate, "to my heirs and to be distributed to them according to law." Under section 1327 of the Civil Code:

"Technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention. * * *"

It is further provided by section 1334 of the same Code that:

"A testamentary disposition to 'heirs,' 'relations,' 'nearest relations,' 'representatives,' 'legal representatives,' or 'personal representatives,' or 'family,' 'issue,' 'descendants,' 'nearest' or 'next of kin' of any person, without other words of qualification, and when the terms are used as words of donation, and not of limitation, vests the property in those who would be entitled to succeed to the property of such person, according to the provisions of the title on succession, in this Code."

Both sections are directly applicable here. The word "heirs" is a technical term, and is used to designate "the persons who would by the statute succeed to the real estate [or, in California, estate of any kind] in case of intestacy." Clarke v. Cordis, 4 Allen (Mass.) 466, 480. "The 'heirs' of a person," said this court in Hochstein v. Berghauser, 123 Cal. 681, 687, 56 Pac. 547, 549, "are those whom the law appoints to succeed to his estate in case he dies without disposing of it by will." This is the ordinary meaning of the word, used in an instrument of any kind. Where a will makes a gift to the "heirs" of a person, section 1334 adds the sanction of statutory definition to the interpretation.

When, then, Mrs. Watts, by the second paragraph of her will, gave the residue to her heirs, she adopted, for the purposes of her testamentary disposition, the statute of succession. In designating her "heirs" as the objects of her bounty, she used a word which, by its legal definition, embraced those persons who would, under the terms of section 1386 of the Civil Code, have taken in the absence of a will. There is no inherent or natural right of inheritance, independent of our statute of succession. Section 1386, which embraces all of that statute material here, affords the only means of ascertaining who are the "heirs" of the decedent. The respondents must rely upon it equally with the appellants, for it constitutes the sole basis for their own status as heirs. It is true that, if the property of the decedent had not been derived from her husband, it would, by virtue of subdivisions other than 8, have passed to her blood relatives alone. But, under the actual facts of this case, subdivision 8 is the governing provision, and under it the appellants would, in case of intestacy, have succeeded to one-half of the estate. That subdivision is as much a part of the law of succession as any other, and those who inherit under it take as heirs of the decedent widow or widower, not as heirs of the predeceased spouse. See subdivision 9 of section 1386.

[4] Any suggestion that Mrs. Watts would probably have wished her estate to go to those of her own blood is based on mere conjecture. In any view, it can have no force here. We must determine her intent from the language of her will, and where that language is clear and unambiguous it "must be interpreted according to its ordinary meaning and legal import, and the intention of the testator ascertained thereby." Estate of Blake, 157 Cal. 448, 459, 108 Pac. 287, 291.

An analogous situation was considered by us in the recent case of Estate of Marshall, 169 Pac. 672. There the will of the testatrix gave the residue of her estate "to my own family, who I think are all in Mexico." The court held that the use of the word "own," coupled with the concluding clause referring to residence in Mexico, indicated that the testatrix intended to limit her gift to her blood relatives. The entire argument proceeded, however, on the assumption that, in the absence of these "words of qualification," the term "family" (which, under Civil Code, § 1334, is equivalent to "heirs") would have covered the persons designated by subdivision 8 of section 1386. In the will of Mrs. Watts there are no qualifying terms to limit or explain the ordinary meaning of the word "heirs." The testatrix says simply that she gives the residue to her heirs. The further provision that it is "to be distributed to them according to law" only serves to strengthen the conclusion that she was directing that the property should go just as it would have gone under the statute of descent in the absence of any testamentary disposition.

The decree appealed from is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; MELVIN, J.; LORIGAN, J.; RICHARDS, Judge pro tem.

---

179 Cal. 10

PIPER v. HAWLEY et al. (Sac. 2434.)

(Supreme Court of California. Sept. 23, 1918. Rehearing Denied Oct. 23, 1918.)

1. WATERS AND WATER COURSES ⟸177(1)—DAMS — TEMPORARY INJUNCTION — DISCRETION OF COURT.

Where a basin had been surcharged with flood waters which, with another storm impending, were steadily rising and threatening, to cross a ridge separating such basin from another basin, whether a temporary mandatory injunction should be issued requiring removal of temporary sack levee along top of ridge built as protection against such water and causing accumulation threatening to cross ridge onto plaintiff's land, was largely discretionary with court.

2. APPEAL AND ERROR ⟸954(1)—REVIEW—DISCRETION OF COURT—INJUNCTION.

An order issuing a temporary mandatory injunction requiring removal of temporary sack levee along top of ridge separating two basins causing accumulation of flood waters that threatened to overflow plaintiff's lands, will be sustained, unless court's discretion was clearly abused.

3. WATERS AND WATER COURSES ⟸167(1)—DAMS—SURFACE WATERS—NATURAL FLOW.

Where flood waters overflowing basin threatened to flow over a ridge separating the basin from another basin, landowners in latter basin could not protect their land from overflow by maintaining obstructions on ridge restraining such water as was surface water from passing over ridge at its lowest point of natural elevation in its accustomed course.

4. WATERS AND WATER COURSES ⟸177(1)—FLOOD WATERS — OBSTRUCTIONS — INJUNCTION—DISCRETION OF COURT.

Where, at a time of heavy floods and storms, flood waters overflowing a basin were steadily rising, threatening to cross over ridge separating such basin from another basin, court did not abuse its discretion in issuing temporary mandatory injunction requiring removal of temporary sack levee along top of ridge built to protect certain land in latter basin from overflow and causing accumulation of water threatening plaintiff's land.

5. APPEAL AND ERROR ⟸781(7)—MOOT QUESTIONS—TEMPORARY MANDATORY INJUNCTION.

Where an appeal is taken from a temporary mandatory injunction commanding that temporary sack levee along top of ridge constructed as protection against overflow of water be removed, the doing of the things commanded to be done does not make questions involved in appeal moot, inasmuch as execution of order did not deprive defendants of the right to costs and damages if injunction was unlawful.

6. APPEAL AND ERROR ⟸781(1)—MOOT QUESTIONS — TEMPORARY MANDATORY INJUNCTION — REMOVAL OF OBSTRUCTION TO WATER.

Where an appeal is taken from a temporary mandatory injunction ordering removal of temporary sack levee on top of ridge obstructing flow of water across ridge, the building of a canal making levee unnecessary did not make the questions involved in appeal moot, such questions being important to the state and reversal entitling defendants to costs and damages.

In Bank. Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by Ida B. Piper against Stewart S. Hawley and others. From an order directing the issuance of a temporary mandatory injunction, defendants appeal. Affirmed.

Arthur C. Huston and Harry L. Huston, both of Woodland, for appellants. Elmer W. Armfield, of Woodland, John S. Partridge, of San Francisco, and Arthur B. Eddy, of Woodland, for respondent.

RICHARDS, Judge pro tem. This is an appeal from an order directing the issuance of a temporary mandatory injunction requiring the removal of a certain earth embankment and temporary sack levee from what is known as Knights Landing ridge, in the county of Yolo. The facts out of which the controversy between the parties hereto arose are substantially as follows:

The Sacramento river flows through the Sacramento valley in a general northerly to southerly direction. During its course therein and from a point near its entry into the valley to its mouth it passes between banks

raised above the level of the adjacent lands on each side of the river, these lands lying in depressed basins or troughs, varying in width from 2 to 7 miles, which at intervals are separated from each other by low ridges which have been built up by the sedimentary deposits of streams which intersect these basins and are tributary to the Sacramento river. On the west side of the river are two main basins, the Colusa basin and the Yolo basin, between which is what is known as the Knights Landing ridge, which extends from the bank of the river at Knights Landing in a southerly and westerly direction toward the town of Yolo, and which was originally built up by the sedimentary deposits of Cache creek. The Colusa basin lies to the northward of this ridge and the Yolo basin to the southward, and the levels of each of these basins have a gradual downward trend toward the south, except as intercepted by this ridge. The natural elevation of the ridge at and near the bank of the river is 38 feet, which increases as the ridge extends westerly. During the winter season flood waters formerly collected in the Colusa basin from rains and from the numerous streams which flow into it and also, in times of high water, from the overflow of the Sacramento river, and these when they reached an elevation in excess of 38 feet would flow over the Knights Landing ridge at the point of its lowest elevation, making their way into the Yolo basin and thence formerly through Cache slough into the main river. The lands of the plaintiff herein are situated on Knights Landing ridge about 3,600 feet westerly from Knights Landing on the river bank and at an elevation from 41 to 42 feet, according to the official data of the state engineering department. In the year 1909, during a period of severe flood, the waters collecting in the Colusa basin, augmented by the overflow of the river, reached a higher elevation than that of the ridge near the river. Reclamation District 108, with other landowners having land holdings in the Colusa basin, in order to relieve the situation, attempted to make a cut through Knights Landing ridge with a view to discharging the waters then collected in the Colusa basin into the Yolo basin. One T. F. Laugenour, a landowner in the Yolo basin below Knights Landing ridge, applied to the superior court of Yolo county for an injunction to restrain the above parties from cutting through the ridge. In May, 1910, said court gave its judgment granting such injunction restraining the defendants in that action from in any manner excavating, cutting, or injuring the Knights Landing ridge, or doing any act or thing whatever in, on or about the ridge which would cause or tend to cause or permit the waters above the ridge to escape through or over the ridge, until such time as a canal could be built, under the direction of the court, to such point that the waters of the Colusa basin could be discharged without injury to the rights of the plaintiff, Laugenour, and others owning land below the ridge. The judgment further provided that such canal should have an elevation, on both sides, of sufficient height to keep back the waters of Cache creek, and the carrying capacity of the canal should be sufficient to take care of the drainage through the same. The judgment further provided that any cuts or excavations made in the ridge should be made under the direction of the court, and that the ridge should be safeguarded from further destruction or injury. Subsequently and in the year 1913 a drainage district was created by an act of the Legislature of that year (St. 1913, p. 109) having for its purpose the cutting of Knights Landing ridge and the construction of a canal through the same to a point near the sink of Cache creek in the Yolo basin. This act, in providing for the creation of the proposed drainage district, made express reference to the act of the Legislature approved December 24, 1911 (St. Extra Sess. 1911, p. 117), adopting the report of the California débris commission transmitted to the federal government on June 27, 1911, providing for a plan of reclamation along the Sacramento river and its tributaries and creating a reclamation board and defining its powers and duties. Said act also directed that the board of drainage commissioners to be created in accordance with its terms should take such steps as should be necessary—

"to open a cut through Knights Landing ridge in Yolo county, and to construct a canal leading from said cut for the purpose of draining and disposing of the waters of Colusa basin by carrying the same to the head of the proposed Yolo by-pass * * * as defined by and in accordance with the general plan of the California Débris Commission."

The act further provided that:

"No water shall be permitted to flow through any cut or excavation in said ridge provided to be made in this act until the canal to be constructed as hereinbefore provided shall have been completed so as to convey the waters flowing or to flow through said cut to the head of said proposed Yolo by-pass * * * in a manner satisfactory to the said reclamation board. Said reclamation board shall have power to direct the method of the construction of said cut, canal, and levees."

It will thus be seen that this act of the Legislature creating the Knights Landing Ridge drainage district and defining its purposes and powers was in harmony with and in furtherance of the earlier and larger plan for the confining or returning of the overflow waters of the Sacramento river to their natural channel, preventing this recurring overflow and reclaiming the lands of the several basins lying along the course of said river. Stats. 1913, p. 109. Upon the organization of this drainage district under said act, the defendants in the aforesaid action moved the superior court of Yolo county for a modification of its injunction against the cutting of the ridge so as to permit said district to make a cut of sufficient width through the ridge to permit the passage of dredgers in

order to construct the canal below such cut, the said penetration of the ridge to be temporary and to be filled when its immediate purpose was accomplished so that the waters accumulating above the ridge would not be permitted to flow through it until the canal which was to dispose of them below had been completed. Upon the hearing on this motion the said court made an order approving the plan of the drainage district for the construction of the permanent works in the ridge and canal below for which it provided, and so modified its former injunction as to permit the temporary penetration of the ridge applied for, specifically directing how such work should be done, and providing for the restoration of the ridge to its former state when the dredgers had sufficiently done the work for the doing of which passage through the ridge was required. The order also provided that all of this work should be completed on or before October 15, 1914, or at such further time as the court should direct. The defendants in said action, having procured the foregoing order, dismissed their appeal from the previous judgment of injunction; and pursuant to such modification thereof, the drainage district began making the excavation of the ridge in accordance with the direction thereof. Ida B. Piper, the plaintiff in the present action, was not a party to the former action and does not appear to have interposed any objection to the progress of the work being done by the drainage district by virtue of the terms of the act of its creation nor by virtue of the modification of the injunction granted in the former case. The work proceeded to the point of the refilling of the gap in the ridge so as to put the same in condition to prevent any water from flowing through or over it until the lower work upon the canal had been completed. In order to do this the drainage district apparently deemed it necessary to raise the summit of the ridge at the point of the cut and for some distance on both sides of the same to such a height as would prevent any waters from passing over it in that vicinity even at extreme high water in times of flood. Accordingly, the top of the ridge was raised from its former natural elevation of 39 feet at points to the eastward of the plaintiff's lands, to an elevation of from 48 to 50 feet. Not long thereafter occurred the heavy flood of the winter of 1914–15, said to be the largest flood known in the history of the region, reaching its maximum in February of the latter year, as a result of which the Colusa basin filled and the waters threatened to cross the ridge at points to the easterly of the plaintiff's premises. In order to prevent this result, Reclamation District 730, one of the defendants and appellants herein, caused to be constructed a temporary sack levee along the top of the ridge extending further westward from the point where the increase of elevation accomplished by the work of the drainage district had ceased, toward the plaintiff's lands. The effect of both of these changes in the elevation of the ridge at points east of the plaintiff's lands was to check the overflow of the increasing waters at their former point of exit and to cause them to further accumulate in the Colusa basin until they reached an elevation which placed the plaintiff's premises in immediate danger of overflow. This was the state of things when the plaintiff herein commenced the present action on February 15, 1915. By this action and especially by the temporary mandatory injunction applied for therein, this plaintiff sought to have all obstructions removed from the top of the ridge to the eastward of her lands which interfered with the free passage of the flood waters of the Colusa basin over the ridge at their former point of exit when they attained a height in excess of 39 feet; or, in other words, to have the natural elevation of the ridge at these points restored. Upon the hearing of the application for this temporary order much testimony was presented, after the hearing of which the court made the order for such mandatory injunction pendente lite, from which this appeal has been taken.

Reclamation District No. 730 lies, as to the lands included within it, to the southward of Knights Landing ridge, in the Yolo basin. Neither it nor other appellants herein were parties directly engaged in the performance of the work of making the cut through the ridge or the canal below, provided for in the act of the Legislature creating the Knights Landing drainage district. The interest of these appellants in seeking to prevent the flood waters of the Colusa basin from overtopping the Knights Landing ridge was primarily that of preventing the overflow of said waters upon their own lands. Knights Landing Ridge drainage district, which had immediately in charge the making of said cut and the construction of the canal below it, was also made a party to this action and was present by counsel in court when the hearing was had upon the application of the plaintiff for this injunction and offered no resistance to the granting of the same, although said injunction was mandatory in character and required the removal of the more permanent portion of the obstruction of the passage of these waters over said ridge which had been placed there by said drainage district in the course of making said cut. It would seem to be manifest, therefore, that the effect of the removal of the obstruction from the ridge provided for by the order complained of by the other defendants, who are the appellants herein, would not be that of causing any injury to the construction work which had been or was in process of being done by the drainage district, but would be merely that of permitting the accumulating waters of the Colusa basin to pass over said ridge, as formerly, at the point of its lowest natural level

and flow down into the Yolo basin and thus reach and overflow the lower lands of the appellants herein.

The foregoing review of the facts of this case removes from our consideration in connection with it a number of the questions which were involved and elaborately considered in the case of Gray v. Reclamation District No. 1500, 174 Cal. 622, 163 Pac. 1024, wherein it was held that the defendant in that action, while engaged in carrying forward the plans adopted by both the federal and state governments for the confinement of the waters of the Sacramento river to their natural channel, thus increasing the navigability of the river and thus also accomplishing the reclamation of the vast tracts of low-lying land comprising the several basins adjacent to the course of said river, could not be prevented from proceeding with such work at the suit of some landowner in one of said basins who might be temporarily injured by the overflow of his lands consequent upon the prosecution of such work, and that the injury of such landowner was in such a case damnum absque injuria. The court also in that case decided that the several basins lying along the west side of the Sacramento river did not possess the characteristics of water courses as that term is therein defined so as to require that all waters that might from any source be collected in them were to be permitted to take their natural course without obstruction. The court also decided in the same case that the conditions which existed along the west side of the Sacramento river in respect to these several basins and their collected waters were not those presented for consideration in the case of Miller & Lux v. Madera Canal, etc., Co., 155 Cal. 59, 90 Pac. 502, 22 L. R. A. (N. S.) 391, wherein the annually recurring floods made the stream wider during the period of such floods so as to include therein adjoining lands, in which case such regularly recurring flood waters were to be deemed a part of the ordinary flow of the stream. The chief point of departure between the case of Gray v. Reclamation District No. 1500, supra, and the case at bar arises from the fact that in the Gray Case the defendant was acting in accordance with the declared policy of the state and federal governments in their combined efforts to increase the navigability of the Sacramento river by confining its waters to their natural channel and also to work the reclamation of the vast areas of fertile land belonging to the state or its citizens, lying within these several basins along both sides of the river; while in the instant case the defendants were acting in the purely private capacity of seeking to protect their lower-lying lands from overflow, and were not in so doing promoting either of the public purposes commended by the court in the Gray Case. The case of Sanguinetti v. Pock, 136 Cal. 466, 69 Pac. 98, 89 Am. St. Rep. 169, in some of its aspects more nearly resembles the case at bar in the respect that in that case each of the parties thereto were private parties occupying the relation of upper and lower owners of lands across which there was a depression wherein surface waters were collected in the winter season and into which at times the flood waters of Mormon slough overflowed and intermingling there with the surface waters descended from the plaintiff's to the defendant's lands. The defendant undertook to so obstruct this depression as to prevent the flow of both sorts of waters upon his land and to cause them to collect upon and flood the plaintiff's land. The court in that case held that the defendant, while he had the right to protect his land from the overflow waters of Mormon slough, had no right to obstruct the downward flow of the surface waters in their natural and accustomed course from the plaintiff's lands to his own, and that in connection with whatever obstruction he constructed against the overflow waters of Mormon slough he must have first provided for a sufficient canal or ditch to carry all such surface waters as were accustomed to flow in said depression from the plaintiff's lands to his own.

[1-3] In the case at bar the trial court, upon the hearing of the application for a temporary injunction, was presented with an extraordinary situation. It was a time of most unusual storm and flood. The Colusa basin had become surcharged with waters which were steadily rising and threatening to obliterate the levees which had been built for the protection of the several reclamation districts in the region and even to destroy the embankment and sack levees along the top of the ridge and descend in destructive volume upon the lower lands. Another storm was impending. If the plaintiff was refused the immediate relief demanded it was made to appear that not only her lands but also the lands of other and more remote owners along the ridge would also be overflowed. The volume of the rising waters consisted of intermingled surface and flood waters, the proportion of each being impossible of speedy or exact ascertainment. The particular defendant which had placed the main and more permanent obstructions along the tops of the levee at its point of lowest elevation was not objecting to the removal of the material which had been placed there by it, and thus evidently did not anticipate any substantial injury to the work it had been carrying on by the restoration of the ridge at that point to its former natural elevation. If this were done the maintenance or removal of the temporary sack levees which had been put in place by the other defendants would become inconsequential, since the overflow waters would pass over the lowest part of the ridge and to the eastward of said defendants' lands. Under such unusual and extraordinary conditions the trial court was invested with a very

large discretion as to what temporary and immediate order should be made in the premises, and unless it should be made to very clearly appear that such discretion had been abused its order so made should be sustained. Conceding the right of the appellants to protect their lands from overflow by such of the accumulated waters of the Colusa basin as were strictly flood waters from the Sacramento river under the authority of Sanguinetti v. Pock, supra, they had not the right under the same authority to maintain obstructions upon the ridge which would also have the effect of restraining such of said waters as were strictly surface waters, from passing over the ridge at its lowest point of natural elevation in their accustomed course and way. Whether it was possible in the emergencies of the moment to make a practical order which should undertake to distinguish and divide these rising waters and the right of the respective parties as to their retention or passage was a matter intrusted almost entirely to the trial court's discretion. In the case of Miller & Lux v. Madera Canal Co. supra, the rule, as well stated by Mr. Justice Sloss, is applicable to the extreme conditions presented by the case at bar:

"It would be superfluous to cite authorities to show that the granting or refusing of a preliminary injunction is a matter resting largely in the discretion of the trial court. Where there is a substantial conflict in the evidence regarding an issue which may affect the discretion of the court in passing upon the application for such injunction, the order made will not on appeal be overthrown merely because there may be considerable or even preponderating evidence which, if believed, would have led to a contrary conclusion. The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or that he should not be restrained from exercising the rights claimed by him."

[4] In the case of Jones v. California Development Co., 173 Cal. 565, 160 Pac. 823, L. R. A. 1917C, 1021, the court, quoting from 3 Farnham, Water & Water Rights, § 889, declared that:

"No arbitrary rule can be laid down which will govern all cases, but each case must be dealt with upon its facts, applying the rule which will be reasonable under the circumstances, under the general rule that the water should be allowed, as far as possible, to seek its natural outlet."

Upon these authorities, from a careful examination of the record before us, we are unable to say that there was any abuse of discretion on the part of the trial court in making the order complained of.

[5, 6] In this case the respondent moved the dismissal of the appeal upon the ground that the questions involved therein had become moot questions for the reason that the things commanded to be done by the mandatory injunction had been done, and upon the further ground that the Knights Landing ridge has been cut and the by-pass and levees constructed under and in accordance with the Statute of 1913 providing therefor and which will hereafter conduct the waters of the Colusa basin through the ridge and into the Yolo by-pass, thus avoiding future floods. As to the first of these grounds the motion is clearly not good, for to hold otherwise would be to deprive a party rightfully resisting an improper preliminary mandatory injunction of his remedy for costs and damages by the simple process of executing the unlawful order. As to the second ground of said motion, while it may be true in the instant case that the removal of the source of trouble may have rendered unimportant its final determination, still the appellants, had our conclusion been otherwise as to the right of the trial court to make the order complained of, would have been entitled to their damages and costs as a result of a reversal of such order; besides, the questions involved are of wider moment than the particular case because of the great importance to the state of California of the settlement of the law relating to the waters and adjoined lands of its two great internal waterways. The motion to dismiss is denied. The order is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.

179 Cal. 106

SMITH et al. v. GAYLORD et al. (Sac. 2450.)

(Supreme Court of California. Oct. 3, 1918.)

1. WATERS AND WATER COURSES ⟸132—DIVERSION OF WATER — PRESCRIPTIVE RIGHTS.
The rule which denies to a lower riparian proprietor the power of acquiring prescriptive rights to the use of the water of a stream by the mere user thereof for any period, after they have passed the lands of the upper proprietor, had no application, where plaintiff's lands were not riparian lands, and he did not divert the water after it had passed defendants' lands, but, on the contrary, went on defendants' riparian lands and by means of dams and ditches diverted water from a stream thereon, and conveyed it to his own lands, and a prescriptive right to the ditch and the waters flowing therein might be acquired.

2. WATERS AND WATER COURSES ⟸143—DIVERSION OF WATER — PRESCRIPTIVE RIGHTS.
Plaintiffs, whose lands were nonriparian, entered on the lands of defendants, through which a stream flowed, and cleaned out and reopened an old and unused miner's ditch, rebuilding a dam at its head, and diverted waters from the stream, through an extension of such ditch, to their own lands. The entry was in the nature of a trespass, and defendants knew of plaintiffs' acts and invasions of defendants' rights, but never objected to or interfered with the diversion of the water for over 15 years, during which plaintiffs used the water under a claim of right. Defendants also used water from the stream in their mining operations, but it appeared that such operations were carried on during the winter months, when plaintiffs were not using or claiming the right to use the waters, and that the waters used by defendants were returned to the stream, so that the amount of water at plaintiffs' point of diversion was apparently not reduced. *Held*, that plaintiffs had a prescriptive right to the amount of water diverted by them, during the months of May to October, inclusive, as awarded by the court.

3. APPEAL AND ERROR ⟸1011(1) — FINDING ON CONFLICTING EVIDENCE — CONCLUSIVENESS.
Where there is a substantial conflict in the evidence, the trial court's findings thereon are binding upon appeal.

4. WATERS AND WATER COURSES ⟸130—DIVERSION—PRESCRIPTIVE RIGHTS.
Where a tunnel was run into the side of a ravine, striking and conducting to the ravine waters which had theretofore come to the surface of the ravine naturally, such waters were properly treated as a part of the natural flow of the stream, to the extent of its previous flow, in determining prescriptive rights.

5. APPEAL AND ERROR ⟸302(5) — EXCEPTIONS BELOW—NECESSITY.
A motion for new trial, containing no such specification of insufficiency of evidence as would direct attention to the defect, will not authorize its review on appeal.

In Bank. Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by L. A. Smith and others against E. C. Gaylord and others. From a judgment for plaintiffs, and an order denying the motion for a new trial, made by the defendants, other than Gaylord, defendants appeal. Affirmed.

Ben P. Tabor and John M. Fulweiler, both of Auburn, for appellants. Tuttle & Tuttle, of Auburn, for respondents.

SLOSS, J. This cause was originally heard in Department 1, where the judgment and order appealed from were affirmed upon grounds stated in an opinion prepared by RICHARDS, Judge pro tem. A hearing in bank was ordered to enable the court to give further consideration to the question of the relative rights of the opposing parties to a flow of water artificially added by defendants to the natural volume of the stream. It was thought that the opinion might, on this point, be in conflict with E. Clemens Horst Co. v. New Blue Point Mining Co., 171 Pac. 417, which had been decided by the court in bank shortly after the filing of the department opinion herein. On further study of the record we are satisfied that the facts of the present case do not present the legal questions determined in the Horst Case. With the exception of a paragraph dealing with this branch of the case, we adopt, virtually verbatim, the following statement and discussion from the opinion of Mr. Justice RICHARDS:

This is an appeal from a judgment in favor of plaintiffs and from an order denying the defendants' (other than Gaylord's) motion for a new trial. The nature of the action is that of a suit by plaintiffs to quiet their title to a ditch and water right in the county of Placer. The defendant Haskell Gold Mining Company has been for many years the owner of certain real property in said county known as the Greenwood Place. During the same period the plaintiffs were the owners of another nearby tract known as the "Oleander ranch." Through the said defendant's property passes a ravine known as "Dirty Face ravine," down which originally flowed a certain limited amount of water. This ravine does not border upon or traverse the plaintiff's lands, nor did its waters originally flow to or across the same. In about the year 1891 a tunnel had been run into the side of "Dirty Face ravine" upon the defendant's property and a flow of water struck, which increased to some extent the amount of water which had theretofore flowed down the ravine. There had been an old miner's ditch having its head in the ravine at some little distance below the site of said tunnel and which conveyed the original flow of the waters of the ravine over towards the Oleander ranch. This ditch had been unused for years, but in about the year 1894, after the accretion in the original waters of the ravine, through the addition of those developed in said tunnel, the plaintiffs went upon the defendant's property, cleaned out the old ditch, repaired the dam at its head, and began diverting a considerable portion of the waters then flowing in the ravine, and conveying the same by means of said reconstructed ditch to their own lands, where they used said waters during certain months of the year for purposes of irrigation. There

is evidence tending to show that this diversion and use of these waters continued thereafter up to a time shortly before the commencement of this action. Upon the trial of the cause the court found that the plaintiffs were the owners of the ditch extending from its head in "Dirty Face ravine" to the Oleander ranch, together with the right to take, divert, and use, by means of said ditch, two miners' inches of the waters of said ravine during the months of July, August, and September of each year, and three miners' inches thereof during the months of May, June, and October of each year. The court further found that for more than 15 years next preceding the commencement of the action the plaintiffs had been in actual, exclusive, open, and notorious possession of said waters and said ditch, and during all of said time said plaintiffs had actually, exclusively, openly, and notoriously used said water and said ditch; that the said possession and user by plaintiffs during all the said times had been hostile to said defendant's title and rights, and said defendants during all such times had full knowledge of said possession and user; that said user and said possession of plaintiffs during all of said times had been under a claim of title exclusive of any right in said defendants; and that said user and possession of plaintiffs during all of said times had been continuous and uninterrupted. It was chiefly these findings and the judgment based thereon which were the subject of defendants' assault upon motion for a new trial, and of the appellants' attack upon this appeal.

[1] It is to be noted at the outset that this is not the case of a lower riparian owner diverting or using the waters of a stream at a point below the lands of the upper riparian owner for the statutory period required for the acquisition of easements by prescription. The lands of the plaintiffs herein are not riparian as to the waters in question, nor is the point of their diversion of such waters below the lands of the defendant which are riparian to such waters, but is upon the lands of the defendants at a point which would constitute an interference with their riparian rights therein. The cases cited by appellants, which deny to a lower riparian proprietor the power of acquiring prescriptive rights to the use of the waters of a stream by the mere user thereof for any period after they have passed the lands of the upper proprietor, have no application to the facts of the case at bar. This is a case where the owners of lands distant from the stream, and in no sense riparian, as to its waters, go upon the lands of another through which a stream is flowing, and by means of dams and ditches, divert a certain amount of such waters, and convey them to their own lands. Having done this for a period much longer than that prescribed by the statute for gaining title by prescription, the plaintiffs now assert a prescriptive right to continue so to do, to the extent of their prior diversion, as shown by the evidence in the case. That a prescriptive right, both to the ditch and to the waters flowing therein, may be thus acquired does not seem to be seriously disputed by the appellants herein, and their contention is therefore reduced to the question as to whether the evidence in the case was sufficient to justify the findings of the court above set forth.

[2] Turning to the evidence in the case, the record discloses practically without contradiction, that in about the year 1894 the plaintiffs entered upon the lands of the defendant Haskell Gold Mining Company, and there cleaned out and reopened the old and unused miner's ditch, and rebuilt the dam at its head, and then began to divert the waters at that time flowing in "Dirty Face ravine," and conveyed the same by an extension of said ditch to their own lands. This entry was, so far as the record discloses, in the nature of a trespass. The opening of the ditch and establishment of the dam was an interference with the said defendant's rights upon its own land, and the diversion of the water then taken, and continued to be thereafter taken, constituted an invasion of the defendant's ownership thereof, and of its rights as a riparian proprietor therein. All of these acts and invasions were from their beginning known to the officers and agents of the defendant Haskell Gold Mining Company, according to their own admissions on the witness stand. They were, therefore, from their inception, an open and adverse user of the defendant's lands, and an interference with its rights as to these waters. There is some evidence that such user was attended with a claim of right on the plaintiff's part, and there is also evidence, which is practically uncontradicted, that the maintenance of the dam and ditch and the diversion of the amount of these waters accomplished thereby was never objected to or interfered with by or on behalf of the said defendants until a short time prior to the institution of this action. There is some evidence tending to show that occasionally during the course of the 15 years of the plaintiffs' user of these waters, the said defendant, through its agents and lessees, during the course of mining operations upon its property, used without objection on plaintiffs' part, some, and at times all, of the waters collected and flowing in "Dirty Face ravine"; and it is argued by appellants that this user of said waters by said defendant was sufficient to prevent the plaintiffs' use thereof from being exclusive, and that, therefore, the plaintiffs' use of such waters could not ripen into a prescriptive right. On the other hand, however, there is evidence tending to show that such mining operations and occasional use of said waters by the defendant were carried on during the winter months when the plaintiffs were neither using nor claiming the right to the use of said waters, and there is also

some evidence that even during the occasions of such use thereof by the defendant in connection with its mining operations, the waters after such use were returned to the ravine and flowed on down it, so that the amount of water at the plaintiffs' point of diversion was never apparently reduced. In this connection it is to be noted that the trial court in its findings and judgment only awarded to the plaintiffs the right to use "two miners' inches of water during the months of July, August, and September, and three miner's inches of such waters during May, June, and October of each year." There is some conflict of evidence regarding some of the matters above recited, but we think that, taking the testimony as a whole, there was sufficient evidence before the court to justify its findings to the effect that the plaintiffs had established a prescriptive right to the use of so much of the waters in question as were awarded to them by the court.

[3, 4] The appellants contend, however, that the trial court awarded the plaintiffs a flow of water developed by the tunnel to which reference has been made; that the waters thus developed would not, under natural conditions, have flowed down the ravine or come to the head of plaintiffs' ditch; and that plaintiffs could not, as against those developing such waters and adding them to the natural flow, acquire any prescriptive right. See E. Clemens Horst Co. v. New Blue Point M. Co., 171 Pac. 417. The findings, however, are against the allegations of the answer which form the basis of this claim. There is a substantial conflict in the evidence on the point, and the finding is therefore binding here. The respondents introduced testimony to the effect that the running of the tunnel intercepted springs and sources from which water had theretofore come to the surface of the ravine naturally, and that the stream had, prior to the running of the tunnel, carried an amount of water at least equal to that awarded the plaintiffs by the decree. To the extent of the right adjudged to belong to the plaintiffs the waters were therefore properly treated as a part of the natural flow of the stream. McClintock v. Hudson, 141 Cal. 275, 74 Pac. 849.

[5] It is urged that plaintiffs failed to make out a case of title by prescription for want of proof that they had, for the required period, paid all taxes levied and assessed upon the water right claimed by them. The point is not available on this appeal. The court found that plaintiffs were the owners of the right, and the statement on motion for new trial contains no such specification of insufficiency of evidence as would direct attention to the defect which is now, apparently for the first time, asserted.

The foregoing discussion covers the several points upon this appeal to which the appellants have presented argument or cited authority in support of their contentions. As to the several other grounds of error which are merely stated without argument or citation of authority, they have no such apparent merit as to justify their consideration or as to warrant a reversal of this case upon appeal.

Judgment and order affirmed.

We concur: SHAW, J.; MELVIN, J.; WILBUR, J.; LORIGAN, J.; RICHARDS, Judge pro tem.

---

179 Cal. 102

SORMANO v. WOOD et al. (L. A. 4616.)

(Supreme Court of California. Oct. 2, 1918.)

1. QUIETING TITLE ⊂⊃47(2)—PLEADING—DESCRIPTIONS.

In action to quiet title, where defendants filed answer and cross-complaint, and one defendant later filed an individual amended cross-complaint, tendering no new material issue, and not intended as a substituted pleading, the variance in descriptions between petition and amended cross-complaint being unsubstantial, findings of fact as to amended cross-complaint were unnecessary.

2. PLEADING ⊂⊃406(5)—FAILURE TO DEMUR—FINDINGS ON CROSS-COMPLAINT.

A contention that the rule that no findings are necessary on cross-complaint in action to quiet title, where there is a general finding for plaintiff, is inapplicable, when there is a variance in description between the complaint and cross-complaint, cannot be raised by defendant, where he did not demur to complaint and put all essential matters in issue by an answer in general terms.

Department 2. Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Giuseppe Sormano against Luther B. Wood and others. From the judgment rendered, defendant J. H. Smith appeals. Affirmed.

Chas. S. McKelvey and Chas. S. Conner, both of Los Angeles, for appellant. George W. Crouch and E. W. Freeman, both of Los Angeles, for respondent.

MELVIN, J. Plaintiff was successful in an action to quiet title to certain real property in the county of Los Angeles. One of the defendants, J. H. Smith, has appealed, bringing here the judgment roll alone.

The complaint is in the usual form, and contains the allegation that plaintiff "is now and for many years last past has been the owner and in the possession of that certain real property," which is described in detail. Luther B. Wood and J. H. Smith (now appellant) answered, denying plaintiff's ownership in the property or any part thereof, and setting up their alleged ownership in fee to all of it. By way of cross-complaint they averred that they were tenants in common to the fee. Plaintiff answered their cross-complaint, again averring his claim of interest in the property. Defendant Loop answered the complaint and alleged his owner-

ship of the described property by virtue of a certain tax deed.

All of the pleadings above described were filed in March and April, 1912. In May, 1915, J. H. Smith filed an amended answer and cross-complaint denying plaintiff's ownership or right to possession of the land described in the complaint. By way of cross-complaint he averred that before the filing of the action he was, and at the time of the signing of his amended answer and cross-complaint still was, the owner and entitled to the possession of the land in question. The clerk entered Sormano's default for his failure to answer this cross-complaint. Defendant Loop answered the amended cross-complaint of Smith setting up his own title, acquired, as he alleged, by certain deeds from the state and from one Hall.

Thereafter the cause was tried, and the court found that all of the allegations of the complaint of Sormano were true, and all of the denials and allegations of the answer and cross-complaint of Wood and Smith were untrue, and that the allegations and averments of the answer of defendant E. E. Loop were untrue. There were other findings and appropriate conclusions of law, requiring plaintiff to pay into court for Smith's benefit a certain amount for taxes, penalties, and costs included in the sale of the land by the state in February, 1912. Judgment was entered against J. W. Hall by default.

Although he admits that the findings dispose of all of the issues raised by the answer and cross-complaint of himself and Wood, and those raised by the answer of Loop, appellant argues that those raised by his later so-called "amended answer and cross-complaint" have not been the subject of any findings, and that therefore the cause must go back for retrial, because of the court's failure to find on material issues.

[1, 2] In the first place, there is no showing, either by recital in the pleading itself or by any order set out in the transcript, that the court gave Smith permission to file his belated and so-called "amended" verified pleading, which seems to be in conflict with the earlier verified answer and cross-complaint of Smith and Wood. But, assuming that the later document was regularly filed, there was nothing to show that it was intended to be in lieu of the pleading which Smith and Wood had previously verified and used in the action. By that pleading all of the essential issues were joined. The amended cross-complaint of Smith tendered no new material issue not involved in both of his answers. Although a defendant in an action to quiet title may properly aver in a cross-complaint his own right to have his title quieted, the principal function of the practice of cross-pleading is to prevent plaintiff from dismissing his action before trial without the consent of the defendant. Larkin v. Superior Court, 171 Cal. 719, 154 Pac. 841, Ann. Cas. 1917D, 670. It has even been held that an erroneous ruling of the court striking out such a cross-complaint is without prejudice in a case in which, like the one at bar, judgment is given in favor of plaintiff. Bulwer Consolidated Mining Co. v. Standard Consolidated Mining Co., 83 Cal. 589, 23 Pac. 1102; Miller v. Luco, 80 Cal. 257, 22 Pac. 195; Hanson v. Goldsmith, 170 Cal. 512, 150 Pac. 364. Indeed, the question presented by this appeal is answered by Brooks v. White, 22 Cal. App. 719, 136 Pac. 500, in which it is held that, where an answer denies plaintiff's and avers defendant's ownership and right to the possession of land, the omission of plaintiff to answer the cross-complaint does not authorize the clerk to enter a judgment by default.

In the closing brief appellant tries to differentiate this case from Larkin v. Superior Court, supra, on the theory that in that case there was no variance (as he asserts there is in this) between the descriptions of the properties as set up in plaintiff's complaint and his own so-called amended cross-complaint. In the latter he asserts title to lots 7 and 8, First addition to Huntington Park, and to a lot 20 feet in width adjoining each lot on the south. In the complaint the property is described as lots 7 and 8 and the north 20 feet of Hogan street (vacated) adjoining lots 7 and 8 on the south, and lying between the east and west lines of the two said lots "extended south," in block 5 of the First addition to Huntington Park, etc. Appellant's counsel solemnly argue that their description contained in the so-called "amended cross-complaint" puts the strip 20 feet in width outside of block 5, while the description in the complaint would seem to put it inside of that block. There is absolutely no merit in this contention, which amounts at most to a very tenuous distinction. In both descriptions the strip 20 feet in width is referred to and located "south" of lots 7 and 8 and "adjoining" them, and for more graphic details reference is made in each to the same recorded map. If the flimsy distinction upon which appellant's counsel rely really existed, still we would be bound to determine that the court, depending upon the map and the testimony, decided that the two descriptions were substantially identical and had application to the same property. Having failed to demur to the complaint, and having answered its averments in general terms, which placed all essential matters of controversy at issue, appellant may not with propriety raise any such question at this late date, even if the variance were one of a more substantial nature.

No other of the contentions contained in the closing brief merits discussion.

The judgment is affirmed.

We concur: WILBUR, J.; LORIGAN, J.

179 Cal. 59

## SOUTHERN PAC. CO. v. INDUSTRIAL ACCIDENT COMMISSION. (S. F. 8803.)

(Supreme Court of California. Sept. 30, 1918.)

COMMERCE ⊂⊃27(8)—FEDERAL EMPLOYERS' LIABILITY ACT—"INTERSTATE COMMERCE."

A member of a repair gang employed by a railroad company to make light repairs upon cars side-tracked in a yard used for interstate and intrastate commerce, killed while passing from one car to the other, was engaged in "interstate commerce" within the federal Employers' Liability Act (U. S. Comp. St. 1916, §§ 8657–8665).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

In Bank. Proceedings under the Workmen's Compensation Act by the widow and children of James Morton, deceased, to obtain compensation for decedent's death, opposed by the Southern Pacific Company, employer. Compensation was awarded by the Industrial Accident Commission, and the employer applies for a writ of review. Award annulled.

Henley C. Booth, of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondent. Frank J. Creede, of San Francisco, for the guardian.

WILBUR, J. The petitioner seeks to review an award of the respondent Industrial Accident Commission in favor of the widow and children of James Morton, deceased, made under the terms of the Workmen's Compensation Act of California (St. 1913, p. 279). The only question here involved is whether or not the respondent has jurisdiction to make an award, or whether the liability of the petitioner is to be determined by the courts in accordance with the provisions of the federal Employers' Liability Act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916, §§ 8657–8665]). This depends upon whether the deceased when killed was engaged in interstate commerce.

The deceased was a member of the repair gang employed by petitioner to make light repairs upon cars side-tracked and detained upon side tracks reserved respectively for inbound or outbound freight traffic in the Bay Shore Freight Yards of petitioner. Such detention on said tracks was in part for the purpose of inspecting the cars to ascertain defects therein and to make such light repairs thereof as were thereby found necessary, in order that the cars might proceed to their destination. "Light repairs" were made upon the cars without moving them from their positions in the "cuts" or "drags" on the side tracks, but "heavy repairs" were made by cutting out said cars and transferring them to tracks specially devoted to repair work. About 40 per cent. of the business of the yard at that time was interstate business, the balance intrastate.

The tracks upon which the cars repaired by the deceased and his fellow laborers were standing were part of the switching tracks in the freight yards essential to the movement of interstate as well as the intrastate commerce. The system of light repairs inaugurated in the yards in question was for the purpose of facilitating the movement of trains to and from the yard and was distinct from the heavy repair jobs which required the cars to be cut out of the "cuts" or "drags" and placed on special side tracks arranged for such repair work. During the day the light repair men doing "light repairs" would repair on an average 100 cars. Decedent's duties required him to pass from one car to another and one track to another seeking out the cars which were tagged by the inspectors as requiring light repairs and finding them to make such repairs. Decedent and his assistant had released the air on a string of cars, some containing interstate and others intrastate freight, and were proceeding across the yard for the purpose of making light repairs upon other cars. While the deceased was crossing one of the switches, he was killed by an empty freight car being suddenly moved upon him because struck by another car "kicked" upon the track by a switch engine. It is not known whether the next car to be repaired by deceased would be loaded with interstate or intrastate commerce, as that would depend entirely upon which sort of a car they happened to first discover tagged for light repairs.

Whether or not deceased was engaged in interstate commerce "depends upon whether the series of acts that he had last performed was properly to be regarded as a succession of separate tasks or as a single and indivisible task," as was said by the Supreme Court of the United States in Erie R. Co. v. Welsh, 242 U. S. 303, 37 Sup. Ct. 116, 61 L. Ed. 319, in passing upon the case of a yard conductor injured while going to report to the yard master for further orders. "The true test," it is there held, "is the nature of the work being done at the time of the injury, and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act." The deceased and his assistant would work on 25 cars daily, and in so doing move from place to place in the yards. Some cars repaired were filled with interstate and others with intrastate freight. The character of employment in which decedent was engaged seems to approach more nearly to that of a switch engineer, as a "single and indivisible task," than to that of a "heavy repair" man, whose work might be properly characterized as a "succession of separate tasks." Such an engineer was killed while leaving the carrier's yard, and it was held that he then was engaged in interstate commerce. "In leaving the carrier's yard at the close of his day's

work, the deceased was but discharging a duty of his employment. See North Carolina R. Co. v. Zachary, 232 U. S. 248, 260 [34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159]. Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work and partook of the character of that work as a whole, for it was no more an incident of one part than of another. His day's work was in both interstate and intrastate commerce, and so when he was leaving the yard at the time of the injury his employment was in both. That he was employed in interstate commerce is therefore plain, and that his employment also extended to intrastate commerce is for present purposes of no importance." Erie R. Co. v. Winfield, 244 U. S. 170, 173, 37 Sup. Ct. 556, 557, 61 L. Ed. 1057, Ann. Cas. 1918B, 662. By the same process of reasoning the decedent, whose general employment was to repair cars containing interstate and intrastate freight in the yards of the petitioner, was employed in interstate commerce while passing through the yard from one such car to another. In considering this question it is also proper to bear in mind the requirements of the federal Safety Appliance Acts (Act Cong. March 2, 1893, c. 196, 27 Stat. 531; Act Cong. March 2, 1903, c. 976, 32 Stat. 943; Act Cong. April 14, 1910, c. 160, 36 Stat. 298 [U. S. Comp. St. 1916, §§ 8605–8615, 8617–8619, 8621–8623]) in regard to the inspection and the care of cars on railways engaged in interstate commerce. The inspection and repair service of the deceased was required by such statute and was therefore made an essential part of the movement of interstate commerce, and the decedent was engaged in performing this work upon cars brought to a standstill partly for that purpose.

We conclude therefore that the deceased was engaged in interstate commerce when killed.

The award of the commission is annulled.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; RICHARDS, Judge pro tem.

---

179 Cal. 63

## PERERA v. PANAMA-PACIFIC INTERNATIONAL EXPOSITION CO.

(S. F. 7815.)

(Supreme Court of California. Oct. 1, 1918.)

1. TRIAL ⟸171—DIRECTION OF VERDICT.
The right of trial court to direct a verdict is, with regard to the condition of the evidence, the same as its right to grant a nonsuit.

2. TRIAL ⟸139(1)—NONSUIT WHEN PROPER.
The court may grant a nonsuit only when disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled the result is that there is no evidence of sufficient substantial nature to support a possible verdict for plaintiff.

3. BAILMENT ⟸2—FOR MUTUAL BENEFIT—EXHIBITION.
Confiding jewelry with another for exhibition purposes and for sale on commission at the Panama-Pacific International Exposition was a bailment for the mutual benefit of both parties.

4. BAILMENT ⟸14(1)—FOR MUTUAL BENEFIT—DEGREE OF CARE.
Bailment being for the benefit of both parties, the bailee would be liable to the bailor for theft by a third person only if the theft was due to lack of ordinary care on the part of bailee.

5. BAILMENT ⟸31(3) — NEGLIGENCE OF BAILEE—EVIDENCE—SUFFICIENCY.
In action for value of jewelry confided by plaintiff to care of defendant for exhibition purposes and sale on commission at Panama-Pacific International Exposition, evidence *held* insufficient to show that theft of jewelry was due to defendant's negligence.

6. BAILMENT ⟸14(3)—FOR MUTUAL BENEFIT—DEGREE OF CARE.
Defendant, with whom plaintiff confided jewelry for exhibition purposes and for sale on commission at Panama-Pacific International Exposition, was not an insurer against theft.

7. BAILMENT ⟸14(3)—FOR MUTUAL BENEFIT—DEGREE OF CARE.
The limit of defendant's obligation to furnish protection for jewelry confided to him by plaintiff for exhibition and sale on commission at Panama-Pacific International Exposition was the exercise of ordinary care in protecting exhibits against theft.

8. BAILMENT ⟸31(1) — NEGLIGENCE — BURDEN OF PROOF.
In action for value of jewelry confided by plaintiff to care of defendant for exhibition purposes and for sale on commission at Panama-Pacific International Exposition, plaintiff had the burden of showing that theft was due to defendant's negligence.

9. BAILMENT ⟸31(3) — NEGLIGENCE OF BAILEE—EVIDENCE.
Evidence of facts and circumstances from which want of ordinary care of defendant, with whom plaintiff confided jewelry for exhibition and sale on commission at Panama-Pacific International Exposition, may be inferred, is sufficient to support conclusion of negligence.

10. BAILMENT ⟸31(2) — CUSTOMS — PROTECTION AGAINST THEFT OF JEWELRY.
In action for value of jewelry confided by plaintiff to care of defendant for exhibition purposes and for sale on commission at Panama-Pacific International Exposition, the court did not err in refusing to allow jeweler to testify as to a custom with reference to protection against theft of jewelry displayed for sale on exhibition.

In Bank. Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Edgar Perera against the Panama-Pacific International Exposition Company. Judgment that plaintiff take nothing, and he appeals. Affirmed.

Ambrose Gherini, of San Francisco (J. Edwin Lyons, of Sacramento, of counsel), for appellant. Brittain & Kuhl, of San Francisco, for respondent.

ANGELLOTTI, C. J. This is an appeal by plaintiff from a judgment that he take nothing. At the close of the plaintiff's case,

the trial court directed the jury to render a verdict for defendant, and upon the verdict so rendered the judgment was given. The principal question on this appeal is as to the correctness of the action of the trial court in so directing the jury.

[1, 2] It is now settled that the right of a court to direct a verdict is, with regard to the condition of the evidence, absolutely the same as the right of a court to grant a nonsuit; and also that a court may grant a nonsuit only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given. Estate of Caspar, 172 Cal. 147, 155 Pac. 631.

[3, 4] The action was for the value of certain jewelry, worth, according to plaintiff's testimony, between $10,000 and $15,000, confided with other jewelry by plaintiff to the care of defendant for exhibition purposes and sale for him by defendant on commission, at the Panama-Pacific International Exposition, and which was never returned or accounted for. There was here a bailment for the mutual benefit of the parties. The evidence introduced on behalf of plaintiff showed that while so on exhibition the jewelry was stolen by some unknown third party. It is conceded by plaintiff that under the circumstances it was incumbent on him, in order to make out a case, to introduce evidence from which the jury might legitimately infer that the theft was due to lack of ordinary care on the part of defendant. See Colburn v. Washington State Art Ass'n., 80 Wash. 662, 141 Pac. 1153, L. R. A. 1915A, 594; 6 C. J. 1158, 1159, 1160. Defendant does not dispute that it was bound to the exercise of ordinary care in the matter of protecting the property of plaintiff from theft.

[5] Viewing the evidence in the light most favorable to plaintiff's claim, as we must, the case made by plaintiff's witnesses, so far as material, was substantially as follows: The jewelry was placed, according to the agreement of the parties, in the arts and crafts section in the Palace of Varied Industries. This building contained a floor space of about 5 acres, and the arts and crafts section comprised about 5,000 square feet of this space in the northwesterly corner of the building. This section contained some other displays of valuable jewelry, as well as displays of other articles. There were many other sections in the building, some containing valuable exhibits. The jewelry of plaintiff was contained, as was the other jewelry exhibited in the section, in showcases. That of plaintiff was contained in two showcases, which, including the locks thereon, were furnished by plaintiff, through his own representative, one Gugliemetti; the defendant requiring only that the cases be uniform in color and design with the other cases in the same section. The section was in sole charge of defendant's employés; but plaintiff's representative, who visited the place occasionally, was cognizant of the manner in which the jewelry was placed and exhibited. On the evening of June 19, 1915, about 7:10 p. m., just before the closing of the building for the night and while patrons were still therein, the two locked cases were pried open at about where the locks thereon were placed, and a large portion of plaintiff's exhibit abstracted by the thief. There was an attendant of the section on duty at the time, and he was engaged for the moment with a customer. There is no suggestion in the evidence that he was in any way negligent. The locks on the cases were not of the best type, and the indications were that it was a simple matter to pry the cases open. Defendant's representative had accepted the cases as delivered, and had never investigated the locks. The regular guard force of the defendant for the exposition, which comprised some 625 acres of ground, consisted of 300 trained men, who were assigned, as required, to particular places and buildings. Defendant had, in addition to this force, some Pinkerton private detective agents, whose duty it was to look out for suspicious characters in and about the buildings and grounds, and had also arranged with the city authorities for the presence on the grounds of "plain clothes men" of the police department for the same purpose. The force of regular exposition guards assigned to and on duty in the Varied Industries Building at the time of the theft consisted of three, two guards and a corporal; the duty of each guard being to patrol one-half thereof, and that of the corporal "to supervise the * * * whole building." As we have seen, there was an attendant on duty in the section at the time of the theft, and there is no suggestion that this was not ordinarily the situation with regard to the other sections in the building. In addition to this, some of those having very valuable exhibits in the building had their own private guards or watchmen. There was no burglar alarm system in any portion of the building. Some nine or ten evenings before this theft the place was entered (whether after the building was closed for the night does not appear), and a case in this section opened and some jewelry stolen; but we have no evidence at all as to the circumstances under which this theft occurred.

We are unable to see in this evidence any substantial support for a conclusion that the theft was due to negligence on the part of defendant. In view of the evidence, the defendant was in no way responsible for the condition of the locks on the cases, or the facility, demonstrated by the theft, with

which the cases could easily and quickly be pried open at the locks. There was, of course, no showing of negligence on the part of defendant in the evidence as to the manner in which the jewelry was placed and kept on exhibit. As said by counsel for defendant:

"The very nature of the bailment was such that the goods were to be kept so that the public might very readily see and examine them."

And plaintiff, through his representative, knew exactly how his property was being kept and displayed, in the cases furnished by him. There is nothing in the evidence reasonably warranting a conclusion that the representative of defendant in charge of this section at the time of the theft was guilty of any lack of ordinary care, or that the defendant was negligent in not having more than one attendant in the section. The real contention of plaintiff is that there was lack of ordinary care in the matter of police protection for the exhibits contained in this building. The evidence introduced by him showed that defendant did furnish in various ways police protection for the exhibits at the exposition, including those contained in this building, and we find in the evidence no sufficient gauge by which it may fairly be concluded that the police protection so furnished was not reasonably adequate; that is, that it was less than a reasonable man, in view of all the circumstances, would deem essential to the proper protection of the various exhibits.

[6-9] Of course, as is conceded, defendant was not an insurer against theft. It could not be expected, in the very nature of things, to have the articles exhibited by plaintiff under the observation of some guard or other employé every moment of the time. The limit of its obligation in this behalf was to exercise ordinary care in the matter of the protection of this exhibit in common with all other exhibits, against theft. The evidence that there were only three regular exposition guards on duty at the time in this building must be considered in connection with the evidence to the effect that the building was still open for business; that there were patrons therein; that there was an attendant on duty in special charge of this section in which plaintiff's jewelry was contained in locked cases; that, so far as appears, there were special attendants in other sections; and that special provision had been made in the way of "plain clothes men," both Pinkerton men and San Francisco police officers, to guard against the presence on the grounds of known criminals and suspicious characters. There is no sufficient data upon which one may reasonably conclude that the provision made for protection of the exhibits was not reasonably adequate. With the limited evidence as to the conditions and circumstances which is contained in the record, it seems to us that any conclusion of want of ordinary care in the matter of police protection would be one based solely on mere conjecture or surmise. The prior theft is of no practical importance in this connection, in view of the want of evidence as to the circumstances thereof. The burden was on plaintiff to affirmatively show negligence. It is true, of course, that evidence of facts and circumstances from which want of ordinary care may reasonably be inferred is sufficient to support a conclusion of negligence, in which event the question of negligence is one for the jury. But the difficulty here is that the facts and circumstances shown by the evidence furnish no sufficient basis for any such inference. This being the condition of the proof, the trial court properly directed the jury to render a verdict for the defendant.

[10] It was claimed in the opening brief of appellant that the trial court erred in refusing to allow an expert jeweler called by him as a witness to testify as to the custom as to the care of jewelry among jewelers when being displayed for sale or exhibition. The sole object of this proposed evidence, as stated by counsel, both in making his offer and in his brief, was to show what protection is given by jewelers to jewelry displayed for sale or exhibit for the purpose of establishing what amount of protection was essential to the exercise of ordinary care by defendant. We do not see how any such custom could be binding on defendant, or competent on the question of exercise of ordinary care.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.; WILBUR, J.; LORIGAN, J.; MELVIN, J.; RICHARDS, Judge pro tem.

---

179 Cal. 116

MADERA SUGAR PINE CO. v. NORMAN B. LIVERMORE & CO. et al. (S. F. 7780.)

(Supreme Court of California. Oct. 3, 1918. Rehearing Denied Oct. 31, 1918.)

1. EVIDENCE ⊜441(9)—PAROL EVIDENCE AFFECTING WRITING—WARRANTY.
If oral warranty of article sold was in direct conflict with written specifications, evidence of such warranty could not be received.

2. EVIDENCE ⊜441(9)—PAROL EVIDENCE AFFECTING WRITING—SALE—WARRANTY.
Where purchaser of locomotive received engine with tractive power of 25,830 pounds called for by contract, evidence of oral agreement that engine would pull more than was stipulated in writing was inadmissible, in action for breach of warranty.

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the Madera Sugar Pine Company, a corporation, against Norman B. Livermore & Co., a corporation, and Norman B. Livermore. From a judgment for defendants, plaintiff appeals. Affirmed.

Chickering & Gregory, of San Francisco, for appellant. Arthur H. Redington and Thomas H. Breeze, both of San Francisco, for respondents.

WILBUR, J. This is an appeal by plaintiff from a judgment in an action brought by it for a breach of warranty on the sale of a locomotive. The alleged warranty was:

"That the engine would be of sufficient power to haul at one time over the railroad track of plaintiff 15 of plaintiff's cars, loaded in the manner customary by plaintiff."

This it failed to do, only hauling 10.

[1] The question involved is whether or not evidence of an oral warranty was admissible, in view of the fact that the specifications and order for the locomotive and the letters accepting the same were in writing. It is claimed that the oral warranty was made at the time the locomotive was ordered, and that it was not the intention of the parties to reduce the entire contract to writing, and that therefore, although a portion of the contract was oral, the latter could be proved by parol evidence. The parties did, however, subsequently reduce the specifications of the engine to writing. If the oral warranty was in direct conflict with these written specifications, evidence thereof could not be received. Germain Fruit Co. v. Armsby, 153 Cal. 585, 96 Pac. 319.

The specifications for the "three-truck sixty-ton Shay" locomotive cover 14 pages of the printed transcript, and, among other things, specify the weight of the engine in average working order 120,000 pounds, and empty approximately 100,000 pounds, number of cylinders, their diameter, cylinder stroke, gear, size of boiler, steam pressure, grate area, and the tractive power, viz., 25,830 pounds. Experts testified that the term "tractive power," as used in the specifications, means the actual drawbar pull which the engine exerts on the cars after all the friction of the engine has been overcome; that "a tractive power of 25,830 pounds" means the tractive power or pulling power on the level, and that the specifications of this engine would have to be changed in order to give it greater tractive power than 25,830 pounds; that the "theoretical" tractive power of the engine, as derived from the specifications, without allowance for friction, etc., would be 34,000 pounds; and that certain deductions were made therefrom, under recognized engineering rules, for friction, etc., which reduced the actual computed tractive power to 25,830 pounds. In other words, an expert, from the written specifications (without any specific statement of the tractive power), would, by computation from recognized formulæ, ascertain that a locomotive built in accordance therewith would have a tractive power of 25,830 pounds. But these specifications, in addition to such details, stated the tractive power to be 25,830 pounds. It is conceded that this engine had a tractive power on the level equal to 25,830 pounds, as specified. It is, of course, obvious that the tractive power will decrease as the grade increases, for the reason that the engine must lift its own weight, which was also specified.

[2] The situation, then, is that the plaintiff got an engine with the pulling power called for by the written contract, but contends that there was an oral agreement that it would pull more than was stipulated in the writing, although in fact it could not pull more, if built according to written specifications. Under these circumstances the writing must control. It is claimed by the appellant that there was sufficient reference in some of the writings to the oral negotiations or stipulations to permit evidence thereof. There is not the remotest reference to any warranty or stipulation concerning the tractive power of the engine. Without quoting from the letters, the most that can be said of them is that they recognize the fact that there had been negotiations between the parties. They do not attempt in any way to incorporate such oral negotiations into the letters or into the specifications. In a letter of September 25, 1912, to the plaintiff from the defendants, it was said:

"Referring to correspondence and conversations with you in regard to the subject of Shay locomotive," etc.

This reference does not attempt to incorporate any previous conversations into the contract between the parties, and, even if it did, it was entirely superseded by the subsequent agreement of the parties upon the specifications of the engine. The trial court properly struck out evidence of the oral agreement with relation to the alleged oral warranty.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; SHAW, J.; LORIGAN, J.; RICHARDS, J., pro tem.

---

179 Cal. 46

## GEARY ST., P. & O. R. CO. v. BRADBURY ESTATE CO. (S. F. 8731.)

(Supreme Court of California. Sept. 28, 1918.)

1. EXECUTORS AND ADMINISTRATORS ⇐224— CLAIMS—STOCKHOLDER'S LIABILITY — PRESENTATION.

Under the express provisions of Code Civ. Proc. § 1493, and in view of section 1500, the personal obligation of a stockholder, since deceased, to pay a call for unpaid subscriptions, is barred by the corporation's failure to present a claim therefor within the time for presenting claims to the executor.

2. CORPORATIONS ⇐144 — TRANSFERS OF STOCK—UNPAID SUBSCRIPTION.

Where a stockholder makes an absolute transfer of stock in good faith, which is duly recorded on the corporate books, he is thereby wholly discharged from further liability on the uncalled-for subscription price.

3. CORPORATIONS ⊂⊃144 — PURCHASERS OF STOCK—UNPAID SUBSCRIPTION.

A corporation, which has purchased stock from a stockholder, is not personally liable to calls thereon which have been made prior to the transfer of the stock on the books, but is so liable for calls subsequently made.

4. CORPORATIONS ⊂⊃144 — TRANSFER OF STOCKHOLDERS—UNPAID SUBSCRIPTION.

A corporation by-law, providing that the stock shall, after payment of all calls or installments thereon be transferable on the books, refers to calls or installments then due, and not to the unpaid balance of the stock, so as to make a purchaser of stock liable for calls made while the stock was in the possession of the seller.

5. CORPORATIONS ⊂⊃144—TRANSFER OF STOCK —UNPAID SUBSCRIPTION.

That a purchaser of corporation stock did not know that part of the original subscription price was unpaid is immaterial, since stock certificates are not negotiable instruments, and the stock represented by them is subject to assessment for subscription calls, no matter to whom transferred.

In Bank. Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by the Geary Street, Park & Ocean Railroad Company, a corporation, against Bradbury Estate Company, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Henry T. Gage and W. I. Foley, both of Los Angeles, for appellant. Pillsbury, Madison & Sutro, of San Francisco, for respondent.

PER CURIAM. Defendant appeals from an adverse judgment. By this action the plaintiff sought to recover the amount of a call upon the original subscription to 30 shares of the capital stock of plaintiff owned at the date of the commencement of the action by the defendant. The court found defendant liable for the payment of the amount of the levied assessment. The facts are as follows:

In 1915 plaintiff, being indebted in the sum of about $300,000, issued a call upon the unpaid subscriptions to its capital stock for $34 a share. This stock involved in the appeal before us had been bought in the open market by Simona M. Bradbury some time prior to December 10, 1902. The purchase was made from a registered holder and a new certificate representing her 30 shares was issued to said Simona M. Bradbury. This writing upon its face showed no indebtedness and contained no information regarding the matter of its being fully or partially paid. While holder of the stock Simona M. Bradbury died testate on the 10th day of December, 1902. Her estate, which was of a value in excess of $10,000 was regularly distributed after probate proceedings in due form in the county of Los Angeles, where she had resided up to the time of her death. The distributees under the will of Simona M. Bradbury held the original certificate without registration on the books of the company from January 2, 1904, the date of final distribution, until May 3, 1904, when they duly sold and transferred title by bill of sale to the defendant, and within a few days a new certificate was issued to that corporation. Defendant, at the time of the sale and assignment of the stock, had not any actual knowledge or information of any unpaid balance due upon the stock by reason of the original subscription, and believed that said stock was fully paid, and knew that no claim for any unpaid balance of the subscription price had been presented against the estate of Simona M. Bradbury, deceased. At the time of the issuance of the new certificate section 17 of the by-laws of the plaintiff corporation provided that:

"The stock of the company shall after payment of all calls or installments thereon be transferable on the books of the company by endorsement on the certificate by the signature of the proprietor or his attorney or legal representative, and delivery of the certificate of stock. The surrendered certificate shall in all cases be canceled by the secretary before issuing a new one in lieu thereof."

Appellant contends that plaintiff's claim for the unpaid balance due on the original subscription, if assumed by Simona M. Bradbury as transferee during her life, is "barred forever," under the law as found in section 1493, Code of Civil Procedure, by plaintiff's failure to present its claim to the executors of her estate, and that this defense is available to the purchaser from the distributees under her will and to their transferee; that by its conduct plaintiff is estopped in view of its by-law 17 from asserting that a part of the subscription price is still due; and that in view of that same section of the by-laws plaintiff's claim is barred by its own laches.

[1] The personal obligation or promise of Simona M. Bradbury to pay calls upon these shares in the plaintiff company, whatever its origin or nature, whether it was merely "not due," or was contingent, became forever barred by the failure of the plaintiff to file or present a claim therefor within the time limited in the notice to creditors given by the executrix of her estate after her death. Such is the express language of section 1493 of the Code of Civil Procedure, and it is further said in section 1500 that no holder of such claim shall thereafter maintain any action thereon. This does not bar him from maintaining an action against a third person, if there were any such, who was jointly or severally liable with the decedent upon the obligation, but there was no such person. The defendant had not then even come into existence.

[2] It cannot be held liable upon the theory that it had assumed the obligation of the original subscriber for the stock; that obligation ceased to exist when Simona M. Brad-

bury bought the stock and had it transferred to herself on the corporate books. "Where a stockholder makes an absolute transfer of his stock in good faith, and the transfer is duly recorded on the corporate books, the transferrer is thereby wholly discharged from all further liability upon the uncalled subscription price of the stock." 1 Cook on Corp. (7th Ed.) § 255. By that transaction Simona M. Bradbury became the obligor. The defendant cannot be held liable for the obligation which she then assumed, for that obligation, as we have shown, was forever barred before the defendant became the owner of the shares.

[3] It cannot be held liable on the ground that its purchase of the shares (prior to transfer on the books) rendered it personally liable to calls thereon. This is settled by the decision in People's Home Savings Bank v. Stadtmuller, 150 Cal. 106–109, 88 Pac. 280. In that case the registered owner of the stock died and the stock was distributed to his widow as his heir. She continued to hold the stock, but did not have it transferred to her on the corporate books. A call for the unpaid balance of the subscription was thereafter made and the corporation began suit against her to recover the same. It was held that the suit would not lie, that her ownership of the stock did not make her liable for the unpaid balance of the subscription price thereof, and that where stock has passed from a registered holder to a third person, whether by purchase or descent, the corporation "has no right of action against the transferee, because, as between him and the corporation, the contractual relation of stockholder has not been created." The opinion quotes with approval the following passage from section 258 of Cook on Corporations (4th Ed.):

"Until a transfer is recorded in the transfer book of the corporation, the transferee, not being duly recognized as a stockholder, is not chargeable * * * with * * * unpaid balances of the subscription."

It is obvious from this decision that if the defendant corporation, after having received this stock from the legatees of Simona M. Bradbury had retained it without having it transferred upon the books, no right of action for calls would ever have existed against it, personally, in favor of the plaintiff corporation. In that event the plaintiff's only means of enforcing calls would have been to sell the stock as provided in Civil Code, §§ 331–349.

[4] The result is that the present action can be maintained only upon the theory that, by having the stock transferred to itself upon the stock books, a personal liability was thereby created against the defendant in favor of the plaintiff to pay calls upon the subscription price. This does not mean that the defendant then assumed the obligation of the original subscriber. The liability arises out of the transaction at the time of the application for the transfer on the corporation books. "If the law implies a promise by the original holders or subscribers to pay the full par value when it may be called, it follows that an assignee of stock, when he has come into privity with the company by having stock transferred to him on the company's books, is equally liable. * * * Being thus liable, there is an implied promise that he will pay calls made while he continues the owner." 3 Clark & Marshall, Corp. § 564a, p. 1736; Webster v. Upton, 91 U. S. 65, 23 L. Ed. 384. The circumstances thus existing at the time that transfer was requested and made were sufficient to create the inference that the transferee agreed to pay calls thereafter to be made. The plaintiff's stock was divided into shares of $100 each. At the time the stock was issued, $37.50 was paid upon each share, and the balance of $62.50 per share remained unpaid. This was the condition at the time the defendant obtained the transfer of these shares to itself. When a person thus comes into an enterprise with other stockholders, upon whom there is an obligation to pay calls for the remainder of the stock price, it is at least a fair inference, and the law makes it a necessary one under our decisions, that he thereby agrees that he will be bound for calls the same as other stockholders. It is upon this implied agreement that the present action is based.

The defendant claims exemption from this liability by reason of the language of section 17 of the by-laws of the company. This by-law was adopted in 1887 and still remains in force. The part relied on reads as follows:

"The stock of the company shall after payment of all calls or installments thereon be transferable on the books of the company."

If this could reasonably be said to mean that before the company was obliged to make such transfer it would have the right to insist on the payment of the entire balance due on the original price, there might be some ground for the claim that the acceptance of stock and the making of the transfer without insisting on such payment and without informing the transferee that there was any balance unpaid, would create an estoppel preventing the company from afterwards demanding such payment upon calls. But it is clear that this is not its meaning. If that were its meaning, and it had been enforced, the result would have been an inequality among the stockholders. Those who owned the original stock would have paid only $37.50, while the subsequent transferees would have paid the full price. No such absurd interpretation is necessary. In the phrase "all calls or installments thereon," the words "installments thereon" do not refer back to the word "stock" in the prior portion of the sentence, but refer to the word "calls" directly preceding the same, and the passage means that the stock of the company shall be transferable after the payment of all

calls or of all installments then due upon such calls. The unpaid balance of the stock would not become due and payable until a call therefor was made by the corporation, and then only to the extent of such call. If the call is to be paid in installments, as sometimes happens, the installments do not become due until the dates fixed therefor. The intention was that, if the installments of a call had been paid up to the time of the application for transfer, the transfer would be made without insisting upon the payment of subsequent installments and that the transferee would then become liable for such subsequent installments and for all future calls on the subscription price. At the time the defendant applied to have its stock transferred, no calls had been made upon this stock, and consequently there was no necessity for the plaintiff to demand any payment from the defendant as a condition of making the transfer.

[5] The fact that the defendant did not know that there was any balance unpaid on the stock at the time it requested the transfer and accepted a new certificate is not a material element in the case. The rule generally prevailing is that:

"Where one buys stock in open market, in good faith, and without notice that the subscription price thereof has not been paid-up, such a purchaser cannot be held liable to pay the unpaid balance of subscription." 1 Cook on Corp. (7th Ed.) § 257.

It is doubtful whether the defendant, or its immediate predecessors, would come within this rule, since it does not appear that they gave any consideration. The legatees took under the will of Simona M. Bradbury, and the defendant appears to be a mere holding corporation for them. But, however this may be, a different rule is established in this state. Certificates of stock, under the decisions in this state, are not negotiable instruments, and "the stock represented by them is subject to assessment for subscription calls, no matter to whom it may be transferred. The rule in this state is that certificates of stock in a corporation are but mere evidences of the holder's right to a given share in the franchises and property of the corporation and are not negotiable instruments." O'Dea v. Hollywood Cemetery Ass'n, 154 Cal. 53, 72, 97 Pac. 1, 8. The purchaser of stock buys it under the rule of caveat emptor and takes thereby a share in the assets of the corporation. If he desires to ascertain whether or not there is an unpaid balance due or owing on the par value of the stock, or on the subscription price, he must make inquiry on that subject. If he fails to do so, he is to be considered as having agreed to take it as it may be, and to become subject to calls when he assumes the position of a stockholder by having his shares transferred to him on the books.

The law on this subject in this state, therefore, stands thus: When a purchaser buys a share of stock in the open market, he holds the same interest in the enterprise, proportionally, as other stockholders and the stock is liable to calls, the same as other stock. The purchaser does not become personally liable to the corporation for subsequent calls until he has his transfer entered on the corporate books, or in some other manner comes into privity with the corporation as a stockholder. In an ordinary case if the transferor to such a purchaser is made to pay subsequent calls, he may recover the same from his vendee. People's Home Savgs. Bank v. Stadtmuller, supra. In the present case this could not happen, for the corporation, by failing to present a claim against the estate, lost its right of personal action against Simona M. Bradbury, the only person then personally liable to calls. But the stock itself remained subject to be charged for calls for the unpaid part of the subscription price and to the enforcement of such charge by sale in the manner prescribed in the Civil Code. When the defendant had its transfer recorded on the corporate books, it then created a personal liability against itself for subsequent calls. The court below properly gave judgment for the plaintiff against defendant for the amount called in on the subscription price after it thus became personally liable.

Plaintiff's claim is not barred by the statute of limitations. The indebtedness was not payable at any time prior to the levying of the assessment and the issuance of the call. Union Savings Bank v. Leiter, 145 Cal. 696, 79 Pac. 441.

The judgment is affirmed.

---

179 Cal. 111

## WHITAKER v. TITLE INS. & TRUST CO.

(L. A. 5797.)

(Supreme Court of California. Oct. 3, 1918.)

1. COSTS ⊂=3—STATUTE.

The right to recover costs exists solely by virtue of statute.

2. APPEAL AND ERROR ⊂=382—UNDERTAKING ON APPEAL—SUFFICIENCY—COSTS.

Under Code Civ. Proc. § 942, as to undertakings on appeal from a judgment directing the payment of money, the undertaking need not include an amount double the amount of costs awarded, in view of provisions of sections 1022, 1025, 1033, 1035, as to allowance of costs, and sections 943–945, 949, as to undertakings on appeal.

In Bank. Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Frank Whitaker against the Title Insurance & Trust Company. Judgment for plaintiff, and defendant appeals. On defendant's application for writ of supersedeas. Application granted.

C. H. Brock and J. N. Hastings, both of Los Angeles, for appellant. J. W. Bell, of Los Angeles, for respondent.

ANGELLOTTI, C. J. The action was one for damages, and plaintiff obtained judgment in the court below. The judgment, so far as material, was as follows, viz.:

"That said plaintiff, Frank Whitaker, have and recover from said Title Insurance & Trust Company, a corporation, the sum of $6,391, with interest thereon from the 20th day of September, 1912, and $375.75, with interest thereon from October 4, 1913, together with his costs and disbursements incurred in this action, amounting to the sum of $72.75."

The judgment was thus "one directing the payment of money," and was governed by the provisions of section 942, Code of Civil Procedure, in so far as the requirements essential to a stay of execution pending appeal are concerned. An appeal was taken to this court from said judgment, and the same is still pending herein. An undertaking for the purpose of staying execution pending appeal, in the form prescribed by said section, was filed in the lower court. This bond was given for an amount exactly double the aggregate amount of principal, with interest thereon to the date of entry of the judgment, and did not include the $72.75 cost. Notwithstanding the giving of this undertaking, the plaintiff is proceeding to enforce the judgment by execution, and the superior court holds that the bond is ineffective as a stay bond, because not sufficient in amount. Hence this application.

Section 942 of the Code of Civil Procedure provides, so far as material here, as follows:

"If the appeal be from a judgment or order directing the payment of money, it does not stay the execution of the judgment or order unless a written undertaking be executed on the part of the appellant, by two or more sureties, to the effect that they are bound *in double the amount named in the judgment or order*"; that if the judgment or order, or any part thereof, be affirmed or the appeal be dismissed, "the appellant will pay the amount directed to be paid by the judgment or order," etc. (Italics are ours.)

The precise question presented here is whether an amount specified in the judgment as recoverable as and for the prevailing party's costs and disbursements is a part of "the amount named in the judgment," within the meaning of those words as used in section 942 of the Code of Civil Procedure. If this question be answered in the affirmative, the undertaking here was insufficient in the amount of $145.50, and consequently ineffective as a stay bond.

[1, 2] This precise question apparently has never before been brought to the consideration of this court. It is, of course, well settled that the right to recover costs exists solely by virtue of statutory provisions, and that when allowed by statute they are allowed solely as an incident of the judgment given upon the issues in the action. See Begbie v. Begbie, 128 Cal. 154, 60 Pac. 667, 49 L. R. A. 141. Our statutes provide for the allowance of costs by the trial court to the prevailing party in practically every kind of action and proceeding, in most cases as of course, and in some matters in the discretion of the court. Code Civ. Proc. §§ 1022, 1025. They are "allowed of course" in an action for the recovery of money or damages "when plaintiff recovers three hundred dollars or over." Subdivision 3, § 1022, Code Civ. Proc. They constitute no part of a judgment at the moment of its rendition, accruing only upon verified claim therefor, specifying items, served and filed within a specified time after verdict or notice of decision, and the fixing by the court of the amount thereof if the claim be disputed by the adverse party within a specified time. Section 1033, Code Civ. Proc. The clerk is required to include the costs in the judgment entered by him if the same have been taxed or ascertained, and it is further provided that:

"He must, within two days after the same are taxed or ascertained, if not included in the judgment, insert the same in a blank left in the judgment for that purpose." Section 1035, Code Civ. Proc.

If by the terms of section 942, Code of Civil Procedure, a stay bond is required on appeals from a judgment or order directing the payment of money covering the amount awarded as costs in order to effectuate a stay of proceedings pending the appeal, it apparently is the only instance under our statutes in which such requirement as to costs is made on appeals from a judgment or order of the superior court. In no other case in which an undertaking is essential to a stay of proceedings do we find any requirement whatever for security as to the costs incidental to the judgment appealed from. Where the judgment is of such a character that an undertaking to stay proceedings is not specifically required by any provision of the statute, execution of the judgment is stayed by an appeal without any undertaking (section 949, Code Civ. Proc.), entirely regardless of the judgment for costs. This was expressly held in McCallion v. Hibernia, etc., Society, 98 Cal. 442, 33 Pac. 329. As to such a situation it was substantially said in the opinion in that case that "the real judgment" in that case was that the plaintiff was the owner of certain money which had been deposited in court to await the determination of the question as to its ownership, and that the costs taxed against the defendant were incidental to the judgment, and as to a stay of execution inseparably connected therewith. It was also said:

"A judgment for costs is not the judgment directing the payment of money contemplated by section 942. * * * The judgment referred to in the foregoing sections [sections 942, 943, 944 and 945, Code Civ. Proc.] is the decree passing upon the matter directly involved in the litigation."

While the case referred to does not decide the precise question we have here, we think it fairly points the way to the proper construction of the provision of section 942, Code of Civil Procedure, which is here involved. The statutory provisions material to the question

of a stay of proceedings pending an appeal from the judgments and orders of superior courts in all other cases than the one covered by section 942, Code of Civil Procedure, show that no security was contemplated in the matter of the costs incidental to the judgment. No good reason appears why any exception should be made to this general rule in the one case of judgments or orders covered by section 942, Code of Civil Procedure, viz. judgments or orders directing the payment of money. In such a case the costs are just as much a mere incident of the judgment for the money decreed to be due upon the claim of the prevailing party, as they are a mere incident to the judgment for the relief granted in all other cases. As said in the McCallion Case, the real judgment referred to in sections 942 to 945, Code of Civil Procedure, "is the decree passing upon the matter directly involved in the litigation," which in the case at bar is the judgment determining and awarding the amount due the plaintiff on the claim alleged in the complaint. The judgment here is "a judgment or order directing the payment of money" within the meaning of section 942, Code of Civil Procedure, only in so far as it awards a recovery for the sums awarded on the issues made by the pleadings, the principal sum, with interest to the entry of the judgment. This manifestly, together with interest accruing subsequent to entry of judgment, and the damages and costs on appeal, was the only thing as to which security was deemed essential to a stay of proceedings pending an appeal.

Under these circumstances, it seems to us that the words "in double the amount named in the judgment" must be taken as referring to the amount adjudged to be due the prevailing party upon the claim involved in the action, and for which recovery is awarded, and as not including the incidental recovery on account of the costs of the action awarded only upon claim made and ascertainment of amount had subsequent to the giving of the judgment. It is worthy of note, in this connection, that so far as material here section 942, Code of Civil Procedure, and section 978, Code of Civil Procedure, relative to undertakings on appeal and to stay proceedings on appeals from justices and police courts, were enacted in 1872 as parts of our original Code in the same form in which they now exist, and that section 978 expressly required, as an essential to a stay pending an appeal, security not only for the judgment proper, but also for all costs. It was expressly provided therein that, if the judgment be one for money, the bond must be "in a sum equal to twice the amount of judgment, including costs," and, when for the recovery of property, in "twice the value of the property, including costs"; also that the bond must be conditioned, when the judgment was for money, "that the appellant will pay the amount of the judgment appealed from, and all costs," and, when for property, "the judgment and costs." As to actions to foreclose a lien on specific personal property, the condition was to be that the appellant "will pay the judgment and costs." The deposit provided for in lieu of a bond was also expressly made to cover the costs. The difference between these contemporaneous enactments is significant, and indicates that the omission to specially cover the matter of the costs of the action on appeals to the Supreme Court was intentional. If it had been intended to provide for security for costs in the cases covered by section 942, Code of Civil Procedure, it would have been an easy matter to so specify, as was done with regard to appeals from justices' or police courts, and section 978, Code of Civil Procedure, shows that such specification was deemed necessary by the Legislature, if it was desired to provide security therefor.

It follows, from what has been said, that the undertaking filed was sufficient to stay proceedings under the judgment pending the appeal. Let a writ of supersedeas issue as prayed.

We concur: SLOSS, J; MELVIN, J.; SHAW, J.; WILBUR, J.; LORIGAN, J.; RICHARDS, Judge pro tem.

---

179 Cal. 98

## NILES v. KAVANAGH et ux. (S. F. 8669.)

(Supreme Court of California. Oct. 2, 1918.)

1. USURY ⊂⊃56—COMMISSIONS—STATUTES.
Under St. 1909, p. 969, § 3, as amended by St. 1911, p. 978, § 2, restricting interest on personal property loans to 2 per cent. per month, a commission charged by a broker for obtaining a loan will make the contract usurious, unless the lender is in no way interested in the commission.

2. USURY ⊂⊃59—PAYMENT OF INSURANCE ON MORTGAGED PROPERTY.
That a chattel mortgagor pays insurance premiums on the property does not make the contract usurious, particularly where the premium is received by a third party who has no interest in the loan.

In Bank. Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by L. F. Niles against Robert P. Kavanagh and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

J. C. Flannery, of San Francisco, for appellants. Henry B. Lister, of San Francisco, for respondent.

SLOSS, J. The plaintiff brought this action to foreclose a chattel mortgage executed by the defendants to secure the payment of their promissory note for $600, with interest at 2 per cent. per month. From the judgment, which was in favor of the plaintiff, the defendants appeal.

The execution of the note and mortgage, and the nonpayment of the amount for which judgment was given, are not questioned; the sole claim of the defendants being that the loan evidenced by the note and mortgage was void under the terms of "an act to define personal property brokers and regulate their charge and business." St. 1909, p. 969, as amended by Stats. 1911, p. 978. That act defines "personal property brokers" as including, among others, all persons engaged in the business of loaning money upon the security of chattel mortgages. It authorizes such brokers to charge and receive 2 per cent. per month as a benefit or percentage upon money advanced, and declares (section 3) that:

"No further or other charges either for recording, insuring or examining the security or property, or for the drawing, executing or filing of papers, or for any services or upon any pretext whatsoever beyond the aforesaid charge for interest or discount shall be asked, charged, or in any way received, where the same would thereby make a greater charge for the money or thing advanced than the aforesaid rate of two per centum per month, and where made, all such charges shall be considered and be of the same effect as so much added interest. * * *"

Section 4 of the act provides that no such contract of a personal property broker, by which any greater interest rate than 2 per centum per month is charged, received, or contracted for, "shall be valid or of any force, virtue or effect."

The court found that the plaintiff was not a personal property broker, or engaged in the business of loaning or advancing money as such, and found further, in effect, that she had not charged or received any rate of interest in excess of that permitted by law. These findings are assailed as unsupported. We need not consider the first of them, which becomes immaterial if there was sufficient evidence to justify the findings that the plaintiff had not charged or received interest beyond the lawful rate.

It appears that the plaintiff was a widow, who had been, for a number of years, in the habit of loaning small sums of money upon the security of chattel mortgages. Her transactions were conducted through one Winston, a broker. In the instance under consideration, there was no direct communication between her and the defendants. The latter applied to Winston for a loan upon the security of their household furniture. The loan was made upon the following day, the defendants executing their note for $600 and their mortgage. They received from Winston the amount specified in the note, less $30, which he claimed as a commission for obtaining the loan. From the sum so advanced, the defendants subsequently paid the sum of $12 as a premium upon a policy insuring the mortgaged property against fire; the loss, if any, being made payable to the plaintiff, as her interest might appear. The mortgage required the borrowers to keep the property thus insured for the protection of the mortgagee.

[1] With reference to the $30 charged by Winston, the court's finding was that Winston acted as agent of both parties, and received the $30 from the defendants as commission for services rendered to them in obtaining the loan. The statute seeks to prevent the lender from receiving as compensation for the use of money anything in excess of 2 per cent. per month. Any device by means of which a greater compensation is exacted is forbidden, despite any attempt to cloak its character under the name of "bonus" or "commission." A payment to an agent of the lender is, in effect, a payment to the lender himself. But where the lender is in no way interested in a charge, or connected with it, the transaction is not to be denounced as usurious. The evidence in this case justified the court in concluding that the defendants employed Winston as their agent to obtain a loan for them, and agreed to pay him $30 for the services rendered by him to them in obtaining it. The plaintiff was not concerned with this charge, she herself paying a separate compensation to Winston for his services to her. The rule generally applied under statutes similar to ours is that under such circumstances commissions paid by borrowers to loan brokers "do not render loans made through them usurious, even though the lender may receive the full legal rate of interest." 39 Cyc. 979, and cases cited.

[2] The only other ground upon which the validity of the loan is assailed is that the borrowers, pursuant to the terms of the mortgage, paid a premium for insuring the property. The insurance was for $1,000, an amount considerably in excess of the loan, and ran for three years, a period which would expire long after the maturity of the note. In the absence of anything to show bad faith, the requirement that the security be protected by insurance, and compliance with this requirement, did not violate the act. The prohibition of the statute against the making of charges for "insuring" the security or property applies only "where the same would thereby make a greater charge for the money or thing advanced than the aforesaid rate of 2 per centum per month." Where a payment does not go to the lender, and is in no sense a compensation to him for the use of his money, the requirement that it be made does not violate the law. It is a very usual and entirely legitimate practice for one lending money upon mortgage of real or personal property to require that the borrower insure the security against loss. By so insuring, the borrower is protecting his own property. He is not paying any additional compensation for the use of the money. Even where the lender is an insurance company, and requires, as a condition of making a loan at full legal interest, that the borrower take out insurance with it, the loan is not to be deemed usurious in the absence of

evidence that the premium is in excess of the usual or fair rate for insurance, or that in some other respect the provision for insurance was designed as a cover for unlawful interest. 39 Cyc. 983; Washington Life Ins. Co. v. Paterson Silk Mfg. Co., 25 N. J. Eq. 160; Homeopathic Mut. Life Ins. Co. v. Crane, 25 N. J. Eq. 418; Utica Ins. Co. v. Cadwell, 3 Wend. (N. Y.) 296, 301; New Eng. M. S. Co. v. Gay (C. C.) 33 Fed. 636. These decisions go upon the ground that the premium is not a payment for the loan of the borrowed money, but is simply compensation to the insurer for the risk incurred. If this be so where the lender is the insurer, there is much less reason for claiming illegality where the insurance is issued, and the premium received, by a third party.

No other points are made.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; MELVIN, J.; LORIGAN, J.; RICHARDS, Judge pro tem.

---

179 Cal. 53

## UNION LITHOGRAPH CO. v. BACON et al. (S. F. 7714.)

(Supreme Court of California. Sept. 30, 1918.)

1. APPEAL AND ERROR ⟹162(1)—RIGHT TO APPEAL — ACCEPTANCE OF PAYMENT OF JUDGMENT.

In suit to enforce stockholders' liability, where judgment was entered for plaintiff, which, on motion of three individual defendants, was set aside, and judgment entered for a smaller amount, apportioned among the three defendants, who paid the amounts, plaintiff, who accepted the money from the clerk, could not thereafter appeal.

2. JUDGMENT ⟹894—PAYMENT—COMPELLING SATISFACTION—STATUTES.

In suit to enforce stockholders' liability, where three individual defendants paid amounts for which they were cast in judgment, plaintiff receiving the money from the clerk, on defendants' motion, the court, under Code Civ. Proc. § 675, properly made an order compelling plaintiff to satisfy the judgment.

3. JUDGMENT ⟹314 — SATISFACTION — COMPELLING FURTHER PAYMENTS.

In suit to enforce stockholders' liability, where, on motion of three individual defendants, judgment for plaintiff was set aside, and judgment for a smaller sum, apportioned among the defendants, was entered, after payment by defendants, thus satisfying the judgment, the court could not compel further payments by them, as to whom the case had terminated.

In Bank. Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by the Union Lithograph Company against W. R. Bacon, Hugh Center, E. E. Cox, and others. From the judgment, and certain orders, as to the named defendants, plaintiff appeals. Appeals from a certain order and judgment dismissed, and other orders affirmed.

Arthur Crane, of San Francisco, and Crane & Crane, of Chicago, Ill., for appellant. Walter R. Bacon, of San Francisco, for respondents.

MELVIN, J. These appeals are from a judgment of September 13, 1915, and from certain orders which will be more fully described in the course of this opinion.

The action was commenced in 1914 by the "Union Lithograph Company, on behalf of all creditors of the Salinas Portland Cement Company, against W. R. Bacon" and other named defendants. The stated purpose of the action was "to create a fund, by collecting stock subscriptions, to pay debts of Salinas Portland Cement Company." The complaint set forth the insolvency and forfeiture of its charter by the cement company; the indebtedness of that corporation (evidenced by a judgment recovered subsequent to said forfeiture) to the Union Lithograph Company in the sum of $1,273.10; the fact that the cement company owed obligations to other creditors not specified, amounting, with the named judgment, to $10,000; the status of the several individual defendants as stockholders in certain specified amounts of stockholdings; and the fact that the subscription price of their stock was unpaid. The prayer was for a judgment requiring the stockholders to pay a receiver, to be appointed by the court, the sum of $10,000, to be distributed by him proportionately to the creditors of the cement company, together with the payment of $1,000 as attorney's fee, and costs of suit.

Defaults of the individual defendants were entered, and plaintiff, Union Lithograph Company, had judgment for $1,375 in its own favor, and in favor of certain other specified creditors of the cement company in sums which, with the amount above set forth, amounted to $10,000. The judgment was also for costs ($13.75) and for attorney's fee ($250). Respondents herein promptly moved to vacate and set aside this judgment upon numerous grounds, and after a hearing following due notice the motion was granted on September 13, 1915, and on the same day judgment was entered for $1,375, to be apportioned among the defendants sued as stockholders in accordance with their holdings of the capital stock of the defunct corporation. An attorney's fee of $250 was included in the judgment, and the court found the amount due from each of the defendants as stockholders to make up the sum necessary to pay the judgment and attorney's fee. The judgments against these respondents, Bacon, Center, and Cox, were, respectively, $10.56, $375.40, and $26.40. No provision was made for costs, except those which might become due if execution should issue. Appeals have been taken from the order, and from the judgment of September 13, 1915, in so far as the latter sets aside

the former judgment. The judgment of September 13, 1915, was entered, and immediately thereafter each of the respondents, Cox, Bacon, and Center, paid to the county clerk the amount found to be due thereunder from him. On the day following such payment plaintiff received these amounts from the county clerk, but did not satisfy the judgment as to these respondents. After demanding and being refused such satisfaction upon proper notice, these respondents, on October 1, 1915, acting under the provisions of section 675, Code of Civil Procedure, moved the court for an order or judgment entering satisfaction as to them of the judgment of September 13, 1915. After a hearing the court made such an order, and from it plaintiff has appealed.

Thereafter, on December 10, 1915, plaintiff moved for an order requiring these respondents to pay into court an additional sum "in the above-entitled action." There can be no doubt that by this motion plaintiff was seeking the additional sums in satisfaction, not of the first judgment, but of that of September 13, 1915, because in the notice of motion are recited the amounts unpaid by respondents other than those now appearing identically as those amounts are fixed by the judgment of September 13, 1915. After a hearing the plaintiff's motion of December 10, 1915, was denied. An appeal has been taken from this order.

Respondents are of the opinion that all of the appeals should be dismissed as to them. They say that all debatable questions between plaintiff and these respondents would have been settled by the judgment of September 13, 1915, if no appeal had been taken by either party; that before any appeal was taken they had satisfied the judgment so far as it was binding upon them; that plaintiff had acquiesced in the judgment by accepting their payments; and that the appeal from the judgment, taken long after December 10, 1915, was therefore of no effect. If, as they assert, plaintiff had no right of appeal after having accepted the amounts of the judgment, we are of the opinion that their position is correct.

Appellant cites such cases as Bryan v. Berry, 8 Cal. 130, and Copple v. Aigeltinger, 167 Cal. 706, 140 Pac. 1073, to support its position that it may collect the amounts found due without satisfying the judgment. The opinion in the former case merely holds that a judgment entered in place of another judgment is appealable, and in the latter it is decided that an order vacating a judgment for defendants and drawing a new judgment for the plaintiff is appealable. But appellant quotes from the opinion in Warner Brothers Co. v. Freud, 131 Cal. 639, 63 Pac. 1017, 82 Am. St. Rep. 400, a sentence which at first blush would seem to justify its contention. The court there used the following language (from Hayes v. Nourse, 107 N. Y. 577–579, 14 N. E. 508, 1 Am. St. Rep. 891):

"It must be deemed too well settled by authority to require further discussion that a party against whom a judgment has been rendered is not prevented from appealing to this court by the fact that he has paid the judgment, unless such payment was by way of compromise, or with an agreement not to take or pursue an appeal."

But that was a case in which the party against whom a judgment was given paid the amount thereof and afterwards took an appeal from the judgment. In the opinion in that case the court quotes with approval section 480a of Freeman on Judgments as follows:

"One against whom a judgment is entered, if he fails to satisfy it, must expect to see his property seized and sold at a sacrifice, and it is difficult to conceive how his payment of the judgment can give rise to any estoppel against his seeking to avoid it for error. The better view, we think, is, that though the execution has not issued, the payment of a judgment must be regarded as compulsory, and therefore as not releasing errors, nor depriving the payor the right to appeal."

But in the same opinion Kenney v. Parks, 120 Cal. 22–24, 52 Pac. 40, is cited to the effect that:

"A party in whose favor a judgment has been rendered cannot enforce the judgment, and while enjoying its benefits appeal therefrom and seek its reversal."

In County of San Bernardino v. County of Riverside, 135 Cal. 618, 67 Pac. 1047, the superior court had ordered a default opened on payment by defendant of a certain sum to plaintiff. Payment was made and accepted, and thereafter plaintiff appealed from the order. In dismissing the appeal the court said, in part:

"The rule and the principle upon which the rule rests are the same, whether such judgment be the final determination of the cause or an intermediate order made in the course of the procedure. A party cannot accept the benefit or advantage given him by an order, and then seek to have it reviewed. After receiving the money which the court has directed to be paid to him, he will not be heard to say that the court erred in making such order."

In Estate of Shaver, 131 Cal. 219, 63 Pac. 340, the court said:

"The right to accept the fruits of a judgment, and the right of appeal therefrom are not concurrent. On the contrary, they are totally inconsistent. An election to take one of these courses is therefore a renunciation of the other."

Indeed, there is abundant authority to the effect that when the prevailing party with a judgment in its favor has accepted the fruits of such judgment, satisfaction thereof, either voluntary or under the compulsion authorized by section 675, Code of Civil Procedure, is "the last act and end of the proceeding." Estate of Baby, 87 Cal. 200, 25 Pac. 405, 22 Am. St. Rep. 239. The same principle is declared in Storke v. Storke, 132 Cal. 349, 64 Pac. 578.

[1] Counsel for appellant elaborately argue their theory that their original action

was one for the creation of a fund to which they might on behalf of the creditors compel the stockholders to contribute in the proportions of the holdings of each to the entire indebtedness of the corporation, and that plaintiff might satisfy its particular claim if necessary from the contribution of a single solvent stockholder. They assert that the court entirely misconceived the law in deciding that there was only a several liability of each stockholder for his proportion of appellant's claim. These matters might well have been urged upon the appeals from the order and judgment of September 13, 1915; but in the court's errors, if any there were, appellant acquiesced by accepting the payments made in accordance with that judgment.

[2, 3] The order compelling satisfaction of the judgment as to these respondents was properly in accord with the law on the subject, and was within the jurisdiction and power of the court making it, and the later order of December 10, 1915, followed as matter of course, because the court could not compel further payments on a judgment by those parties to the litigation as to whom the case had terminated by satisfaction of the said judgment.

The appeals from the order and judgment of September 13, 1915, are as to these respondents dismissed, and the other orders are affirmed.

We concur: ANGELLOTTI, C. J.; LORIGAN, J.; SLOSS, J.; SHAW, J.; WILBUR, J.; RICHARDS, Judge pro tem.

---

179 Cal. 68

## ALLEN et al. v. RAILROAD COMMISSION OF CALIFORNIA et al. (L. A. 5025.)

(Supreme Court of California. Oct. 1, 1918. Rehearing Denied Oct. 31, 1918.)

1. PUBLIC SERVICE COMMISSIONS ⟸35—REVIEW OF ORDERS—SCOPE OF REVIEW.

Under Public Utilities Act 1915 (St. 1915, p. 161) § 67, authorizing the Supreme Court to review orders or decisions of the Railroad Commission by a writ of certiorari or review, and providing that the review shall not extend further than to determine whether the commission has legally pursued its authority, including a determination of whether the order or decision violates any constitutional right of the petitioner, and that the findings and conclusions of the commission on questions of fact shall be final, and not subject to review, the findings and conclusions which are not subject to review are those on questions of fact within the jurisdiction of the commission, and the question of mixed law and fact, as to whether or not a corporation is a public utility, so as to give the commission jurisdiction over it, is reviewable.

2. PUBLIC SERVICE COMMISSIONS ⟸21, 35—REVIEW OF ACTS—POWERS OF SUPREME COURT.

The Supreme Court may restrain the Railroad Commission from exercising powers which it does not possess, or annul its decree when such unwarranted powers have been exercised.

3. WATERS AND WATER COURSES ⟸257(1)—IRRIGATION—REGULATION OF RATES.

If a corporation, contracting to furnish water for irrigation purposes at an agreed rate to purchasers of water right certificates, was at the time of so contracting a public service corporation, its contracts were subject to modification by the Railroad Commission.

4. WATERS AND WATER COURSES ⟸257(1)—IRRIGATION—REGULATION OF RATES—"PUBLIC SERVICE CORPORATION."

Where a corporation, which sold water right certificates to purchasers of land from an associate corporation, entitling the certificate holders to a specified quantity of water per acre for irrigation at an agreed price, also engaged to supply a town site and the succeeding city with water for municipal and domestic purposes, and proceeded to do so, but the city required only 1½ per centum, or at the utmost 3 per centum, of its water, while approximately 94 per centum of its water was devoted to use under its water right certificates, though it became a public service corporation in so far as the needs of such city were concerned, it did not thereby dedicate all of its water to public use, though it had a single and undivided supply of water, and, so far as the water which it had contracted to furnish to the certificate holders was concerned, it was not a "public service corporation," and the rates for such water were governed by the contract, and not subject to regulation by the Railroad Commission.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Public Service Corporation.]

5. WATERS AND WATER COURSES ⟸257(1)—IRRIGATION—REGULATION OF RATES—"PUBLIC UTILITY."

The corporation did not become a public utility merely by itself fixing the rates and charges for the water which it sold, nor could its submission to the jurisdiction of the Railroad Commission, and its declaration that it was a public utility, affect the previously vested rights of the certificate holders.

6. WATERS AND WATER COURSES ⟸257(1)—IRRIGATION—REGULATION OF RATES.

That such corporation's articles of incorporation stated that one of the purposes of its incorporation was to supply the inhabitants of towns in a particular valley with water for domestic purposes did not constitute a dedication of its properties to a public use, so as to make it a public service corporation, subject to the jurisdiction of the Railroad Commission; especially as the articles of incorporation further declared that the corporation would acquire its water and water rights by purchase and appropriation without saying anything about condemnation.

7. DEDICATION ⟸41—PRESUMPTIONS AS TO DEDICATIONS.

A dedication of property to a public use is never presumed without evidence of unequivocal dedication.

8. WATERS AND WATER COURSES ⟸254—SALE OF WATER—REGULATION—"PUBLIC UTILITY"—"WATER CORPORATION."

Const. art. 12, § 23, declares that every private corporation furnishing water directly or indirectly to or for the public is a public utility, subject to control and regulation by the Railroad Commission, and provides that every class of private corporations, individuals, or associations declared by the Legislature to be public utilities shall be subject to such control and regulation, and that the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is plenary and unlimited by any provision of the Constitution. St. 1913, p. 84, § 1, provides that whenever any corporation sells, leases,

rents, or delivers water to any person, etc., except as therein limited, such person, etc., is a public utility, and subject to the jurisdiction, control, and regulation of the Railroad Commission. Public Utilities Act defines a water corporation as including every corporation or person, etc., owning, controlling, operating, or managing any water system for compensation within the state. *Held*, that all private rights in the matter of the rental or sale of water are abolished so far as that can be done under the Constitution of the United States.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Public Utility.]

9. WATERS AND WATER COURSES ⟸254—SALE OF WATER—REGULATION—"PUBLIC UTILITY."

While, in a broad sense, everything upon which man bestows labor, for purposes other than the benefit of his immediate family, is impressed with a public use, to constitute a true "public utility," over which the state may exercise its regulatory control without regard to the private interests which may be affected thereby, the devotion to a public use must be of such a character that the public generally, or that part of it which has been served, and which has accepted the service, has a right to demand that such service shall be conducted so long as it is continued with reasonable efficiency under reasonable charges.

10. CONSTITUTIONAL LAW ⟸154(2), 296(1)—WATERS AND WATER COURSES ⟸216—SALE OF WATER—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Const. art. 12, § 23, St. 1913, p. 84, and the Public Utilities Act, relative to the regulation of public utilities, including water companies, must be construed as applying only to properties, which have in fact been devoted to a public use, and not as an effort to impress with a public use properties which have not been devoted thereto; since, if given this latter construction, they are void wherever they unjustly interfere with private property or private contractual rights under Const. U. S. art. 1, § 10, and Amend. 14, prohibiting laws impairing the obligation of contracts and forbidding the taking of property without due process of law.

Wilbur, J., dissenting.

In Bank. Application by J. C. Allen and others for a writ of review directed to the Railroad Commission of the State of California and the Lake Hemet Water Company. Decree of commission annulled.

E. E. Keech, of Santa Ana, and Henry Goodcell, of San Bernardino, for petitioners. Douglas Brookman, of San Francisco (Max Thelen, of San Francisco, of counsel), for Railroad Commission. Oscar Lawler and James E. Degnan, both of Los Angeles, and W. A. Purington, William Collier, and H. H. Craig, all of Riverside, for applicant Lake Hemet Water Co. Short & Sutherland and L. L. Cory, all of Fresno, amici curiæ. Hunsaker & Britt and Joseph L. Lewinsohn, all of Los Angeles, for protestant Hart. H. S. Dukes, of Hemet, for City of Hemet.

SHAW, J. Upon further consideration of this case we adhere to the opinion prepared by Mr. Justice HENSHAW and rendered by the court upon the original submission. Some additional treatment of points discussed upon the rehearing is appropriate.

The principal reason for the order granting a rehearing was the desire of the court to re-examine the evidence upon the question of fact whether the Lake Hemet Water Company, at the time it executed to the respective petitioners the water contracts held by them, had dedicated to public use the water which the company thereby agreed to sell and deliver to the holders of the contracts, or whether these contracts were made without such dedication and in each case for the private advantage of the parties contracting. Further examination on this point has satisfied us that our original conclusion was correct. The water was held in private ownership, it had not been dedicated to public use at the time these several contracts or water certificates were executed, and the right thereby vested in the landowners to whose land the water was thereby made appurtenant was private property.

In the subsequent briefs emphasis is laid on evidence to the effect that in the year 1898, prior to the execution of a large number of the water certificates in question, the water company sold to persons who were not owners or purchasers of any part of the land to which Whittier and his associates intended the water to be applied, an amount of water equal to 50 per cent. of its supply for that year. This, it is claimed, was in effect a dedication of that proportion of the water to public use. It is plain from the evidence in the case that these sales were not made with the intent to dedicate that water to public use. They were made solely and only because that year was one of extreme drouth in that vicinity, and as a temporary relief for that time only to outside lands which would otherwise have suffered great damage from the failure of their usual water supply. There was no intention to vary the original plan of applying the water to the land which the managers of the enterprise had for sale and to none other, except to the extent of any incidental surplus.

In the argument by the attorneys for the Commission great reliance is placed on the decision in Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, and especially on the phrase "affected with a public interest," used in the opinion. This case and this phrase is frequently invoked to advance the idea that the general interest of the state in the welfare and prosperity of its citizens is a sufficient basis for the right of the state to regulate prices for the use or sale of private property. Because of the use of this phrase the case itself is misunderstood. The phrase was used in quotations from the old English authorities declaring that there could be public regulation of the tolls to be taken by millers for grinding grain. These millers, having invited all persons to bring their grain to the mill to be ground, and having

thus established a business, sought to increase the tolls, or to favor some customers above others, and claimed the right to do so. It was held that, having thus dedicated the mill to this public use, the public had a right or interest in it, and in describing this right it was said that when property was thus "affected with a public interest" it ceases to be exclusively private property. So with the great grain elevators involved in the Munn Case, which, by the development of modern commerce and steam machinery, had become established as an adjunct to railroads, though managed by others, and as practically the only means of shipping grain on the railroads, it was said that they, too, as well as the ancient English mills, had become "affected with a public interest," and were, therefore, no longer private property only, and were subject to public regulation. The parallel is obvious, but it does not apply to water sold with land for use upon the land and as an appurtenance thereto in the manner shown in the present case. The fact that the parties holding separate water rights, each upon his own land, are numerous, does not convert their several private uses into a public use.

There is no ground for the claim that the water distributing system used by the water company can be considered as a thing separate from the right to receive water and declared to be a separate and public service, the rates for which, as to these petitioners, can be fixed by the Railroad Commission, and made to exceed the rates specified in the water certificates. The distributing system is a species of real property. Stanislaus W. Co. v. Bachman, 152 Cal. 726, 93 Pac. 858, 15 L. R. A. (N. S.) 359. The right of a landowner to receive water not devoted to public use upon land for its benefit, from an outside source, through a system of canals or pipes for conducting it to the land, is an easement attached to the land and a corresponding servitude upon the source of supply and the distributing system. Copeland v. Fair View Co., 165 Cal. 154, 131 Pac. 119; Palermo Co. v. Railroad Commission, 173 Cal. 386, 160 Pac. 228. The easement and the servitude constitute a single entity and the one cannot be separated from the other without destroying both. The petitioners have property interests in the distributing system by reason of these easements and servitudes. The contract fixed the rate, not only for the water as such, but also for its delivery; that is, for the use of the system for that purpose. To raise the rate without consent of the landowner would impair the obligation of the contract, and, so far as the increase inured to the benefit of the public use of other water through the same system, it would be taking the private property of these petitioners for public use without compensation.

It may be that the rates fixed by the contracts with petitioners are too low, and that the company will be unable to go on with the service, either to the public utility serving the town of Hemet or to the petitioners, unless both shall pay more for the service. That will demonstrate that the contracts which the water company voluntarily made for disposition of its own property were improvident and unwise. But that does not give the Railroad Commission power to interfere, however desirable such interference might be if the power were wisely exercised. It is not the guardian of those who do not wisely manage their property.

All the other points that are material or important to the decision of this case are fully and adequately treated in the former opinion. It leaves nothing more to be said and we adopt it as the opinion of the court.

"The Lake Hemet Water Company, a corporation, hereinafter called the applicant, petitioned the Railroad Commission to fix the rates to be charged and collected by it for the sale and distribution of water, asserting itself to be a public service corporation. Some 300 or more landowners receiving water under contracts from the applicant appeared and made objection, insisting that, so far as their water and water rights were concerned, these rights were held in private ownership, and that as to them at least the applicant was not a public service corporation, and jurisdiction to fix the rate charges for such water was therefore not in the commission. The commission heard evidence, made its finding and decree, by which it was declared that the applicant, as to all of its corporate functions, was a public utility, and thereupon fixed water rates. From this determination the aggrieved landowners sought and obtained this writ of review.

[1, 2] "This review is held under section 67 of the Public Utilities Act of 1915. It is plain, and indeed it has in effect been decided, that the declaration in that section that 'findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review' has to do with the commission's determinations upon questions of fact within its jurisdiction. When the question, ever one of mixed law and fact, goes, as here, to the jurisdiction itself, when the whole controversy revolves around the inquiry as to whether or not the corporation is a public utility, to say that the determination of the commission upon this matter is final and conclusive, and is not subject to review, is the equivalent of denying to a petitioner a hearing upon a right carefully preserved to him by the language of section 67 itself—a hearing and a determination of whether the order and decision under review 'violates any right of the petitioner under the Constitution of the United States or of the state of California.' So it will be found that in such petitions as Pacific Telephone Co. v. Eshleman, 166 Cal.

640, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822; Del Mar Water Co. v. Eshleman, 167 Cal. 666, 140 Pac. 591, 948; Title, etc., Co. v. Railroad Commission, 168 Cal. 295, 142 Pac. 878, Ann. Cas. 1916A, 738; Marin Water, etc., Co. v. Railroad Commission, 171 Cal. 706, 154 Pac. 864, Ann. Cas. 1917C, 114; Atchison Ry. Co. v. Railroad Commission, 173 Cal. 577, 160 Pac. 828; Western Association, etc., v. Railroad Commission, 173 Cal. 802, 162 Pac. 391—this court has uniformly and without a dissenting voice investigated every complaint where the petitioners upon reasonable grounds asserted that the commission had either exceeded its jurisdiction or refused to exercise the jurisdiction which in law it possessed. In the last-cited case the commission, believing it did not have jurisdiction to entertain the application of the petitioner, refused to do so, and this court, reviewing its powers, held that it did possess this jurisdiction and issued mandate to the commission to exercise it. The converse of this proposition must be equally plain. If this court by mandate may compel the commission to exercise powers which it does possess, upon the other hand it may restrain the commission from exercising powers which it does not possess, or annul its decree when such unwarranted powers have been exercised.

"Thus we are brought to a consideration of the evidence upon which the commission acted in holding this plaintiff to be in toto a public service corporation. The evidence, consisting for the most part, and indeed so far as value is concerned, wholly, of undisputed record and written facts, is without substantial controversy. And indeed it may be added that the pure findings of fact set forth by the commission are not seriously disputed, petitioners' grievance arising over the conclusion—one of mixed law and fact—that the applicant is wholly a public service corporation.

"Into a Mexico rancho, the San Jacinto Viejo, flows the San Jacinto river. This rancho was partitioned between Estudillo, Stone, Jordan, and others. The allotments to the named persons did not boarder on the stream, but the partition judgment provided that each of these and their successors should have a right of way for a ditch, flume, or acqueduct across the lands of intervening owners for the purpose of securing and using, upon equal terms with the owners of all other allotments, their due proportion of the waters of the San Jacinto river for irrigation and other purposes in connection with their land. In 1886 the Fairview Land & Water Company was the owner of that portion of the rancho whereat the river entered. In that same year W. F. Whittier and his associates acquired certain rights and asserted certain claims to the waters of the river, and secured a contract from Estudillo for the sale to them of 3,000 acres of his land. The following year Mr. Whittier and his associates simultaneously organized two corporations under the laws of this state—the Hemet Land Company and the Lake Hemet Water Company. These two corporations were in all essentials under identical ownership and control, with the same stockholders, boards of directors, offices, and letter heads. From time to time Mr. Whittier acquired the interests of his associates, and at the time of this hearing, in January, 1916, he was the sole and real owner of both corporations, owning all of the stock in equity and all of the stock in law, saving a few shares outstanding and used to qualify the members of his directorates. Sixty per cent. of the stock of the Lake Hemet Water Company was originally issued to Mr. Whittier and his associates in consideration of their transfer to the corporation of their interests in the land along and adjacent to San Jacinto river, and of their water, water rights, and claims to water pertaining thereto, and, in addition, of similar rights and claims to the waters of South Fork, North Fork, and Strawberry creek, tributaries of the San Jacinto river. To the Hemet Land Company they conveyed their interests in the lands of Estudillo, Stone, and Jordan which they had acquired, and under the ownership of the Hemet Land Company these lands became known as the Hemet tract. In 1887 Mr. Whittier caused the survey of these lands to be made and recorded. It was known as the 'Map of the lands of the Hemet Land Company and of the three thousand acre Estudillo tract.' This map was adopted by the Hemet Land Company. Upon it a town site embracing 160 acres was delimited, and the Hemet Land Company dedicated the streets and avenues thereon designated and named to public use, reserving therefrom, however, certain rights of way for street cars, steam cars, telegraph lines, sewers, gas conduits, 'flumes and water pipes for domestic use or irrigation purposes.' During this year also the Lake Hemet Water Company and the Fairview Land & Water Company adjusted and settled their conflicting claims to these waters, as will be found adequately set forth in Copeland v. Fairview Land & Water Co., 165 Cal. 148, 131 Pac. 119. The Lake Hemet Water Company in this year carried a pipe line into this 160-acre tract where the town or city of Hemet now is and established a public watering trough therein. Aside from the question of dedication, this was the first actual devotion to public use of any of the waters of the company. Lots were sold in the town site, homes and other structures erected, and the applicant supplied them with water from its system. In 1891 the applicant began the construction of the Hemet dam on South Fork, and completed it in 1895, and contemporaneously constructed a diverting, transmitting, and distributing system to deliver water for irrigation and domestic purposes to,

and was at the time of the hearing delivering water upon, practically all of the lands as shown on its official map.

"If it has not already become apparent it soon will be that so far as Mr. Whittier and his associates are concerned, this was a purely private business venture for purposes of legitimate private gain. Vast areas of land in Southern California are valueless (except for grazing purposes) unless artificially supplied with water. Because of this, two methods of meeting the exigencies arose and both came into common use—the one the method whereby certain landowners associated themselves together and expended money in securing water to be used on their own lands, forming for this purpose a mutual water company; the second, the method here put in practice, whereby men of means—for only men of means could do this thing—secured tracts of land at almost nominal prices (because the land without water had so little value), upon which lands they knew or believed they could put water. They then developed their water system and advertised the lands with appurtenant water rights for sale at a greatly enhanced price. The latter was the method here adopted by Mr. Whittier and his associates. In some of the minor details these companies moved along different plans. In their essentials, however, the methods were the same. Sometimes with the land went proportionate shares of water stock to the purchaser, entitling him to the use of a given amount of water on his land. Sometimes the land and water rights were held by a single corporation, and the conveyance of the land in express terms carried with it the right to the use of a given quantum of water. Mr. Whittier and his associates, soon after the official map of the Hemet Land Company was approved, began to advertise and sell these lands, and the practice is set forth in the finding of the commission as follows:

" 'The testimony shows that, with possible minor exceptions all water regularly sold by petitioner for irrigation (as distinguished from "extra water") was sold to persons who are owners of water right certificates issued by petitioner. Under the plan originally formulated by Mr. Whittier and his associates, owning both Hemet Land Company and Hemet Land & Water Company, whenever a parcel of land was sold by Hemet Land Company the purchaser of such land desiring water thereon was obliged to purchase a water right certificate from Hemet Land & Water Company. Later, when other lands were purchased by Mr. Whittier and his associates, in addition to the original Hemet Tract, a similar arrangement was made. The land company sold the land and the water company sold so-called "water certificates." These certificates entitled the holder to one miner's inch of water for eight acres of land.'

"On the average these land purchasers paid $75 per acre for their land and $75 per acre for their water rights appurtenant to their land. The company issued prospectuses in 1887, 1902, and 1906, each prospectus in similar language declaring that 'each purchaser of land in the Hemet tract is provided with a contract calling for both a domestic and irrigation supply of water. Domestic water is free during the irrigation season, and $1.00 per month for each family the remaining five months. The irrigation supply costs $2.00 per acre per annum. Each acre of land under this contract is entitled to one-eighth of a miner's inch of water, continuous flow, during the irrigation season. That is, the water right is inseparable and is only transferable with the land.' These water right certificates contained a binding obligation upon the water company to deliver to the purchaser a constant flow of one inch of water for each eight acres on his designated land during the irrigation season, with a right to cumulate the water, under such regulations as would best subserve the interest of all parties. The purchaser agreed to pay, and did pay, the $75 per acre, or such other sum as might have been designated in the contract for this water right, and the further sum of $2.00 per acre while the contract remained in force. The use of the water was limited to described land. Provision was made for the use of water for domestic purposes as above outlined. The contract bound all assignees or successors in interest, but could not be assigned by the purchaser without the written consent of the water company. At the time of the hearing these water right certificates covered 69 acres at an annual rate of $5 per acre and 5874 at an annual rate of $2 per acre. The applicant also announced special rates, whereby the owners of these water right certificates could, when the quantity of water which the applicant possessed justified it, secure extra water for irrigation at fixed rates, measured by the California miner's inch for all excess water above that provided for in the water certificates—10 cents an inch when there was a large abundance of excess water, 25 cents an inch when there was an abundance of water immediately preceding the opening of the regular irrigation season, April 14th, and 50 cents an inch during the period of the irrigation season proper.

"The quantity of water which can be supplied by the applicant is limited. Of that 'net, safe yield,' not to exceed 3 per cent., and perhaps but 1½ per cent., is actually required and used by the city of Hemet. All the rest of this 'net, safe yield' is used under these water certificates, and after such use there is a protective remainder of water amounting to but 3 or 4 per cent. of the total supply. This, of course, takes no account of excess waters, which, being occasional, are not to be depended upon. Thus approximately 94 per cent. of the waters of applicant are devoted to use under its water right certificates, 3 per cent. in supplying the needs of the municipality and citizens of the city of Hemet, while the remaining 3 per cent. remains in storage.

"The articles of incorporation of the Lake

Hemet Land & Water Company declared the purposes of the corporation to be 'to acquire by purchase and appropriation water and water rights and to develop water and to use, hold and enjoy the same, * * * and to acquire all other and further easements necessary for the storing, conveyance, use, sale and other disposal of such water in the county of San Diego and elsewhere in the state of California; and to construct dams, reservoirs, flumes and ditches and other conduits for the storage and distribution thereof; and to supply the inhabitants of the towns in San Jacinto Valley with pure water for domestic purposes.'

[3] "The petition of applicant to the Railroad Commission to fix its water rates upon the asserted ground that it was a public service corporation was based upon the allegation that the remuneration which was received by the applicant from the existing rates was wholly inadequate. In brief, the time had come when the applicant, Mr. Whittier, concluded that the duty was an onerous one, and he sought a repudiation of these contracts and water right certificates upon the ground, unquestionably sound in law, that if the corporation which entered into the contract was, at the time of entering, a public service corporation, these contracts were subject to modification at the instance of the commission. S. P. Co. v. Spring Valley Water Co., 173 Cal. 291, 159 Pac. 865, L. R. A. 1917E, 680; Limoneira v. Railroad Commission, 174 Cal. 232, 162 Pac. 1033. Certain facts in addition to those above set forth were presented to the commission. Beginning with the year 1912, in response to a general order issued by the commission to all public utilities, this applicant filed its schedule of rates, rules, and regulations for the service of water for irrigation and domestic use and did so each year thereafter. The applicant further recognized its own character and the jurisdiction of the commission by making an application before it for an order authorizing the sale of certain of its properties. No doubt can be entertained but that from 1912 Mr. Whittier, who, as the sole owner of these corporations, may be indifferently regarded with the water company itself as the applicant, did all that lay in his power to declare the company to be a public service corporation and to destroy the water rights of these petitioners, for which water rights he had received the sum of $438,938.60.

"The next series of facts presented to the commission comes, first, from the testimony of Mr. Whittier as to the 'policy' of the water company, which was to sell its water 'to every one that wanted water.' Mr. Whittier at the time he gave this testimony was 84 years of age. But Mr. Whittier further testifies that he is giving his evidence from his recollection, and that he is quite sure the records are better evidence, and this, of course, may not be questioned. The final fact before the commission is that the applicant established and maintained a public watering trough on the town site of the present city of Hemet before it issued any of its water certificates.

"It is well now, for a clear understanding of the question, to epitomize the position of these petitioners. They concede that the applicant is a public service corporation in so far as the city of Hemet is concerned and as to the amount of water which that city does or may require. They will not object to a finding that such present or future needs on behalf of the city constitute a first and preferential right to the use of the water. They insist, however, that, subject to that public use only, they have a private right in ownership by virtue of their water right certificates to the use of all water provided for in those certificates; that their rights, being private rights, are governed wholly and exclusively by their contracts. Next, as to the excess waters, the rates for which have been fixed by the applicant itself, their attitude is one substantially of indifference as to whether or not the rates to be charged for those waters shall or shall not be fixed by the commission.

"The position of the commission, and of the applicant before it, is, first, that, under the facts above set forth, applicant was from the time of its creation and continuously thereafter a public service corporation, and that it had dedicated all of its waters to public use; second, that whether or not it had so dedicated its waters and properties to public use, by virtue of the laws of this state and their definition of a public utility, the applicant was such a public utility. Necessarily resulting from the upholding of either of these positions it is declared (and granting the premise the conclusion is unescapable) that all of these water right certificates were, in contemplation of law, issued subject to the rate-fixing power of the commission, and that therefore in so fixing the rates in derogation of these contracts no right of contract is violated.

[4-6] "1. Treating first of the facts above set forth as establishing or failing to establish the public service character of applicant, it may at once be said that when it engaged to supply the town site and the succeeding city of Hemet with water for municipal and domestic purposes, and proceeded to do this thing, it became a public service corporation, at least in so far as the needs, present or future, of the growing city of Hemet were concerned. But, of course, it does not follow, either in law or in reason, that because of this it had dedicated all its water to public use. To-day the city of Hemet requires but 1½ per cent., or at the utmost 3 per cent., of those waters. It would be little short of ridiculous to contend that upon the 97 per cent. remaining had been imposed the same servitude. Our decisions fully recognize that a private water company may be organized

to sell water for purposes of private gain and not in so doing become a public utility. Thayer v. California Development Co., 164 Cal. 117, 128 Pac. 21. Further, that a company having a single and undivided supply of water (if that circumstance be considered of consequence) may devote its properties and a part of those waters to public service and may retain a part for the advantages of private sale, and not become a public service corporation as to all by virtue of the dedication of a part. Leavitt v. Lassen Irrigation Co., 157 Cal. 83, 106 Pac. 404, 29 L. R. A. (N. S.) 213; Thayer v. California Development Co., supra; Del Mar Water, etc., Co. v. Eshleman, 167 Cal. 666, 140 Pac. 591, 948. Manifestly the applicant did not become a public utility merely by itself fixing the rates and charges for the water which it sold, nor could its submission to the jurisdiction of the Railroad Commission and its declaration that it was a public utility in the slightest affect the previously vested rights of these petitioners. Herein this case is broadly differentiated from that of Franscioni v. Soledad Land & Water Co., 170 Cal. 221, 149 Pac. 161. In the last-named case a private corporation had been delivering water for private use under contract. It petitioned the proper authority to fix the rates to be charged for this service. The landowners who had been receiving water under private contract acquiesced in this petition and the rates were fixed. These rates were acted upon by all the parties in interest without question or dissent. Thereafter the company sought to amend its articles of incorporation and declare therein that it was supplying water 'as a private corporation and not as a public water company,' and this court held that it was within the power of a private corporation to change the character of its use, with the assent of the recipients of the water under private contract, that this change had been so effected, and, the property having thus become stamped with a public use, it was not within the power of the corporation alone to change that use back to a private use, as it undertook to do. So while a public service corporation cannot out of these waters impressed with a public use sell private or preferential water rights, a private corporation can and may. Leavitt v. Lassen Irrigation Co., supra; Byington v. Sacramento, etc., Co., 170 Cal. 124, 148 Pac. 791. Of course the purposes avowed in articles of incorporation do not fix the character of the corporation in its future activities as being a public service corporation. Such declarations of purpose merely serve to give the corporation capacity to engage in such public service if it shall so desire. Del Mar Water, etc., Co. v. Eshleman, 167 Cal. 666, 140 Pac. 591, 948.

"So far as weight is to be attached to the purposes of the organization of the applicant as expressed in its articles of incorporation, amongst those purposes is one 'to supply the inhabitants of the towns in San Jacinto Valley with pure water for domestic purposes.' But this, standing alone, constitutes no dedication of applicant's properties to a public use. A most thorough and elaborate exposition of this, and, indeed, it may be added, of many other matters pertaining to this consideration, having been made by this court in Thayer v. California Development Co., supra, better cannot be done than to quote at some length from that exposition:

" 'The language plainly imports that the right, when acquired, is the property of the person who claims it and takes the steps prescribed to gain it. * * * The property does not become impressed with a public use or trust until after the owner has first acquired it and then dedicated it to the use. The acts of acquisition and of dedication, respectively, are distinct from each other. Technically the latter must follow the former and cannot precede or accompany it. An "appropriation of water" under the Code is therefore not, ipso facto, a dedication or appropriation to public use. The additional act of dedication is as necessary to the creation of a public use in a water right so acquired as it would be if the right was acquired by conveyance or in any other manner, or as in the case of any other property dedicated to public use. * * *

" 'According to the theory of the plaintiff in this case, whenever the owner of a water supply determines to and does sell it for a price agreed on between himself and the purchasers, it immediately becomes subject to public use, and any other person to whom it can be conveniently distributed in the same manner would have the right to a proportionate share of the water on the same terms as the purchasers, and, if the supply is limited, the first purchasers must divide with all others who may come in and claim a share. Under that theory, where a person having a surplus of water parts with a portion of it by sales to others, he thereby appropriates such portion to purposes of sale and dedicates it to public use. This application of the section would destroy private rights in water and convert every sale thereof into a dedication to public use. We do not believe that the Constitution was intended to have such effect or that it should be so construed. Article 14, taken as a whole, shows plainly that it was intended to regulate the use of water appropriated and dedicated generally for sale and distribution among an indefinite number of users. It could not have been intended to declare that a single sale of a part of his water by one having more than he needs would convert the use into a public use in which others could share. If a single sale could not do this, other sales of like character would not accomplish it. The section must be understood to apply to cases where one has appropriated water generally, for sale, rental, or distribution, and not to cases where sales are made to particular persons at a fixed price by ordinary contracts of purchase and sale. To compel such subdivision and distribution of water supplies as this construction would entail would destroy the value of all water rights. In this state the water supply is so small that large areas must go without irrigation entirely. Such water as there is must be applied, as far as it will go, in quantities sufficient to make the lands profitably productive. The principal benefit of irrigation comes from its use in growing vineyards and orchards. These require a large expenditure and a permanent water supply to make them profitable. If those engaging in such enterprises know that they must be ready always to divide their water supply with those in the vicinity who may subsequently choose to engage

therein, such enterprises would be discouraged, the development, growth, and progress of the state would be much retarded, and its productive capacity greatly decreased.

" 'This provision of the Constitution has been in force 33 years. It has never been understood that it had the effect here contended for. There have been many instances in which the owners of large tracts of land have acquired water, conducted the same to the land, and sold and conveyed the land in small tracts to actual settlers with a proportionate share of the water appurtenant to the land, coupled with an agreement to continue the water supply at a fixed annual rate. Such a disposition is essentially a matter of private contract, and it shows no intent to create a public use.'

"The quotations above given relieve from the necessity of any further exposition of the matter. This applicant did carry out this declared purpose by dedicating so much of its water to public use as was or might be necessary to supply the town of Hemet. Further than that it has not gone. Further, the articles of incorporation as to the purposes declare that the corporation will acquire its water and water right 'by purchase and appropriation,' both methods being wholly within the purview of private ownership of such rights when acquired. It is not without significance that there is omitted therefrom the declaration of the right to acquire by condemnation, which right runs only with a public service; and of similar significance is the fact that when this applicant, in the course of its activities, needed to acquire, and did acquire, certain rights of way, it did not undertake to do so by condemnation, but effectuated its purpose by purchase.

[7] "To hold that property has been dedicated to a public use is 'not a trivial thing' (San Francisco v. Grote, 120 Cal. 60, 52 Pac. 127, 41 L. R. A. 335, 65 Am. St. Rep. 155), and such dedication is never presumed 'without evidence of unequivocal intention' (Niles v. City of Los Angeles, 125 Cal. 512, 58 Pac. 190). The character of the contracts evidenced by these water right certificates, the restriction upon transfer, the fixing of the acreage quantum, the enormous sum in the aggregate paid by these petitioners for their water rights, establish beyond the need of further discussion that the parties to those contracts believed that they were dealing in their private capacities and selling and receiving water for private use. But one suggestion here is sufficient. Is it conceivable that these landowners would have given Mr. Whittier and his associates a bonus of $438,938.60 for the right to use water, which right the law had given them without the expenditure of one dollar of it?

"Upon this branch of the case, then, the conclusion is inevitable that the applicant was not, as to all of its water and properties, a public service corporation, and that these petitioners entered into their contracts with applicant, both parties to each contract acting as of right in their private capacities. Nothing in the cases relied on by respondents militates against this conclusion. Franscioni v. Soledad Land & Water Co., supra, has already been considered. In that case there was an acquiescence upon the part of the holders of private contracts to change in use from private to public. Here the holders of such contracts are protesting and have protested from the moment that it appeared that their contractual rights might be impaired. Limoneira, etc., v. Railroad Commission, 174 Cal. 232, 162 Pac. 1033, was a case where the company was indisputably a public service corporation, but it had entered into two agreements which were asserted to be private and beyond regulation. It has heretofore been said that such private right cannot be carved out of a public use (Leavitt v. Lassen Irrigation Co., supra), and the decision of this court upholding the jurisdiction of the Railroad Commission was based upon this ground, this court recognizing that if a new appropriation had been made by the company, waters from which appropriation were to be devoted to this private use, it might well be held that the contracts were of private character. But, so reads the decision, 'There is nothing to compel the conclusion that there was any new appropriation of water to enable the utility to satisfy the requirements of these contracts.' Palermo Land & Water Co. v. Railroad Comm., 173 Cal. 380, 160 Pac. 228, is of no value to the present consideration, since the contracts there under review in themselves provided for a rate which should be 'fixed by public authority.' And, finally, it may be added upon this matter that in Copeland v. Fairview Land & Water Co., 165 Cal. 148, 131 Pac. 119, this applicant here contended, and successfully contended, against the position which it now takes, the position there taken being that it was not a public service corporation. We do not cite this as being a determinative adjudication upon the question, but it serves at least to illustrate the changeable views which the applicant has entertained of its own activities, functions, and duties. In all respects vital to this consideration these certificates are of the character of those considered in Stanislaus Water Co. v. Bachman, 152 Cal. 716, 93 Pac. 858, 15 L. R. A. (N. S.) 359. In the Thayer Case, supra, it was decided that the sale in gross by a water company of water to a mutual water company was not a dedication of such waters to public use. In Marin Water & Power Co. v. Town of Sausalito, 168 Cal. 587, 143 Pac. 767, it was decided that a sale and delivery of water by a water company to a municipality owning its own water system, to be sold by the municipality to its inhabitants, was not a dedication of such water so sold in gross to a public use so that the gross rates were subject to municipal regulation. It is not possible to see how, in the light of the principles upon which these adjudications are rested, it can be held that these private contracts with private individuals for a private

supply of water upon their private lands was a dedication of such waters to public use.

[8] "2. The second position adopted by respondents, as above outlined, is that this applicant is a public service corporation, without regard to the question of the dedication of its properties to public use, by virtue of the definitions of such public service corporations found in our law. To begin with, the Constitution, art. 12, § 23, declares that every private corporation furnishing water 'either directly or indirectly to or for the public is hereby declared to be a public utility, subject to control and regulation by the Railroad Commission.' Further, this section of the Constitution declares that 'every class of private corporations, individuals, or association of individuals, hereafter declared by the Legislature to be public utilities, shall likewise be subject to such control and regulation.' And, finally, this section provides that the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is plenary and unlimited by any provisions of the Constitution. Pursuant to this constitutional definition and grant of power, the Legislature in 1913 (Stats. 1913, p. 84, c. 80) declared:

"'Whenever any * * * corporation sells, leases, rents or delivers any water to any person, firm, private corporation, municipality, or any other political subdivision of the state whatsoever, except as limited by section 2 hereof, whether under contract or otherwise, such person, firm or private corporation is a public utility, and subject to the provisions of the public utilities act of this state and the jurisdiction, control and regulation of the Railroad Commission of the state of California.'

"And the Public Utilities Act (Stats. 1915, p. 115) defines a water corporation in the following language:

"'The term "water corporation," when used in this act, includes every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any water system for compensation within this state.'

"It must in this be recognized that the Constitution of this state, and the Legislature in pursuance of it, has undertaken to put out of existence any and all private rights in the matter of the rental or sale of water. So far as our Constitution and laws are concerned the state has done this thing. There stands between it and its enforcement, so far as this court is concerned, only the Constitution of the United States, which, as the supreme law of the land, is, whenever it speaks, the supreme law of this state.

[9] "What is a public utility, over which the state may exercise its regulatory control without regard to the private interests which may be affected thereby? In its broadest sense everything upon which man bestows labor for purposes other than those for the benefit of his immediate family is impressed with a public use. No occupation escapes it, no merchant can avoid it, no professional man can deny it. As an illustrative type one may instance the butcher. He deals with the public; he invites and is urgent that the public should deal with him. The character of his business is such that under the police power of the state it may well be subject to regulation, and in many places and instances is so regulated. The preservation of cleanliness, the inspection of meats to see that they are wholesome, all such matters are within the due and reasonable regulatory powers of the state or nation. But these regulatory powers are not called into exercise because the butcher has devoted his property to public service so as to make it a public utility. He still has the unquestioned right to fix his prices; he still has the unquestioned right to say that he will or will not contract with any member of the public. What differentiates all such activities from a true public utility is this, and this only: That the devotion to public use must be of such character that the public generally, or that part of it which has been served and which has accepted the service, has the right to demand that that service shall be conducted, so long as it is continued, with reasonable efficiency under reasonable charges. Public use, then, means the use by the public and by every individual member of it, as a legal right. Such is not only the accepted significance of the phrase by the great weight of authority as expounded by Mr. Lewis (Eminent Domain, sec. 164 et seq.), but is the definition repeatedly announced by this court. Thus, in Pinney & Boyle Co. v. Los Angeles Gas & Electric Co., 168 Cal. 12, 141 Pac. 620, L. R. A. 1915C, 282, Ann. Cas. 1915D, 471, explaining that it is not the use which the consumer makes of the commodity which constitutes the test as to whether or not the owner or purveyor of that commodity is a public service corporation, it is declared:

"'It is the duty which the purveyor or producer has undertaken to perform on behalf of and so owes to the public generally, or to any defined portion of it, as the purveyor of a commodity, or as an agency in the performance of a service, which stamps the purveyor or the agency as being a public service utility.'

"To the same effect is Thayer v. California Development Co., supra, while in Del Mar Water Co. v. Eshleman, 167 Cal. 666, 680, 140 Pac. 591, 596, it is declared that 'even a constitutional declaration cannot transform a private enterprise, or a part thereof, into a public utility and thus take property for public use without condemnation and payment.'

[10] "Our Constitution and our statutory definitions above quoted therefore must be construed as applying only to such properties as have in fact been devoted to a public use, and not as an effort to impress with a public use properties which have not been devoted thereto. For if the latter be the true construction of our Constitution and statutes, then manifestly in their operation they are void wherever they unjustly inter-

fere with private property or private contractual rights by force of article 1, § 10, and of the Fourteenth Amendment of the Constitution of the United States. If the first alternative be selected, then, for reasons already given, such parts of these properties as are affected by the contracts with these petitioners have not been devoted to public use and their private contractual rights must prevail.

"For these reasons the determination, conclusion, and judgment of the commission that these petitioners' contractual and vested rights are subordinate to the regulatory powers of the commission is in excess of the commission's jurisdiction, and therefore void, and in so far the decree of the commission is annulled."

We concur: LORIGAN, J.; MELVIN, J.; RICHARDS, Judge pro tem.

WILBUR, J. I dissent. The main opinion holds that our state Constitution, and laws passed in pursuance thereof, authorizing the Railroad Commission to fix rates for the use of water, are in conflict with the federal Constitution prohibiting the impairment of contracts, and are to that extent void and of no effect. It concedes that the state has exerted to the full all its sovereign powers to regulate and control the rates for the use of water, but holds the state to be impotent in the presence of the private rights to water and its distribution in this case. I concur in the main opinion in so far as it holds that the rights to water (one-eighth inch per acre) is a private right. It was so held in Thayer v. California Development Co., 164 Cal. 117, 128 Pac. 21, and the subsequent constitutional amendment and statute must be held to have been adopted in view of that decision. But the decision of the Railroad Commission does not interfere with that right. To an understanding of the case it is essential that some facts disclosed by the record be stated in addition to those set forth in the main opinion. The contracts under which the petitioners claim, in addition to securing to them a certain amount of water, require the water company to deliver such water "at such points on the pipes or conduits of the party of the first part (water company) as may be nearest the land" of the grantee. The contract thus recognizes that the distributing system belongs to the water company. For this system the water company has expended $447,000, paid in by its stockholders. It has also received $438,938.60 from the sale of its water, a part or all of which was expended in payment of current expenses. It would cost $657,385 to reproduce the distributing system. That the water company has done all in its power to dedicate its water and its distributing system to a public use is held in the main opinion, and that, having conceded and invoked the jurisdiction of the Railroad Commission, the water company should be bound by its dedication, is held in Palermo L. & W. Co. v. R. R. Comm., 173 Cal. 380, 384, 160 Pac. 228, 229, where it is said by the court in bank:

"* * * It appears that in December, 1912, the Palermo Company applied to the Railroad Commission to have its rates for water established, and that the commission made its order allowing an increase in the rates theretofore in effect. Opinions and Orders of the Railroad Commission, vol. III, p. 1247. The case, therefore, falls directly within the doctrine of Franscioni v. Soledad Land & Water Co., 170 Cal. 221, 149 Pac. 161, where we held that, as against the water company, such submission to the authority of the regulating body was effective to 'change the use from a private and particular use to a public use so as to make the service and terms of delivery subject to regulation and control by public authority.' No valid distinction can be drawn between the Franscioni Case and the one before us." Palermo L. & W. Co. v. Railroad Commission, supra.

In the instant case the owners of property costing $657,385 to reproduce dedicate the same to a public use, and the state, through its Constitution, its laws, and its duly accredited representatives, accepts and acts upon such dedication. It is held in the main opinion that such dedication of such property is ineffectual. If it is once conceded that the distributing system is, or has been, dedicated to a public use, it follows that the rates to be charged for the use thereof are to be fixed by public authority, and that the inhibition of the federal Constitution against the impairment of contracts does not apply, even though rates in excess of the contract rates are fixed. Limoneira Co. v. Railroad Comm., 174 Cal. 232, 162 Pac. 1033. The main opinion holds that the purchasers of the water contracts not only secured a right to the water, but also secured an easement in the distributing system attaching to the land, and thus have a property right in the pipe lines; citing Stanislaus W. Co. v. Bachman, 152 Cal. 726, 93 Pac. 858, 15 L. R. A. (N. S.) 359; Copeland v. Fairview Co., 165 Cal. 154, 131 Pac. 119; Palermo Co. v. R. R. Comm., 173 Cal. 386, 160 Pac. 228. If we hold that the owners of water certificates have a property right so definite in the pipe lines and distributing system as to prevent the dedication thereof to a public use by the water company, it would seem that such owners should at least bear the corresponding burden of the maintenance thereof, including their proportion of the expense of distribution of the water contained therein, particularly as against the public also served thereby. The Railroad Commission finds that the system has at all times been run at a loss. Neither the public nor the private users of water have paid their proportion of the expense of maintenance. The annual loss, including depreciation, now approximates $30,000. The proportion thereof properly apportioned to the owners of water certificates (94 per cent., according to the main

opinion) would be $28,200. If the system is to remain a going concern, this amount, at least, must be assessed upon the public users (the 3 to 6 per cent.), if the private users cannot be required to pay more than the contract rate. The holders of water certificates bought with knowledge that the system was used and to be used to distribute water devoted to a public use. By thus consenting that public waters, mingled with their private waters, could be conveyed through the distributing system in which they have an interest, they assented to the use of their property (the pipe line) for a public use. If they owned the whole pipe line and thus used it, it must be conceded that they thereby dedicated the same to a public use. Why does not their assent to such use of their undivided right therein necessarily constitute such a dedication thereof to a public use? Their rights in the water and in the system can be recognized by the Railroad Commission in fixing rates. A rate proportionately lower than that imposed on those having no property right in the water or distributing system can be fixed. Although it is conceded that the statute authorizes the fixing of rates by the Railroad Commission in this case, if constitutional, it is well to observe that the commingling of public and private waters in a privately owned distributing system is expressly made a basis of the jurisdiction of the Railroad Commission. Stats. 1913, p. 84, §§ 2, 3, 4.

"Sec. 2. Whenever any private corporation or association is organized for the purpose solely of delivering water to its stockholders or members at cost, and delivers water to no one except its stockholders or members at cost, such private corporation or association is not a public utility, and is not subject to the jurisdiction, control or regulation of the Railroad Commission of the state of California.

"Sec. 3. Whenever any private corporation or association organized for the purpose of delivering water solely to its stockholders or members at cost does deliver water to others than its stockholders or members for compensation, such private corporation or association becomes a public utility and subject to the terms of the public utilities act and the jurisdiction, control and regulation of the Railroad Commission of the state of California.

"Sec. 4. Whenever any private corporation or association is organized both for the purpose of delivering water to its stockholders or members at cost and to persons, firms, corporations, municipalities or other political subdivisions of the state in addition thereto, such private corporation or association is a public utility and subject to the provisions of the public utilities act and to the jurisdiction, control and regulation of the Railroad Commission of the state of California." Stats. 1913, p. 85.

It is, of course, the duty of the Railroad Commission to recognize private and constitutional rights and fix the rates with reference thereto. In this case, while finding, erroneously, as we hold, that all the water distributed by the water company was dedicated to a public use, it nevertheless refused to consider the value of the water as a basis for fixing the rates, and, although the water company at first sought a reasonable interest upon the alleged value thereof ($494,000), the company abandoned its claim, and the Railroad Commission refused to recognize it. In short, in effect, the water users who had paid $438,000 therefor were recognized as entitled to water claimed to be worth $494,000. The Railroad Commission fixed rates for water that would pay the operating and maintenance expenses and give a revenue to the company on a capitalization of less than one-half of the value of their distributing plant. It seems clear that the water company and the certificate holders, by express dedication and by necessary implication, have consented to the jurisdiction of the Railroad Commission in so far as the distributing system is concerned, and that, therefore, it has jurisdiction, and that in the exercise of that jurisdiction it has not violated any rights of petitioners in the water or distributing system, such as would justify our interference. I therefore conclude that the jurisdiction of the Railroad Commission may be well predicated upon the consent of the water company and the implied consent of the certificate holders whose property rights are given due consideration by the Railroad Commission. It is also true, I think, that the business of storing, conserving, and distributing water, whether privately owned or dedicated to public use, to large tracts of land for the use of large numbers of persons for domestic and irrigation purposes in an arid state, particularly where such distributor enjoys a monopoly, is so clearly a matter of great public concern as to justify the people in declaring that such business is a public utility. It is unnecessary to give reasons in detail for such an obvious conclusion, but it may be noted that changed labor conditions, increased cost of supplies and materials necessary to maintain such distributing system, bankruptcy, termination of corporate existence, or death of individuals furnishing water, all have a marked effect upon the ability of the distributor to distribute water, and upon the public so furnished with water, and that the ordinary remedies for breach of contract to distribute or deliver water, or equitable actions to protect and enforce such contract rights, would be wholly inadequate to protect the public directly and indirectly affected by such failure and the consequent damage. Many of these considerations, however, do not apply to the corporations excepted from control of the Railroad Commission, for the reason that in such mutual companies the actual cost of maintenance, whether great or small, is distributed among the water owners. As we are dealing with legislation that definitely and clearly authorizes the fixing of the rates for the water company under constitutional provisions, authorizing such legislation and providing for such fixing of rates (article 14, and article 12, § 23) we need only

consider whether the federal Constitution prohibits such action, and for that purpose we must look to the Supreme Court of the United States as final and conclusive authority. The question of the limitations upon state legislative power by the federal Constitution has been frequently under consideration by that court. Only a few cases need be noted.

In Spring Valley Water Works v. Schottler, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173, the Supreme Court of the United States said:

"That it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, we do not doubt. That question is settled by what was decided on full consideration in Munn v. Illinois, 94 U. S. 113 [24 L. Ed. 77]. As was said in that case, such regulations do not deprive a person of his property without due process of law."

In the case of Munn v. Illinois, supra, in passing upon the power of the Legislature of the state of Illinois to declare grain elevators public utilities and regulating rates for the storage and handling of grain, the Supreme Court said:

"This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest it ceases to be juris privati only.' This was said by Lord Chief Justice Hale more than 200 years ago, in his treatise De Portibus Maris, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

In Atlantic Coast Line R. R. Co. v. City of Goldsboro, 232 U. S. 548, 34 Sup. Ct. 364, 58 L. Ed. 721, the rule is thus stated:

"It is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise. Slaughter-House Cases, 16 Wall. 36, 62 [21 L. Ed. 394]; Munn v. Illinois, 94 U. S. 113, 125 [24 L. Ed. 77]; Beer Co. v. Massachusetts, 97 U. S. 25, 33 [24 L. Ed. 989]; Mugler v. Kansas, 123 U. S. 623, 665 [8 Sup. Ct. 273, 31 L. Ed. 205]; Crowley v. Christensen, 137 U. S. 86, 89 [11 Sup. Ct. 13, 34 L. Ed. 620]; New York & R. R. Co. v. Bristol, 151 U. S. 556, 567 [14 Sup. Ct. 437, 38 L. Ed. 269]; Texas & R. R. Co. v. Miller, 221 U. S. 408, 414, 415 [31 Sup. Ct. 534, 55 L. Ed. 789]."

In determining the question whether or not a business is of such public interest and concern as to subject it to regulation as a public utility, the Supreme Court of the United States holds that that question is primarily one for the Legislature. In Munn v. Illinois, supra, it is said:

"For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the state. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the Legislature is the exclusive judge."

It seems clear from these authorities, upon the facts found by the Railroad Commission, that the state had power to declare the water system a public utility. It finds that—

"The consumers concede that, in so far as the supply of domestic water to persons other than the holders of water certificates is concerned, petitioner is a public utility." That the "petitioner adopted rules and regulations for the sale of water for irrigation and domestic use, which rules were printed and distributed to its consumers and referred to in petitioner's advertisements. Petitioner's business has grown from its initial supply of domestic water to the first inhabitants of what is now the town of Hemet, until in 1915, as shown by petitioner's annual report for the year ending December 31, 1915, on file with the Railroad Commission, petitioner sold water through 85 meters for irrigation, 481 meters for domestic use, 5 meters for manufacturing and power, and 6 meters for public use. During the same year petitioner sold water measured through other devices for the irrigation of 5,554 acres of land. Approximately 2,500 people, including approximately 1,500 in the town of Hemet, rely upon petitioner's system as their sole source of water." That the "petitioner is a water company, incorporated under the laws of this state. It is the only water system in control of water which it sells for compensation. For more than 25 years petitioner has been engaged in the sale of water to the entire public on the land to the service of which petitioner has dedicated its water. Petitioner has fixed and enforced rates, rules, and regulations for the service of water for irrigation and domestic purposes and to the town of Hemet for public purposes. Petitioner's water system consists of watershed lands, the Lake Hemet reservoir on the south fork of the San Jacinto river, diversion works at four points of diversion, transmission mains of riveted steel and wood pipe, wooden flume and lined ditch and a distributing system of wooden and concrete flume, concrete and riveted steel pipe, all used in the delivery of water to wholesale and irrigation consumers. In addition, petitioner owns and operates a separate system with a separate diversion for the distribution of water through riveted steel and standard screw pipe to domestic consumers. In the operation of its system petitioner for more than fifteen years has had the control and use of $^{17}/_{20}$ths of the water of the north fork of the San Jacinto river and Strawberry creek under agreements with Fairview Land & Water Company, the owner of such waters. The safe yield of petitioner's water system is 161,000 miner's inch days annually, or 6,376 acres feet, delivering 725 miner's inches during the irrigating season."

It is also found that the water company had issued:

(a) Contracts covering 69.36 acres at the rate of $5 per acre per year.

(b) Contracts covering 5,874.77 acres at the rate of $2 per acre per year, and that the amount of acres irrigated was 5,554; that "petitioner's total operating expenses to December 31, 1914, was $512,353.87; $93,607.43 was depreciation. Total cost of operation was $418,746.44. Total revenue, after deducting receipts from the sale of water rights, $239,824.47. It thus appears that the result of petitioner's operations under its rates now in effect has been a gross revenue of $178,-921.97, less than bare operating and maintenance expenses."

We are not called to pass upon the reasonableness of the rates fixed by the Railroad Commission, if no constitutional right is invaded.

I therefore conclude that the Railroad Commission had authority to fix rates under the Constitution and law:

First, for the reason that the water company had consented thereto by the express dedication of all its interest in the system, and that the Railroad Commission was empowered and required in fixing rates to fix them with due regard to the private ownership of the water certificate holders in the water and the distributing system.

Second, for the reason that the owners of water certificates had consented to the use of the distributing system, and their interest therein by the public, and had thus jointly with the water company dedicated the distributing system to a public use.

Third, for the reason that the character of the business conducted by the water company and water users authorized the state to declare the same a public utility, and to provide for the fixing of rates by the Railroad Commission, whose duty it was to fix rates in due recognition of the private rights of water certificate holders in such property, and that the intervention of this court is only proper where a clear violation of such rights appears.

---

38 Cal. App. 71

## CAROTHERS v. CAINE. (Civ. 2469.)

(District Court of Appeal, First District, California. Aug. 19, 1918. Rehearing Denied Sept. 18, 1918.)

1. BROKERS ⟸32 — ACTING FOR ADVERSE PARTIES—SECRET PROFIT.

Where plaintiff fixed his own terms and employed defendant merely to procure acceptance, defendant being also the agent of the other party to the exchange and known by plaintiff to be such, compensation received by defendant from the other party was not a "secret profit" to which plaintiff was entitled.

2. BROKERS ⟸7—EMPLOYMENT.

That defendant, while acting as agent for B., one of the parties to exchange of realty, promised plaintiff, the other party, that he would get the best price he could from B., did not constitute defendant plaintiff's agent.

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by E. B. Carothers against C. L. Caine. Judgment for plaintiff, and defendant appeals. Reversed.

H. E. Barbour and Everts & Ewing, all of Fresno, for appellant. R. G. Retallick and C. K. Bonestell, both of Fresno, for respondent.

LENNON, P. J. This is an action to recover the sum of $1,883.30, alleged by plaintiff to be a secret profit made by defendant in a transaction in which the latter was acting as plaintiff's agent. Plaintiff recovered judgment for said amount and interest, and defendant appeals.

[1] Apart from various specifications of error as to the admission of testimony, the main ground urged in support of the appeal is that there is no evidence in the record that the defendant was acting as the plaintiff's agent in negotiating the terms of the contract, or was anything but a middleman between the parties; that the evidence shows that the plaintiff fixed his own terms, and employed defendant merely to procure their acceptance, and the defendant being also the agent of the other party to the exchange of properties out of which the claim arises, and known by plaintiff to be such, was entitled to be compensated by such other party; that consequently the sum received by defendant as such compensation was not a secret profit; and that the trial court erred in holding that it was.

We think the contention of appellant must be sustained. The evidence shows that Caine, the defendant, being a real estate agent, had been authorized by one Breckinridge to find a purchaser for 80 acres of vineyard in Fresno county owned by him, and in pursuance of the authorization offered the property to Carothers, the plaintiff, for a price of $16,000. Carothers declined to pay this price, but said that if he could get it for $15,000 he would make an offer for it, and requested the defendant to see if he could get a better price on it, which the defendant promised he would do, later reporting to the plaintiff that the owner would not abate his demand. The negotiations continued, and finally an agreement was entered into between the plaintiff and Breckinridge by which, instead of paying cash for the 80 acres, the plaintiff agreed to transfer to Breckinridge certain real and personal property owned by him, and the transaction went through in that way. The agreement of exchange was drawn by the defendant, and was in the form of an offer on the part of the plaintiff of the property that he was willing to transfer for the 80 acres, together with an authorization to the defendant to act as

plaintiff's agent in negotiating the exchange, and an agreement to pay him a commission of $125 in case he procured an acceptance by Breckinridge of plaintiff's offer. This acceptance was procured by the defendant in writing upon the same day. Before the drawing up and execution of the offer mentioned, and at a time when it appeared to the defendant that he could bring the parties to an understanding, he procured from Breckinridge a contract to receive out of the money or property which Breckinridge should get in the deal all over a certain amount. The difference turned out to be the sum of $1,883.30, which was paid by Breckinridge to the defendant, and is the amount for which the plaintiff sues upon the theory, as we have said, that the defendant was plaintiff's agent in conducting the transaction, and was forbidden by law to make a secret profit therefrom.

[2] We think it clear from the facts as above outlined that the principle of law followed by the court in arriving at its judgment has no application to the case. The only employment of defendant by plaintiff was incorporated in the latter's written offer, up to which time the defendant was acting solely for Breckinridge. His promise to the plaintiff while so acting to get the best price he could from Breckinridge did not constitute him the plaintiff's agent, nor was it intended to, and did not impose upon him any legal duty to use any effort to induce his principal to reduce his price. On the contrary, at that time the defendant's duty was to procure from plaintiff the price at which his principal had authorized him to offer it. That the plaintiff should subsequently have employed the defendant to procure the acceptance of a definite offer on his part could not affect the character of acts already performed. Defendant's agreement with Breckinridge that he should receive all over a certain sum out of the purchase price was made prior to his employment by the plaintiff, and when plaintiff did finally employ him it was not for the purpose of buying the 80 acres at the best possible price—imposing upon the defendant the obligation to use his best skill and efforts to that end—but was solely to procure the acceptance of a definite offer. In addition to this, and above all, the fact that the plaintiff was aware that Caine was acting as the agent of Breckinridge completely deprives the compensation received by him from Breckinridge of the character of a secret profit. The plaintiff could not have supposed that Caine was acting gratuitously; and the amount of his compensation, and whether it took the form of a commission of 5 or 50 per cent. on the purchase price, or whether it was to consist of the excess of such price over a given sum, or both, was no concern of the plaintiff. He therefore was not entitled to receive from the defendant the advantage of the difference in amount between what he paid for the land and what Breckinridge, the other party to the exchange, received.

"If a broker exercises no discretion, but merely brings together the parties to an exchange or the purchase and sale of property, and his employment then terminates, and the parties themselves settle the terms of the transaction, he acts as a mere middleman, and he may accordingly recover a commission from each party if each has agreed to pay him; and it is immaterial in such case that either party was unaware that he was employed by the other." Corpus Juris, vol. 9, p. 576, § 76.

"It is only when the arrangement of a broker is that of an agent with discretionary authority from his principal in the matter of such employment that he cannot accept employment from another whose interests conflict with those of his principal. In such cases the brokers act as mere middlemen without discretion in making any of the terms of the sale or exchange, or to conclude either of them in any other respect, and such terms are fixed and arranged without reliance upon the brokers by the parties themselves." Pollatschek v. Goodwin, 17 Misc. Rep. 587, 40 N. Y. Supp. 682.

"The rule that an agent, acting for both parties and for each without the knowledge of the other, can collect commission from neither, applies only to agents stricti juris, and not to middlemen." Manders v. Craft, 3 Colo. App. 236, 32 Pac. 836.

For the reasons given, the judgment is reversed.

We concur: BEASLY, Judge pro tem.; STURTEVANT, Judge pro tem.

---

38 Cal. App. 79

## ROULLARD v. GRAY. (Civ. 2415.)

(District Court of Appeal, First District, California. Aug. 20, 1918. Rehearing Denied Sept. 19, 1918; Denied by Supreme Court, Oct. 18, 1918.)

1. HUSBAND AND WIFE ⟸23½—PURCHASES BY WIFE—LIABILITY OF HUSBAND—RATIFICATION.

Evidence *held* to show such acceptance by the husband of a transaction by which plaintiff sold the wife an automobile as to render the husband liable for the balance due on the price.

2. NAMES ⟸10—FICTITIOUS NAMES—RIGHT TO MAINTAIN ACTION—SUFFICIENCY OF PUBLICATION OF CERTIFICATE.

Civ. Code, §§ 2466, 2468, as to publication of certificate by person doing business under fictitious name, as prerequisite to maintaining action, are sufficiently complied with in action for balance due on automobile by publication subsequent to commencement of the action but before the defense of noncompliance was raised by motion for nonsuit.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Joel Roullard against Donly C. Gray. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 30 Cal. App. 757, 159 Pac. 457.

Larkins & Bailey, of Visalia, for appellant. Kitt Gould, of Clovis, and C. K. Bonestell, of Fresno, for respondent.

LENNON, P. J. This is an action for the recovery of a part of the purchase price of

an automobile, brought by the assignee of the vendor. The defendant denied the purchase of the automobile. The trial court rendered judgment for the plaintiff, and defendant appeals. The appellant sets out numerous alleged errors of law in the admission of testimony, etc., and also contends that the evidence does not support the findings or the judgment.

The evidence shows that the automobile was sold by the plaintiff's assignor to Hazel I. Gray, then the wife of the defendant herein; that an old automobile, the property of the defendant, was traded in at a valuation of $450, a payment of $500 was made by check drawn upon the account of defendant and signed "Donly C. Gray, by Hazel I. Gray," and the personal note of Hazel I. Gray was given for the balance. The defendant, Donly C. Gray, was not present during the transaction, and the account was carried upon the books of the vendor in the name of Hazel I. Gray. The bank paid the check drawn on the defendant's account for a part of the purchase price of the automobile, and defendant did not object to this signature; he did not repudiate the transaction, nor seek to recover his old car, which had been exchanged for the new one; he used the new automobile to some extent and paid for repairs upon it. Shortly after the purchase of the machine, Hazel I. Gray commenced suit for divorce against the defendant, and in that action the defendant filed a verified answer alleging that the automobile in question was his separate property.

[1] It is true the evidence is conflicting as to the general authority given by defendant to Hazel I. Gray to transact his business affairs during his absence, and the fact that the account was carried on the books of the company in the name of Hazel I. Gray is rather strong evidence that the company looked to her for payment. Yet we think the record does furnish sufficient evidence of defendant's acceptance of the entire transaction to sustain the findings and the judgment.

[2] Appellant also urges that the respondent had no legal right to maintain this action and was not entitled to a judgment herein without having proven that prior to the commencement of this action, or at least prior to the filing of the original answer herein, his assignor had complied with sections 2466 and 2468, Civil Code of this state. Section 2466 requires a certificate to be filed by persons doing business in the state under a fictitious name and provides for the publication of such certificate. Section 2468 provides:

"* * * No person * * * or his assignee * * * shall maintain any action upon or on account of any contract * * * until the certificate has been filed and the publication has been made as herein required."

The plaintiff in the trial court offered in evidence in support of the allegation of his complaint that his assignor had complied with the sections above mentioned, and affidavit of publication of the certificate of the assignor, which affidavit showed publication November 3, 10, 17, 24, and December 1, 1916, which dates were subsequent to the time of the commencement of this action. The defendant objected to its introduction and at the close of plaintiff's case filed a motion for nonsuit, upon the ground, among others, that the plaintiff had not shown a compliance with sections 2466 and 2468. The affidavit showed publication at a time before the motion for nonsuit was filed. The trial court ruled that a compliance with the above sections had been shown.

The phraseology of that part of section 2468 above quoted has been construed in the case of Cal. S. & L. Soc. v. Harris, 111 Cal. 133, 43 Pac. 525. The court, in construing another and a similar section of the Code, said:

"At the commencement of this action, the plaintiff had not filed the certified copy with the county clerk of Madera county, but it did file it with that officer several months before the defendant filed his amended answer, setting up this defense, so that at the time this defense was pleaded by the defendant the plaintiff had complied with the statute. * * * Section 299 does not declare that the plaintiff shall not commence an action in any county unless it has filed a certified copy in the office of the county clerk, but merely declares that it shall not maintain an action until it has filed it. To maintain an action is not the same as to commence an action, but implies that the action has already been commenced. 'The verb "maintain" in pleading has a distinct technical signification. It signifies to support what has already been brought into existence.'"

We think that the affidavit offered in evidence showing publication before this defense was raised by the motion proved a sufficient compliance with the provisions of the statute and was properly admitted in evidence.

It is unnecessary to discuss in detail the other alleged errors of law occurring at the trial and enumerated by the appellant, for the reason that, upon an examination of the entire record, it appears that there has been no miscarriage of justice.

The judgment is affirmed.

We concur: BEASLY, Judge pro tem.; STURTEVANT, Judge pro tem.

---

38 Cal. App. 75

SNOOK et al. v. FIELDEN. (Civ. 2522.)

(District Court of Appeal, First District, California. Aug. 19, 1918.)

APPEAL AND ERROR ⊂=1010(1) — DISPOSITION—SUPPORT OF FINDINGS.

Trial court's findings, amply supported by the testimony introduced, will not be disturbed on appeal.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by James A. Snook and B. H. Nelson against Allie Lorena Fielden. Judgment for plaintiffs, and defendant appeals. Affirmed.

South & Ross, of Fresno, for appellant. L. N. Barber, of Fresno, for respondents.

LENNON, P. J. The plaintiffs brought this action to foreclose a chattel mortgage executed by defendant as security for the payment of a promissory note given by her as first payment upon a contract for the purchase of 30 acres of land situated in Fresno county, belonging to the Fresno Farms Company, the assignor of plaintiffs. The foreclosure was resisted by the defendant, who set up in her answer that the contract in connection with which the mortgage was given was entered into by her only through and by means of the false representations of the plaintiffs' agents. After trial the court awarded plaintiffs judgment as prayed, and defendant appeals.

The sole ground urged in support of the appeal is that certain findings of the court negativing the claims of defendant as to the falsity of the representations in question are not supported by the evidence.

The representations alleged to be false by defendant's answer were that the land forming the subject of the contract was free from hardpan; that water in abundance was to be had upon it at all times under a water right appurtenant to the land; that the land was well adapted to the growing of vines, trees, and alfalfa; and that it was of the value of $150 per acre—the price which defendant agreed to pay for it.

The court, in its findings 4, 5, and 6—which are the findings attacked by the appellant as unsupported by the evidence—declared that the land was in fact free from hardpan; that there was appurtenant to it a water supply sufficient for all reasonable and necessary irrigation and available for defendant's use; that at the time of making the representations complained of the plaintiffs believed upon reasonable grounds that the land was well adapted to the growing of vines, trees, and alfalfa and was of the value of $150 per acre. The court in the findings attacked also found that the defendant was experienced in farming and familiar with the value and character of land, and that she made an examination of this particular tract before entering into the contract; and, finally, that after entering into the contract she affirmed the same with full knowledge of all the facts concerning the truth or falsity of the representations in question.

It is unnecessary to set out in detail the evidence upon which these findings of the court are based. An attentive study of the record has convinced us that they are amply supported by the testimony introduced, and that therefore there is no merit in this—the sole contention of the appellant.

The judgment is therefore affirmed.

We concur: BEASLY, Judge pro tem.; STURTEVANT, Judge pro tem.

---

38 Cal. App. 98

Ex parte SILVA. (Cr. 818.)

(District Court of Appeal, First District, California. Aug. 26, 1918.)

1. CRIMINAL LAW ⊂⊃991(3) — IRREGULAR JUDGMENT—SENTENCE.
Where a court having jurisdiction of the person and cause sentenced defendant for first degree burglary "in accordance with" Pen. Code, § 461, thus leaving the term indefinite, when the law then in force required it to be definite, the judgment was not void, but irregular.

2. CRIMINAL LAW ⊂⊃1216(1) — AMENDED SENTENCE—WHEN TIME BEGINS TO RUN.
Where an irregular judgment sentencing for crime is corrected by an amended judgment, the latter runs from the date of the former, giving the defendant the benefit of the time served.

Application by Fernaz Silva for a writ of habeas corpus. Petitioner discharged.

Fernaz Silva, in pro. per. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for respondent.

PER CURIAM. The petitioner was convicted of an offense committed before the taking effect of the so-called Indeterminate Sentence Law. In passing judgment upon him, however, the court sentenced him to imprisonment, to use the language of the judgment, "in accordance with section 461, of the Penal Code," which section provides that the punishment for burglary of the first degree, the offense of which the petitioner was convicted, should be imprisonment for not less than one year nor more than fifteen, thus leaving undetermined the duration of his confinement. Subsequently and after the decision of the Supreme Court in the case of Ex parte Lee, 171 Pac. 958, the petitioner was brought before the superior court and resentenced, his punishment this time being fixed at one year's imprisonment. At this time he had already served six months and six days; and if the second sentence dates from the making and entry of the first judgment, as the petitioner contends, he has served the full term imposed when resentenced if account be taken of certain credits for good conduct to which it is admitted he is entitled, and is consequently entitled to be released.

[1] It is conceded that the court had jurisdiction of the cause and of the person of the petitioner, so that it had power to pass upon him a judgment of imprisonment. Such judgment, therefore, was not void, although it did not, as according to the law in force

at that time it should have done, provide a definite term of incarceration. Nor has any appeal been taken from said judgment. A similar situation arose in the case above mentioned (Ex parte Lee), where it was held that in such a case a proper procedure to remedy the defect in the judgment was to return the person affected by it to the judge or court that had imposed the irregular sentence and have a proper sentence pronounced, the court finding warrant for such procedure under the terms of section 1493 of the Penal Code.

[2] The question now arises whether the amended judgment should run from its date or the date of the one of which it is amendatory. In Clark v. Dunnam, 46 Cal. 205, it was held that, in the absence of a statute to the contrary, an amended judgment will be held to speak from the date of the original judgment. Whether that principle applies to a criminal case was considered in Burnett v. State, 14 Tex. 455, 65 Am. Dec. 131, where it was held that the rule for the construction of a judgment is the same in a criminal case as in a civil. And in People v. O'Brien, 4 Cal. App. 723, 89 Pac. 438, while this question was not directly discussed or considered, the decision in the case in effect applies the principle.

We think it follows from the foregoing that the sentence imposed upon the petitioner by the amended judgment ran from the date upon which the original judgment was made and entered; and that the term of imprisonment imposed, deduction being made of the credits to which it is admitted the petitioner is entitled, has expired; and that the petitioner is entitled to be discharged from custody.

The petitioner is discharged.

---

38 Cal. App. 95

## FREUDENBERG v. LUCAS et al.

(Civ. 2084.)

(District Court of Appeal, First District, California. Aug. 26, 1918. Rehearing Denied by Supreme Court Oct. 23, 1918.)

1. BILLS AND NOTES ⊂⊃405—INDORSER'S LIABILITY—DEMAND FOR PAYMENT—STATUTE.

Under Civ. Code, §§ 3131, 3141, where maker of note refuses payment on sole ground he is without funds, and makes no demand note be exhibited, its exhibition, as condition to charging indorser, is excused.

2. BILLS AND NOTES ⊂⊃405—DEMAND FOR PAYMENT—EXHIBITION OF INSTRUMENT.

Where exhibition of note to maker in demanding payment was excused because maker stated he was without funds, it was not necessary, to make demand good to charge indorser, that holder should have possession of instrument with ability to exhibit it on demand; it being in nearby safe in custody of holder's agent, who was temporarily out of town.

3. BILLS AND NOTES ⊂⊃419—INDORSER'S LIABILITY—NOTICE OF DISHONOR.

Notice from holder to indorser of dishonor of note *held* to set forth facts, as to demand for payment and refusal for want of funds, necessary to excuse nonpresentment of instrument, from which indorser could draw inference note had been dishonored within statute.

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by G. A. Freudenberg against A. J. Lucas and J. G. Jackson. From judgment denying relief against defendant Jackson, plaintiff appeals. Reversed, with direction to enter judgment for plaintiff.

Chas. E. Davis and Robert W. Harrison, both of San Francisco, for appellant. A. D. Plaw, of San Francisco, for respondent.

PER CURIAM. This is an action upon a promissory note arising under the law as it stood prior to the adoption of the Negotiable Instrument Law. The case was tried upon an agreed statement of facts, which showed that on August 10, 1912, defendant Lucas executed and delivered to respondent Jackson his promissory note for $2,000 payable to his order one year from date. At the same time Lucas delivered to Jackson as security for the payment of the note a stock certificate of a certain corporation. Thereupon by mutual consent, the note and certificate were both delivered to one A. A. Curtis, with instructions to hold the same until the note matured unless sooner paid, and, if it were paid on the date of maturity, to deliver the note and stock certificate to the then owner of the note. Prior to maturity the note was indorsed by Jackson to one Faraday, and by Faraday to the present plaintiff. On the date of maturity plaintiff went to the office of Curtis to get the note, but was informed by those in charge that Curtis was out of town, that the note was in his safe, and that they did not know when Mr. Curtis would return. These statements were made in the presence of Lucas, of whom plaintiff then demanded payment of the note. Lucas made no demand upon plaintiff that he exhibit to him the note, but stated that he was unable to pay it because he had no funds, and that plaintiff would have to look to the indorsers for the payment thereof. In due time plaintiff served upon Jackson a notice the material part of which is as follows:

"This is to notify you that on August 11th, 1913, payment of that certain promissory note (describing the note and indorsement) was demanded of said A. J. Lucas, but that payment thereof was refused by said Lucas for the reason, as stated by him, that said Lucas has not sufficient funds to pay it, and that therefore, as holder of said note I now look to you for the payment thereof. Yours, etc., G. A. Freudenberg."

Jackson having refused to pay the note, plaintiff brought this action against Lucas, as maker, and Jackson, as indorser, and has taken this appeal from that portion of the judgment denying him relief against respondent Jackson.

Counsel for respondent, in support of the decision of the lower court, contends that

Jackson was discharged from his liability as indorser for two reasons: First, because plaintiff did not have the actual and immediate physical possession of the note at the time he demanded payment of the maker; and, second, because the notice did not set forth either presentment of the note or the fact of nonpresentment, with such facts as might excuse presentment. We are of the opinion, however, that neither of these two contentions can be maintained, for the reasons hereinafter stated.

The following are the provisions of the Code material to the discussion:

"Sec. 3131. Presentment of a negotiable instrument for payment, when necessary, must be made as follows: * * *"

"Sec. 3141. A negotiable instrument is dishonored, when it is either not paid, or not accepted, according to its tenor, on presentment for the purpose, or without presentment where that is excused."

"Sec. 3143. A notice of dishonor may be given in any form which describes the instrument with reasonable certainty, and substantially informs the party receiving it that the instrument has been dishonored."

[1, 2] While there is no statutory expression in California as to what will excuse the presentment of a note, sections 3131 and 3141 above quoted clearly recognize the common-law rule that presentment under certain circumstances is unnecessary and excused. And it is admitted by respondent that where, as in the case at bar, the maker refuses payment on the sole ground that he is without funds to pay, and makes no demand that the note be exhibited to him, actual exhibition of the note to him is excused. But respondent claims that, even though exhibition of the note was excused, plaintiff must have had the actual physical possession thereof, with the ability to exhibit it to Lucas had he demanded it, in order to constitute a valid demand.

The claim is highly technical and, in our opinion, without any support in logic. When, on the date of the note's maturity, Lucas and plaintiff were in Curtis' office, the note was in the same room with them, in the safe where the depository chosen by Lucas and respondent had put it, and it was in the eyes of the law in plaintiff's possession, for it cannot be disputed that Curtis was on that day plaintiff's agent, and his possession was that of his principal. If exhibition of the note had been demanded, it might have taken some time to find Mr. Curtis and to get the safe open; but there was no legal impediment to the production of the note by plaintiff any more than if plaintiff had brought it to Lucas in a strong box the key of which plaintiff had inadvertently left at his home in another town. In either case the law would excuse a reasonable delay in physically producing the note, where such production was demanded; and where, as in the instant case, no such demand was made, it would be carrying technicality to a ridiculous extreme to make the validity of plaintiff's demand turn upon the wholly irrelevant question of his ability or inability to open his agent's safe.

[3] The notice substantially informed respondent of the dishonor of the instrument, as the demand for payment, and the refusal thereof for the assigned reason of want of funds, were the two facts from which nonpresentment was excused; and the notice fully advised respondent of all the necessary facts from which he could draw the legal inference that the note had been dishonored within the meaning of the statute.

Judgment reversed, with direction to the lower court to enter judgment in favor of plaintiff for the unpaid balance of the note as appears from the agreed statement of facts.

---

(38 Cal. App. 76)

## MORAND v. HOYERDAHL et al.

(Civ. 2547.)

(District Court of Appeal, First District, California. Aug. 20, 1918.)

HOMESTEAD ⊂⊃43 — DECLARATION — SUFFICIENCY.

A declaration of a homestead under St. 1860, p. 311, made by a married person, must state that he is married, and a statement merely that he is the head of a family is insufficient.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Alice Morand against Jennie Hoyerdahl and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Mannon & Mannon, of Ukiah, for appellants. J. K. Peirsol, of Ft. Bragg, and G. E. Redwine, of Ukiah, for respondent.

LENNON, P. J. Plaintiff sought a judgment quieting her title to an undivided one-half interest in certain real property situate in Mendocino county. The defendants, Jennie Hoyerdahl and C. M. Mannon, appeared and answered, alleging that the defendant Hoyerdahl is the owner of the whole of the property described in the complaint, that defendant Mannon has a first mortgage on all of Mrs. Hoyerdahl's interest, and that the plaintiff has no right whatever in the property. At the trial the parties stipulated to the effect that if a certain declaration of homestead, recorded by one Louis Morand July 26, 1872, was sufficient in form, the title to all of the real property in question belongs to defendant Hoyerdahl subject to a mortgage to defendant Mannon, but that if the said declaration is insufficient in form the title is vested an undivided one half in plaintiff and the other half in Hoyerdahl, subject to the mortgage before mentioned. It was also stipulated by the parties that Louis Morand was married at the time of the execution of the declaration of homestead in question. The lower court held the declaration of homestead insufficient, in that

it failed to state that the declarant was married, and accordingly awarded an undivided one-half of the property to the plaintiff. From this judgment defendants appeal.

The declaration of homestead contained the statement:

"And I do hereby declare in writing that I am the head of a family, that I have selected said property as a homestead and that it is my intention to use and claim the same as a homestead, and that I am at the time of making this declaration residing with my family and the persons under my care and maintenance on the premises hereinafore described."

It is contended that the statement in the declaration of homestead, "I am the head of a family," is a sufficient compliance with the statute.

The statute in force at the time of the making and filing of the declaration reads as follows:

"Said selection shall be made by either the husband or wife or both of them, or other head of a family, declaring their intention, in writing, to claim the same as a homestead. Said declaration shall state that they or either of them, are married, or if not married, that he or she is the head of the family; that they or either of them, as the case may be, are, at the time of making such declaration, residing with their family or the person under their care and maintenance on the premises, particularly describing said premises, and that it is their intention to use and claim the same as a homestead." Stats. 1860, p. 311.

The statute names two classes of persons who may select a homestead, (1) the husband and wife or either of them, or (2) any other person who is the head of a family, and the statute makes the requirements as to the contents of the declaration of homestead depend upon which of these two classes the claimant belongs. In this connection it is to be noted that the language of the statute is in the disjunctive. To hold, as contended by appellants, that the requirement is in the alternative and that the statute should be construed to read that the declaration shall state "that they * * * are married or that he or she is the head of a family," would be to reject that portion of the statute "that they or either of them are married, or if unmarried," as surplusage. Courts are not inclined to adopt a construction of a statute which renders some part of it meaningless and of no effect. It is presumed that the Legislature in making this statute intended, as the language imports, that a married person in selecting a homestead should state in the declaration that he is married. The statement in the declaration of homestead, "I am the head of a family," is not a statement that the declarant was married, and, as there was no statement in the declaration which would tend to show that fact, the requirement of the statute has not been met.

Judgment affirmed.

We concur: BEASLY, Judge pro tem.; STURTEVANT, Judge pro tem.

(38 Cal App. 82)

## PEOPLE v. LAMATTINA. (Cr. 429.)

(District Court of Appeal, Third District, California. Aug. 20, 1918. Rehearing Denied Sept. 19, 1918. On Rehearing in Supreme Court, Oct. 18, 1918.)

1. CRIMINAL LAW ⟸977(3) — SENTENCE—TIME OF IMPOSITION.
Where defendant on conviction applied for probation, and time for passing sentence was continued for 20 days, and upon the twentieth day the defendant consented to a further continuance and his application for probation was denied, whereupon defendant moved for new trial which was denied, the court acted within its rights under Pen. Code, §§ 1191 and 1202, as to the time of pronouncing sentence.

2. CRIMINAL LAW ⟸977(3) — SENTENCE — TIME OF IMPOSITION.
Where accused was convicted of an offense and there had been one continuance to pass on application for probation and the court as required by Pen. Code, § 1202, was about to pass sentence, it was not error for the court to state that unless accused consented the sentence must be passed, and such statement did not establish coercion of accused.

3. CRIMINAL LAW ⟸977(3) — SENTENCE—TIME OF IMPOSITION.
Under Pen. Code, § 1202, as to the time of pronouncing sentence after conviction, where probation is applied for but is finally denied and a new trial thereupon regularly demanded, the court may extend the time for the pronouncement of sentence for a reasonable number of days.

4. STATUTES ⟸87 — LOCAL AND SPECIAL LAWS—TIME OF PRONOUNCING SENTENCE.
Pen. Code, § 1202, as to the time to which pronouncement of sentence may be continued, providing that if it is not so pronounced accused shall be entitled to a new trial, is not violative of Const. art. 4, § 25, as a local or special law.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Napoleon Lamattina was convicted of assault with a deadly weapon, and, from the judgment and an order denying new trial, he appeals. Affirmed. On motion for rehearing. Rehearing denied.

L. J. Schino, of Merced, and Terry W. Ward, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was charged by information filed in the superior court of Merced county by the district attorney of said county with the crime of an assault with a deadly weapon with intent to commit murder. He was convicted of the crime of assault with a deadly weapon, and prosecutes this appeal from the judgment and the order denying him a new trial.

The sole point upon which the defendant relies for a reversal is that judgment of sentence was not pronounced within the time prescribed by the statute, and that therefore, by the terms of the statute, it was the imperative duty of the trial court to grant him a new trial.

The record shows that the verdict of the jury was rendered on the 13th day of Septem-

ber, 1917, at which time the court fixed Monday, the 17th of September, as the time for pronouncing judgment. On the day last named, the defendant made an application for probation, and thereupon the court ordered that the matter of probation be referred to the probation officer of the county. The district attorney then stated that the probation officer thought he would require approximately three weeks within which to make a proper investigation and file his report, and suggested that the matter of pronouncing sentence be postponed three weeks from that day. The court thereupon continued the sentencing of the defendant to October 8, 1917, which would be 20 days after the verdict was rendered and recorded. On October 8th the probation officer reported that he was unable to make a final report at that time and asked for two weeks' additional time within which to do so. The court replied that an order continuing the time for the filing of the report of the probation officer would not be made unless the defendant himself requested it, and counsel for defendant consented to the making of an order giving the additional time requested by the probation officer. The court, however, insisted that the request should come directly from the defendant himself and thereupon asked the latter, addressing him by name, if he desired "to give Mr. Bilman, the probation officer, two weeks more to inquire into your case as to whether he will give you probation." To this question, the defendant replied, speaking through an interpreter, that he "would like to have a shorter time, to get it as soon as possible," whereupon the court said:

"Now, the question is, before I am going to grant it, it must be with his consent, or else he will take the judgment right now, to-day. Just state to him I will make an order sending him to San Quentin to-day unless he consents to it."

This declaration by the court was interpreted to the defendant, who thereupon expressed his consent to the order giving the probation officer the further time requested. The order extending the time was accordingly made and the probation officer reported, on the 22d day of October, 1917 (within the additional time granted him), against the application of the defendant for probation. On the same day, the defendant made a motion for a new trial, one of the grounds being newly discovered evidence, and asked for a continuance of ten days to enable him to file affidavits in support of his motion on said ground. The matter of hearing the motion was accordingly continued until the 5th day of November, 1917, at which time the motion for a new trial was renewed upon the additional ground "that the time for pronouncing sentence has been continued beyond the time specified by the statute." As already stated, the motion was denied and the defendant sentenced to be confined in the state prison at San Quentin. It will thus be observed that, from and after the day upon which the verdict was rendered to the day upon which the defendant was sentenced, 52 days elapsed.

Section 1191 of the Penal Code reads as follows:

"After a plea or verdict of guilty, or after a verdict against the defendant on a plea of former conviction or acquittal, or once in jeopardy, the court must appoint a time for pronouncing judgment, which must not be less than two, nor more than five days after the verdict or plea of guilty; provided, however, that the court may extend the time not more than ten days for the purpose of hearing or determining any motion for a new trial, or in arrest of judgment; and provided, further, that the court may extend the time not more than twenty days in any case where the question of probation is considered in accordance with section one thousand two hundred and three of this Code; provided, however, that upon the request of the defendant such time may be further extended not more than ninety days additional. If in the opinion of the court there is a reasonable ground for believing a defendant insane, the court may extend the time of pronouncing sentence until the question of insanity has been heard and determined, as provided in chapter six, title ten, part two, of this Code."

Section 1202 of said Code provides:

"If no sufficient cause is alleged or appears to the court at the time fixed for pronouncing judgment, as provided in section eleven hundred and ninety-one of this Code, why judgment should not be pronounced, it must thereupon be rendered; and if not rendered or pronounced within the time so fixed or to which it is continued under the provisions of section eleven hundred and ninety-one of this Code, then the defendant shall be entitled to a new trial. If the court shall refuse to hear a defendant's motion for a new trial or when made shall neglect to determine such motion within the time fixed for pronouncing judgment, or within the time to which the same is continued under the provisions of section eleven hundred and ninety-one of this Code then the defendant shall be entitled to a new trial."

As stated, the contention is that, the pronouncing of judgment of sentence having been postponed beyond the time within which section 1191 provides that sentence shall be pronounced, the defendant was entitled to favorable action by the trial court on his motion for a new trial. The following cases are cited in support of the proposition: Rankin v. Superior Court, 157 Cal. 189, 106 Pac. 718; People v. Polich, 25 Cal. App. 464, 143 Pac. 1065; People v. Okomoto, 26 Cal. App. 568, 147 Pac. 598; People v. Winner, 31 Cal. App. 352, 160 Pac. 689; People v. Gilbreth, 33 Cal. App. 23, 164 Pac. 18.

In the Rankin Case, the Supreme Court construed sections 1191 and 1202 as mandatory in their terms, and held that where sentence is not pronounced in a criminal case within the time prescribed by section 1191, and the defendant applies for a new trial on that ground, it is the imperative legal duty of the trial court to grant the application. The other cases named necessarily adopted the construction thus placed upon said sections.

Originally, section 1191 limited the time within which sentence might be imposed, where the question of probation is considered, to "not more than twenty days." The

Legislature of 1911, however, amended the section by adding thereto, after and following the language limiting the time to twenty days, the following proviso:

"Provided, however, that upon the request of the defendant such time may be further extended not more than ninety days additional."

In People v. Polich, the verdict was rendered March 27, 1914. The defendant at that time applied for probation, and for the purpose of considering that question, the court postponed the sentencing of the prisoner to April 3d, seven days after the verdict was rendered. The request for probation was denied on the last-named day and the defendant sentenced to the penitentiary. The appellate court, affirming the judgment and order, held that, as the statute plainly provides, inasmuch as probation was asked for by the defendant, the trial court pronounced judgment of sentence within due time, since under section 1191, it was within the discretion of the court, under the circumstances, to fix any time within twenty-five days after verdict rendered for the pronouncement of sentence. Rankin v. Superior Court, supra. It furthermore appeared in that case that the defendant made no demand for a new trial on the ground that sentence was pronounced beyond the time specified by the statute.

In People v. Okomoto, the verdict was rendered on September 17, 1914, and, probation having been applied for by the defendant, and the same denied, sentence was pronounced on October 14, 1914, within 25 days from the day on which the verdict was rendered. The court properly held that the sentence was pronounced within due time.

In People v. Gilbreth, the verdict was rendered on the 14th of September, 1916. The defendant thereupon applied to be admitted to probation, and, for the purpose of considering the application, the matter of sentence was by the court of its own motion continued until September 28th. On that day, the defendant requested a further continuance for further consideration of the question of probation, and the court accordingly extended the time to October 5th, on which day a further extension to October 10th was made, at the request of the defendant. On the last-named day, the court, of its own volition and in the absence of a request from or the consent of the defendant, extended the time for pronouncing sentence to October 17th, thus making in all 33 days from the time the verdict was rendered to the time when sentence was pronounced. The defendant moved for a new trial on the ground, among others, that judgment of sentence was pronounced on a day beyond that provided by the statute against his consent. The appellate court sustained his appeal on that ground and reversed the case.

In People v. Boling, 32 Cal. App. 42, 161 Pac. 1169, the trial court postponed the matter of pronouncing sentence from time to time until 116 days elapsed between the date of the verdict and the day upon which the defendant was sentenced, and denied the latter's motion for a new trial made upon the ground that the matter of the pronouncement of sentence had been postponed to a day beyond the time limited by section 1191 for that act to be performed. Obviously, under the circumstances, there was open to the appellate court no other course than to reverse the judgment and order, which was done. This would necessarily have been the result even if the defendant had consented to the postponement to the day upon which the sentence was pronounced, since it appears that the sentence was pronounced one day beyond the 25 and 90 days which, added together, constitute the utmost limit of time to which the court is restricted for the performance of that duty. People v. Winner, supra.

In People v. Winner, the verdict was rendered on March 16, 1916. On the 20th of said month, the defendant presented a motion for a new trial. Seven days thereafter—on the 27th—the court, by consent of counsel on both sides, ordered the case submitted on briefs, to be presented to the court "within five, five and two days." On April 4th, more than 15 days after the defendant's conviction by the jury, the court made an order denying his motion for a new trial. The defendant thereupon made a motion for a new trial upon the ground that more than 15 days had elapsed since the date of the rendition of the verdict, and upon the same ground objected to the pronouncement of judgment of sentence upon the defendant. This motion was denied. There was no question of probation presented to the court, and therefore the 20-day limitation provision of section 1191 had no application. Obviously, the time within which sentence should have been pronounced had passed when that act was performed by the trial court, and, of course, the defendant was entitled to be awarded a new trial.

[1] In the present case the situation is wholly different from those considered in the above cases. Here the trial court acted within its legal rights in postponing the matter of the imposition of sentence. In the first instance, as has been shown, the time to which the matter was continued is expressly allowed by the statute, the question of probation having been presented for consideration, and, in the second instance, the continuance was by the express consent of the defendant himself, the two postponements covering a period less than that to which the matter might have been postponed with the consent of the defendant.

[2] It is argued, however, that the consent of the defendant to the postponement beyond the 25 days was not freely given but coerced by a threat by the court that the defendant would be sentenced the day that the proposition for a further continuance was presented if he did not himself consent to the postponement. This position cannot justly be

maintained. The court, having the law in view and conceiving that under its provisions the postponement of the pronouncement of sentence without the express assent of the prisoner himself would require the granting of a new trial on that ground, if it were demanded, merely meant to say, and, indeed, all that its remarks may justly be interpreted to mean was, that, unless the defendant consented to a further continuance for the purpose of giving the probation officer further opportunity to investigate and report on the question of probation, it would be its mandatory duty to pronounce judgment of sentence that day. In other words, the statement by the court was only equivalent to saying: "If the defendant himself does not consent to a further postponement of sentence, it will be the duty of the court to sentence him now." Of course, the court was compelled to pass upon the matter and entitled to give its reasons for the ruling, and this is really all that the remarks of the court amounted to.

It is true the defendant expressed the desire that the time be shortened as much as possible, but he finally consented to the time requested by the probation officer, and, perhaps, if not acting with perfect freedom in doing so, was entirely influenced to give his consent by his attorney's ready approval, expressed in court, of the request for a further continuance.

[3] But there arises the question whether the court lost the right to pronounce judgment of sentence on the 5th day of November, that day being the twelfth day after the date of the order denying probation. Of course, when that order was made, the matter of probation ceased to be a matter before the court. That question, in other words, was then eliminated from the case.

The statute provides, as will be observed, that sentence must be pronounced no later than five days after the rendition of the verdict unless there is a motion submitted for a new trial, in which case the court, for the purpose of hearing and determining such motion, may extend the time not more than ten days. By this we understand the section to mean ten days in addition to the five days, otherwise the language would undoubtedly have been, "extend the time to not more than ten days." The section, however, further provides for further extensions of time where probation is applied for. In this case, the court could not sentence the defendant within the five or fifteen days after verdict because probation was applied for. We therefore conclude that what the statute means is this: That, where probation is applied for, and the matter of sentence is for that reason postponed by the court either upon its own motion or upon the consent of the defendant, and probation is finally denied and a new trial thereupon regularly demanded, the court, then obviously being without the power to impose sentence within either five or fifteen days after verdict, may, with the consent of the defendant, extend the time for the pronouncement of sentence for the purpose of considering the motion for a new trial for a reasonable number of days after the date of the denial of probation, if the exigencies of the proceedings on the motion called for it. This appears to be a just construction of the statute. Indeed, it is the only construction to be given unless we are required to hold that, where a motion for a new trial has been made after probation has been denied upon the consideration of that question beyond the five days limitation, the ten "additional days" within which the court may pronounce sentence where a new trial is demanded begin to run from the date of the denial of probation. But the section does not so provide. The five and ten days' limitation after verdict, having long before gone by or expired, can have no application to that stage of the proceeding where probation has been denied and a new trial thereupon regularly demanded. Therefore it must be held to be within the general spirit of section 1191 that the court has the right in such circumstances to postpone the pronouncement of judgment of sentence, if necessary to do so for a proper and just consideration and disposition of the motion, for any reasonable time after the denial of probation. Of course, it is no reply to say that it is contemplated by the section that the court should pronounce judgment immediately upon making the order denying probation. Such action would be subject to the objection that it might deprive the defendant of a fair and just consideration and determination by the court of his motion for a new trial, and, besides, such a course would come no nearer in legal effect to measuring up to the requirement that, in case of a new trial being demanded and probation not asked for, the court shall dispose of the motion not later than fifteen days after verdict is rendered, than if the matter of pronouncement of judgment were postponed for ten or fifteen days after the denial of probation.

We conclude that the trial court did not transcend its authority or, in other words, lose its right to pass sentence upon the defendant by postponing, under the indicated circumstances, the matter of the pronouncement of judgment of sentence to November 5th.

[4] The Attorney General earnestly contends that section 1202 of the Penal Code is violative of article 4, § 25, of the Constitution. That section of the organic law specifically designates a number of cases as to which local or special legislation is prohibited, and the third subdivision thereof declares against the passage of special laws "regulating the practice of courts of justice." It is this last provision with which it is claimed section 1202 is in conflict. This

proposition, it seems, has never been presented to the Supreme or other appellate courts, and therefore has never been directly passed upon by those courts, although, as above shown, many cases involving said section have been considered and decided by them; and, in view of the conclusion at which we have arrived upon the only point made by the appellant, it is not deemed absolutely necessary to consider it here. We may, with no impropriety, say, however, that, while the argument of the Attorney General in support of the point is vigorous, we have not thus been impressed with the conviction that his position is sound. We think that Deyoe v. Superior Court, 140 Cal. 476, 74 Pac. 28, 98 Am. St. Rep. 73, plainly negatives the contention of the Attorney General upon the proposition. In that case, Chief Justice Angellotti, in clear language and with what we esteem to be invincible logic, conclusively shows that it does not necessarily follow from the fact that a law is confined in its operation to a certain class of individuals that it involves special legislation within the contemplation of the provision of the Constitution referred to. It is there held, as by the decisions it has uniformly been held, that, if the individuals to whom a law is applicable constitute a class which requires legislation peculiar to itself in the matter covered by the law, then it is a general law within the meaning of that phrase as it is used in the Constitution. Of course, the class upon which the law is intended exclusively to apply must be separated from all other classes of individuals by some natural or intrinsic or constitutional distinction of such a nature as reasonably to indicate the necessity or propriety of legislation restricted to that class. Rode v. Siebe, 119 Cal. 518, 51 Pac. 869, 39 L. R. A. 342; Pasadena v. Stimson, 91 Cal. 238, 251, 27 Pac. 604; Darcy v. San Jose, 104 Cal. 642, 38 Pac. 500.

We hardly believe that it will be denied that the class of individuals to whom only section 1202 applies is separated from all other classes of parties to actions by a positive and natural or inherent distinction. Indeed, the section could not in the very nature of the case be applied to parties to civil actions, but of necessity can operate only upon that class of individuals who are charged with and convicted of violating the criminal law. Civil and criminal actions are as different and distinct as are manhood and boyhood and the individuals affected by or coming within either of those classes of actions are equally as different and distinct. Obviously, there can be no doubt that the Legislature has the right under the Constitution to designate the occasions, if they be reasonable, upon which or any one of which a person convicted of a crime by a jury may be entitled to a new trial, and it will not be contended that a certain specified delay by the trial court in pronouncing judgment of sentence after the verdict is rendered shall constitute a ground for a new trial is an unreasonable provision in that regard. Nor (as seems to be the contention) does it constitute a valid reason for holding section 1202 invalid merely because the ground for a new trial therein provided for is not to be found in the section containing the other and long-established grounds for a new trial in criminal cases.

But, as above stated, the Deyoe Case, supra, is, in our opinion, an authority clearly against the position of the Attorney General upon the point under consideration. Indeed, it strikes us that the case here is stronger against the claim of the invalidity of the legislation involved on the ground that it is special within the meaning of the constitutional inhibition than is the Deyoe Case, for the latter case upholds a statute which applies only to a single civil action. It is there held that the statute authorizing interlocutory decrees in divorce actions, which are, of course, civil as contradistinguished from criminal actions, does not involve special legislation contrary to article 4, § 25, subd. 3, of the Constitution, notwithstanding that such decrees are generally not provided for in other actions belonging to the same general class (civil) as divorce actions.

However, the judgment and the order must be affirmed for the reasons first above given, and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Motion for Rehearing.

In petitioning for a rehearing of this case, counsel for the defendant declares in his petition that in our former opinion we failed to consider and pass upon the point—the principal and controlling point in the case—that where judgment is not pronounced in a criminal case within the time limited by section 1191 of the Penal Code the defendant is entitled to a new trial without regard to whether he has or has not consented to the delay. It is further stated in the petition: "We again point out that in the case at bar a motion for a new trial was made which was not determined within 15 days after verdict of guilty."

We thought that in our original opinion both the above-stated propositions were quite fully considered and a decision thereof arrived at and announced. In the hope of making ourselves clearer to counsel, however, we will here repeat what therein we held, as we still hold, that, under the ruling in the case of Rankin v. Superior Court, 157 Cal. 189, 106 Pac. 718, probation having been applied for in this case by the defendant, the trial court was authorized to pronounce judgment of sentence at any time within 25 days after the date of the verdict, without the consent to a postponement by the defendant, said number of days consisting of the 5 days within which time section 1191 provides that the court must impose sentence, where probation is not asked for, and the 20 days additional time to which the court, in the exercise of its discretion, may postpone the pronouncement of sentence, where probation is applied for. We

further held that, according to the construction given section 1191 of said Code in the Rankin Case, the language thereof, "not less than two nor more than five days after the verdict or plea of guilty," means that the time so allowed for pronouncing judgment begins to run, not on the day the verdict is rendered or plea entered, but with the day immediately succeeding that upon which the verdict has been rendered or the plea of guilty entered. Under this construction and the facts of this case, the court did not of its own motion extend the time beyond the 25 days within which, under the circumstances, it was authorized to postpone the matter of sentence without the consent of the defendant. The further postponement, as we show in our original opinion, was, according to the record, with the consent of the defendant, and did not extend beyond the time to which the defendant is himself authorized by the statute to give legal consent.

As to the second point above suggested, we have only to say that in our former opinion we disposed of the proposition involved therein to our satisfaction. It would seem to be unnecessary to remark that, under the circumstances of this case, it obviously became, by reason of the application for probation, absolutely impossible for the court to have determined or disposed of the motion for a new trial within 15 days after the date of the verdict. If it were necessary to hold that that provision was in all cases or under all circumstances to be strictly followed, then the whole section would involve the very exemplification of absurdity. So to hold would require it to be held that the question of probation would either have to be considered after a motion for a new trial was determined or not considered at all. Of course, the statute does not contemplate such a situation. The defendant, under the statute, is not only entitled to apply for probation and have that question determined before his motion for a new trial is heard and determined, but is entitled to move for a new trial, if he so chooses, and to have the motion determined, after probation is denied him. Section 1191 prescribes no particular time for disposing of such a motion after probation is denied, and we held in our original opinion, as we now hold, that in that case the court may take any reasonably necessary time for considering and disposing of the motion, and that in this case the time taken for such purpose did not involve an unreasonable delay. Rehearing denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Rehearing in Supreme Court.

PER CURIAM. In denying the application for a hearing in this court we are not to be understood as holding that the pronouncing of judgment may be postponed beyond the lapse of the time prescribed in section 1191, Penal Code, as amended in 1911. The opinion sufficiently shows that it was not so postponed in this case.

The application for a hearing in this court after decision in the District Court of Appeal of the Third Appellate District is denied.

38 Cal. App. 100

## PEOPLE v. GERMINO. (Cr. 801.)

(District Court of Appeal, First District, California. Aug. 28, 1918.)

1. RAPE ⊂=35(4)—TIME OF OFFENSE—VARIANCE.

In prosecution for statutory rape, state having charged an act of April 9th as the one on which it would rely, evidence *held* to sustain conviction, though prosecutrix almost throughout her testimony referred to the act as occurring on April 11th.

2. CRIMINAL LAW ⊂=826—INSTRUCTION—REQUEST—TIME.

It is insufficient, during trial of a case, when the court is ruling on the admissibility of evidence, to request in a general way that the court then instruct the jury on any particular phase of the law.

3. CRIMINAL LAW ⊂=828—INSTRUCTION—WRITTEN REQUEST.

If defendant, charged with statutory rape, desired that the jury be instructed, limiting the scope of the testimony as to acts other than the one forming the basis of the charge, he should have submitted to the trial court a written instruction.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Louis Germino was convicted of statutory rape, and, from the judgment and an order denying his motion for new trial, he appeals. Affirmed.

Harry McKee, of Fresno, and Vincent Surr, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. This is an appeal by defendant from a judgment of conviction of statutory rape, and from an order denying his motion for a new trial.

During the trial the prosecutrix, without objection, was permitted to testify as to the occurrence of five or six other instances of sexual intercourse between her and the defendant than the one upon which the charge was founded; and the defendant's principal contention upon this appeal is that his rights were substantially prejudiced by reason of the court's refusal to compel the prosecuting officer to elect upon which of the several acts he would rely. The simple answer to this contention is that such officer did make the election required, selecting for that purpose an act occurring on the 9th day of April, 1917.

[1] Granting that, the state having charged the act of that date as the one upon which it would rely for a conviction, it must prove that act, we think the evidence sustains the conviction and that it sufficiently proves the charge as of that date. It is true that almost throughout her testimony the prosecutrix, when detailing the circumstances of this act, referred to it as occurring on the 11th of April; but later and on cross-examination it was made to appear that no act of intercourse between her and the defend-

ant occurred on that date, and that her testimony in fact related to April 9th.

[2, 3] Appellant complains that the court gave no instruction limiting the scope of the testimony as to acts other than the one forming the basis of the charge; but the defendant did not offer one of this character, and, of course, if he desired that the court instruct the jury upon that particular point it was his right and duty to propose such an instruction. It is not sufficient during the trial of a case, and at a time when the court is ruling upon the admissibility of evidence, to request in a general way that the court then instruct the jury upon any particular phase of the law. If he desired that the jury be instructed upon the point in question, he should have submitted to the court a specific written instruction embodying it so that it might be given with the other instructions of the court.

For the reasons given, the rights of the defendant were not prejudicially affected by the matters complained of; and the judgment and order are affirmed.

---

38 Cal. App. 109

## BARBER ASPHALT PAVING CO. v. ABRAHAMSON et al. (Civ. 2429.)

(District Court of Appeal, First District, California. Aug. 28, 1918. Rehearing Denied by Supreme Court Oct. 23, 1918.)

1. MUNICIPAL CORPORATIONS ⟹414(1)—PUBLIC IMPROVEMENTS—LIABILITY OF PROPERTY OWNERS.
Under Vrooman Act, § 20, relating to street improvements, once a street has been accepted, it must thereafter be both repaired and improved by the city, so that subsequently property owners cannot be assessed for constructing therein a new kind of pavement, gutter, or curb.

2. MUNICIPAL CORPORATIONS ⟹414(1)—PUBLIC IMPROVEMENT—ACCEPTANCE.
An ordinance whereby a city accepted a roadway was not in contravention of Vrooman Act, § 20, because it excepts therefrom a portion required by law to be kept in repair by a railroad company, when read in connection with Civ. Code, § 498.

3. MUNICIPAL CORPORATIONS ⟹414(1)—PUBLIC IMPROVEMENTS — ACCEPTANCE—"ROADWAY."
Under Vrooman Act, § 20, relating to street improvements, curb is to be included within the term "roadway," so that acceptance of roadway includes the curbing.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Roadway.]

4. EVIDENCE ⟹318(3) — HEARSAY—MAYOR'S VETO—PUBLIC IMPROVEMENTS—ACCEPTANCE —CONDITION.
Where a roadway has been accepted by the city under Vrooman Act, § 20, relating to street improvements, the mayor's veto of the ordinance of acceptance and the reasons given therefor are not admissible in a subsequent proceeding to repair such highway, as showing that the street was not in good condition when accepted; such evidence being hearsay.

5. MUNICIPAL CORPORATIONS ⟹414(1)—PUBLIC IMPROVEMENTS—JURISDICTION OF COUNCIL.
Where a city had no authority to lay down at the expense of property owners a new street in place of one accepted under Vrooman Act, § 20, the condition of the street at the time of the adoption of resolution of intention was immaterial to the jurisdiction of the council to order the construction of the new street.

6. MUNICIPAL CORPORATIONS ⟹568(2)—PUBLIC IMPROVEMENTS — EVIDENCE — JURISDICTION OF COUNCIL.
In a proceeding to enforce an assessment for improving a street which had already been accepted by the city under Vrooman Act, § 20, an offer of testimony *held* merely to amount to an offer to show the condition of the original street as accepted, and not sufficient to show the lack of jurisdiction in the council to pass the ordinance of acceptance.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by the Barber Asphalt Paving Company against Henry Abrahamson and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Snook & Church, of Oakland (J. A. Cooper, of San Francisco, of counsel), for appellant. Mortimer Smith, of Oakland (Chapman & Trefethen, of Oakland, of counsel), for respondents.

BEASLY, Judge pro tem. In this case the appellant asserts the validity of the proceedings taken by the officials of the city of Oakland for the improvement of San Pablo avenue, and which were held invalid by the Supreme Court in Barber Asphalt Co. v. Jurgens, 170 Cal. 273, 149 Pac. 560. Most, if not all, of the questions presented in that case and there decided are raised here; the reason given by counsel for appellant for so doing being that new facts developed at the trial of this case, which, regardless of the rules laid down in the Jurgens Case, show the proceedings to have been in fact valid. We think, however, that the record before us does not sustain this contention, although the questions raised in the trial court were presented apparently in somewhat different form than that in which they arose in the decided case.

The proceedings were conducted under the Vrooman Act (St. 1885, p. 160) as it existed before the statute of March 21, 1907 (St. 1907, p. 806), when the resolution of intention to make the improvement now under consideration was adopted by the council. At the trial of this case the plaintiff offered evidence to prove that the contract made and entered into in this proceeding was not for repairs to the street, but was for the construction of an entirely different kind of pavement, curb, and gutter, and bases thereon the contention that the work described in the complaint did not constitute repairing or improving in the sense in which those words were employed in the Vrooman Act (section 20), but was new and original work.

[1] At the time this proceeding was taken, section 20 of that act provided that a street which had been accepted under that section should thereafter be kept in repair and improved by the municipality, the expense thereof to be paid out of a fund to be appropriated by the council for that purpose. The street involved here had been so accepted; and it was held in the Jurgens Case that this proceeding to reimprove the street was invalid, because the street had been previously improved and accepted under section 20. It will be noted that under the terms of this section, once a street has been accepted, it must thereafter be both repaired and improved by the city; from which we think it follows that the city council had no authority in the proceeding giving rise to this action to assess the property owners to pay the cost of improving a street by constructing therein a new kind of pavement, curb, or gutter, any more than it had authority to assess the property for the repair of the street.

[2] Counsel for appellant also contend that the ordinance by which the city council of Oakland accepted the roadway of San Pablo avenue excepted therefrom the portion thereof required by law to be kept in repair by a company having railroad tracks thereon, and that this was in direct contravention of the express provisions of section 20 of the Vrooman Act. But it was held in the Jurgens Case that that section should be read in connection with section 498 of the Civil Code, and that the ordinance was not rendered invalid by the inclusion therein of the exception pointed out.

[3] Counsel also contend that this last-mentioned ordinance was invalid for the further reason that it did not, as they claim, accept the whole of the street, including the curbing. It is true that the ordinance did not specifically include curbing; but the point was presented in the Jurgens Case, and it was there held that section 20 of the Vrooman Act was drawn with an intention of specifying curbing as a part of the roadway, and that curbing, therefore, for the purposes of the act, is included within the definition of the term "roadway," and that acceptance of a roadway in compliance with that section includes the curbing. All these points, and some others argued by counsel, were decided advisedly by the Supreme Court in the Jurgens Case, and there is nothing in the case at bar which presents the legal questions in any different light than that in which they appeared to the Supreme Court in that case.

[4] Counsel, however, offered certain evidence, the exclusion of which by the trial court is here specified as error. For example, to show that the street was not in good condition throughout, as section 20 of the Vrooman Act provided it must be before it could be accepted, counsel offered the mayor's veto of the ordinance of acceptance, in which that official gave his reasons for his veto, and from which it appears that in his opinion the street as improved did not come up to that degree of durability which business streets should possess before being finally accepted. Manifestly the mayor's reasons for vetoing this ordinance are not evidence in this case of the condition of the street at the time when the veto was presented. The mayor was not on the witness stand; he could not be subjected to cross-examination upon the veto; and while the veto itself, as a part of the proceedings, if material, could have been received in evidence without error, nevertheless the statements therein made by the mayor as to his reasons for such action were not evidence in this action of the facts stated in the veto. They might be correct, and they might be untrue. They were hearsay in this case.

In order to prove the condition of San Pablo avenue at the time the improvement was ordered under the contract and proceedings here involved, Frank K. Mott, who was mayor of the city of Oakland at the time these proceedings were instituted, was called by the plaintiff and asked to describe the condition of San Pablo avenue at the point of the improvement on March 31, 1907, the date of the adoption of the resolution of intention upon which these proceedings were based. Counsel also, in connection with this evidence, offered to show the specific condition of San Pablo avenue at that time, namely, that the street had been improved prior to that time with redwood curbs and macadam pavement; that it had not been paved with asphalt, the kind of pavement contemplated by this proceeding; that no concrete curbs nor rock gutters had been constructed thereon—all for the purpose of showing that at the time of the adoption of the resolution of intention, and at the time the contract was entered into for this work, the work did not constitute repairs or improvement, as contemplated by the provisions of section 20 of the Vrooman Act, but that it consisted of an entirely new improvement, with an entirely different character of curbs, gutters, and pavement than that which existed upon the street at the time the resolution of intention was adopted.

[5] As we have seen, it must be held that, because the street had been improved and accepted under this section of the Vrooman Act as it existed at the time of the initiation of this proceeding, the city had no authority to lay down at the expense of the property owners a new street, any more than it had authority to repair the old street by patching it up. The condition of the street at the time of the adoption of the resolution of intention was therefore immaterial to the jurisdiction of the council to order the construction of a new roadway thereon.

In order to show the actual condition of San Pablo avenue at the time of the adoption of the Ordinance No. 1071 by which it was accepted, the plaintiff called J. Ross Morgan and asked him to describe the condition of

the avenue at that time. Presumably this offer, although not specific, was for the purpose of showing that the street was either not in good condition throughout, or that some other jurisdictional prerequisite to the adoption of the accepting ordinance was lacking. In connection with this offer, and in order to understand it, the proceedings upon the examination of J. W. Tompkins, another witness called immediately succeeding the sustaining by the court of an objection to the evidence offered by the witness Morgan, must be taken into consideration. Tompkins was the city marshal, superintendent of streets, and tax collector at the time of the acceptance of the street. He was asked if he knew the condition of San Pablo avenue at the point of the improvement at the time the accepting ordinance was adopted. This question was objected to, and the court sustained the objection. Counsel for plaintiff then offered the same evidence which he had sought to introduce by Mayor Mott and Mr. Morgan. Thereupon the following proceedings took place:

The Court: You only asked two or three questions of Mr. Morgan.

Mr. White: I will ask another one.

The Court: This question—you have simply fixed knowledge. Now, go ahead from that. That is all you have fixed.

Mr. White: We offer to show by this witness in the first place the condition of San Pablo avenue on the 4th of February, 1889, to the effect that it had been constructed with redwood curbs, and that it had only been partially or very poorly macadamized through a portion of the roadway.

The Court: In other words, you want to impeach the act of the council in accepting it?

Mr. White: Not necessarily impeach the act of the council, but to show that they had no jurisdiction in doing the things they attempted to do, and also to show that the roadway was improved with an entirely different kind and character of curb, gutters, and pavement from the kind of curb, gutters, and pavement that was required under this contract with the Barber Asphalt Paving Company in 1907. And in view of that offer I now ask Mr. Tompkins what was the condition of the roadway in San Pablo avenue between Twentieth and Thirty-Sixth streets on February 4, 1889?

Mr. Smith: I object to that as incompetent, irrelevant, and immaterial.

The Court: The objection may be sustained. (To which ruling the plaintiff then and there excepted.)

Mr. Cooper: The court holds the ruling that no evidence is admissible, no matter what we offer, to show that the city council, at the time they passed the ordinance accepting San Pablo avenue, did not have jurisdiction, or that the fact did not exist which they recited in the ordinance did exist. Your honor holds that we cannot impeach that by parol testimony?

The Court: That is my view of it, Judge, offhand. You cannot show that as an impeaching proposition; their act, so far as that is concerned, so far as this case is concerned, was binding; and it is beyond attack at this late day in a subsequent action, to attack it by parol testimony.

Mr. Cooper: I am not questioning your honor's view, excepting I want to know.

The Court: That is my view of it.

[6] Construing the offer of evidence here in connection with the testimony of Tompkins as the broadest offer which counsel made—and we cannot, in fairness to the trial judge and the parties defendant in this case, otherwise construe it—the trial court was right in sustaining the objection, because under the rule of the Jurgens Case this evidence as offered was not sufficient to "impeach" the accepting ordinance. All that was offered was to show that the roadway was improved with a different kind of curb, gutter, and pavement from that contemplated in the resolution of intention in this case. There was no specific thing in the offer which would have shown a lack of jurisdiction in the council to pass the accepting ordinance, the point at which the evidence was aimed. We cannot broaden counsel's offer. The trial court had the right to assume that counsel was making his statement as inclusive and specific as the facts of his case justified.

It is not necessary, however, to go to the extent of holding that no circumstance could have been shown by parol, if it had existed, which would have shown want of jurisdiction to accept the street. It is sufficient that the offer, as made, was not of facts which, if true, would have done so. As the offer in the case of the witnesses Mott and Morgan was quite general, and as the offer as to the witness Tompkins was so closely connected with it and to the same point, we think that the trial court must have assumed that the plaintiff had no evidence to offer stronger than that sought from the latter witness, and cannot be said to have erred in its ruling on this point.

There is nothing in the case of Ransome-Crummey Co. v. Bennett (Sup.) 171 Pac. 304, at variance with the foregoing views. The remainder of the briefs and argument of counsel is taken up with objections made by respondent's attorneys to the validity of the proceeding involved herein; and, in view of the disposition of the other points presented, the decision of those questions becomes unnecessary.

The judgment and order are affirmed.

We concur: KERRIGAN, J.; ZOOK, Judge pro tem.

179 Cal. 157

## FAIRBAIRN v. AMERICAN RIVER ELECTRIC CO. (Sac. 2522.)

(Supreme Court of California. Oct. 7, 1918. Rehearing Denied Nov. 4, 1918.)

1. ELECTRICITY ⟸14(2) — TRANSMISSION OF CURRENT—CARE REQUIRED.

Companies engaged in carrying electricity along the public highway must exercise such care as a careful and prudent person, having in view the dangers to be avoided and likelihood of injury, would exercise under the circumstances, in placing their wires so as not to interfere with traffic.

2. ELECTRICITY ⟸14(2) — TRANSMISSION OF CURRENT—HEIGHT OF WIRES.

An electric company, carrying a high tension wire strung over a public highway, must place it high enough to allow the passage of hay-stacking derricks underneath, where such derricks are properly and frequently moved over the highways in the district.

3. ELECTRICITY ⟸13 — TRANSMISSION OF CURRENT—DEFENSES.

That telephone and high power wires are strung along highways at a less height than those of an electric company does not constitute protection to such company in the case of injury occurring by coming in contact with its wires.

4. ELECTRICITY ⟸19(12) — PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE.

Where a person was injured by receiving a high power electric current through a hay-stacking derrick, brought into close proximity to electric wires from which the current arcked to the derrick, the question of contributory negligence was for the jury.

5. ELECTRICITY ⟸19(13) — PERSONAL INJURY—INSTRUCTIONS.

In an action for injuries from shock from a high power wire coming into proximity with a derrick boom moved across a highway, it was not error to modify instruction that defendant had a right to maintain a pole line along a road by adding to it that this was true if it exercised a high degree of care, as had been explained in other instructions.

Department 2. Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by John Fairbairn by J. F. Fairbairn, guardian ad litem, against the American River Electric Company. From a judgment for plaintiff, and a denial of a new trial, defendant appeals. Affirmed.

See, also, 170 Cal. 115, 148 Pac. 788.

L. A. Redman and Chickering & Gregory, all of San Francisco, Devlin & Devlin, of Sacramento, and Redman & Alexander, of San Francisco, for appellant. Stanley Moore, of San Francisco, and Gibson & Woolner, of Oakland, for respondent.

LORIGAN, J. In this action for damages for personal injuries alleged to have occurred through the negligence of the defendant, plaintiff had a verdict and judgment for $25,000 and from that judgment and an order denying a new trial the defendant appeals.

The defendant in 1906 constructed a power line along the public highways through the county of Sacramento, from its power plant in the mountains near Placerville to the city of Stockton, for the purpose of distributing electricity for public use, and in running along the side of the Middle Jackson road in Sacramento county, in the vicinity of what is known as Walsh station, the wires of the defendant crossed a lane connecting the farm of a Mr. Humphrey with the said Middle Jackson road at a height of 27 feet 8¾ inches above the level of the ground. On July 7, 1910, plaintiff, with his father and brother and the hired man, started to haul a hay-stacking derrick, known as the Schmeiser derrick, from the farm of Mr. Humphrey along the lane to the Middle Jackson road. This derrick measured from the ground to the top of its boom 30 feet 4 inches, and was of the stationary type; that is, the boom could not be lowered or taken down for transportation—it had to be moved with the boom erect. A team was hitched to the derrick, and the party proceeded down the lane to the Middle Jackson road. When they were about to pass into the road they looked at the wires which crossed the lane along its side to see whether the derrick would pass freely under them, and reached the conclusion that the top of the boom was a little lower than the power wires. It was suggested, how-

ever, by one of the parties moving it, that if the hind wheel of the derrick truck was removed this would lower the boom about 2 feet and allow free passage under the wires. The wheel was accordingly removed, and the derrick moved forward a couple of feet by hand; the horses having been unhitched from it. When so moved forward, but before it was moved under the wires, plaintiff with his father went to the other side of the Middle Jackson road to be assured whether the boom, now dropped by the removal of the wheel, would clear the wires, and, both being of the opinion that it would, they with the others proceeded to run the derrick forward, pulling on an iron cable attached to the boom, so as to swing it clear under the wires. As the boom was being pulled under the first wire (there were three), and without actual contact with any of them, the electricity arcked through the intervening space and passed down the boom cable, which the plaintiff had hold of, into his body, inflicting injuries which necessitated the amputation of his left arm and both legs below the knees.

The claim of the plaintiff in the action was that his injuries were occasioned through the negligence of the defendant in stringing its wires along the highway so low as to interfere with the free passage of the derrick under them. In its answer defendant denied any negligence on its part, and alleged that the injuries of the plaintiff were caused through his own negligence. This is the second time this case is here on appeal. It first came here for consideration in 1915, on an appeal by defendant from a verdict and judgment then also entered against it for $25,000, and the judgment was reversed, on the ground that the plaintiff had failed to prove any negligence on the part of the defendant in the construction, maintenance, and operation of its power line. Fairbairn v. American River Electric Co., 170 Cal. 115, 148 Pac. 788. We shall refer to this ground for reversal more particularly later.

[1] The law with reference to companies engaged in carrying electricity along the public highway is well settled, and is set forth at considerable length in the opinion on the former appeal. For present purposes we may content ourselves with stating the general rule on the subject as there declared, which is that:

"Owing to the highly destructive power of electricity when carried in quantities sufficient for power purposes, and to the fact that it is not visible to the eye or apparent to the other senses, a person or company maintaining an electric power transmission line along, or over a public or private road, is required to exercise a high degree of care in placing the wires, so as not to interfere with traffic on the ordinary highway, and so as to avoid contact with and injury to any person or object which may reasonably be expected to pass under the wires. * * * The standard to be attained is that of ordinary and reasonable care, and this means such care as a reasonably careful and prudent person, having in view the dangers to be avoided and the likelihood of injury therefrom, would exercise, under the circumstances, in order to prevent injury. Where death may be caused by an agency lawfully in use, ordinary care requires that every means known, or that with reasonable inquiry would be known, must be used to prevent it."

The claim of plaintiff in this action is that defendant, in stringing its wires along the Middle Jackson road and across the Humphrey lane, violated this rule; that it was bound to take notice of farming conditions and customs in the country through which its wires were being placed, and to provide against interfering with them; that at the time defendant constructed its power line there were very many derricks exceeding in height 27 feet 8¾ inches, the height at which the power lines of defendant were strung, used upon farms in stacking and bailing hay and threshing, which every season were being conveyed over the highways and the lanes or roads leading therefrom and upon the farms about for use thereon; that it was the duty of the defendant to ascertain this fact, and to have erected its wires high enough so as to permit free and safe passage of said derricks under them and to prevent danger. There can be no question about the soundness of this contention of plaintiff, and the principal point arising on this appeal is whether the evidence shows a use, upon farms in the locality in which the wires of defendant were strung and the accident happened of derricks exceeding in height the height of its wires, and the custom of moving them at certain seasons along and over the highways and lanes of the county and from farm to farm. The reversal on the former appeal was ordered because the evidence then given on the part of plaintiffs was not deemed sufficient to prove this fact. On the former trial plaintiff appears to have limited himself to proving the use only in the vicinity of Walsh station of the Schmeiser derrick of the stationary pattern similar to the one he was moving when the accident happened, and it further appeared from the evidence that only two such had been sold in the county and that the style had gone out of manufacture, and while it was also proven that homemade stationary derricks were in use at the time the power line was constructed, it was not shown that they were as high as the wires of the defendant. On the second trial, however, plaintiff introduced evidence showing the use quite extensively in Sacramento county when the power line of the defendant was constructed of both patented and homemade derricks 28 feet and over in height which were used in stacking and baling hay and threshing, and their movement over the highways and over the lanes and roads to and from farms. It is, of course, of no moment what the style of derricks or stackers may have been—whether the Schmeiser or other style or homemade derricks—it is enough to have required defend-

ant to place its wires for the passage under of derricks of whatever make at a greater height than that at which they were strung, if derricks taller than the height of said wires were usually used in the county at the time its power line was constructed, and were usually moved over and across the highways, roads, and lanes of the county.

On this trial it was shown by witnesses produced on behalf of plaintiff that there were in use prior to 1906, when the power line of defendant was constructed, in the region where the accident in question happened, stacking derricks of from 28 to 30 feet in height. The two main types of these derricks were the Jackson Eclipse, and later the Schmeiser derricks, and there were also homemade derricks. The testimony of the witnesses referred to is substantially as follows:

L. Carrington, a salesman for the Sacramento branch of Baker & Hamilton from 1896 to 1908, testified that their firm sold the Jackson Eclipse haystacker during that period throughout the Sacramento valley, and that it was one of the most common stackers in use. He identified this stacker in a catalogue of Baker & Hamilton issued in 1902, which showed that its uprights above the axle of the truck on which they rested were 28 feet 8 inches in height. G. W. Hausman, a field man, employed by the same branch of Baker & Hamilton from March, 1901, to March, 1914, testified that in the year 1906, when the power line of defendant was constructed, the Jackson Eclipse stacker was the most common stacker in use in Sacramento county; that this stacker was drawn by horses and moved upright; and that he had never seen one taken down. F. S. Hoffman, an employé of the Byron Jackson Machine Works, the original manufacturer of this type of derricks, also testified that when these stackers were moved from place to place they remained upright.

H. D. Millard, a retired farmer, who had been engaged in farming for many years in that portion of the county of Sacramento near Walsh station, testified that he had used all kinds of stackers; that he used the Jackson stackers on farms where he did threshing in the neighborhood of where the injury occurred as much as 30 years ago; that he also owned a Cooper derrick 31½ feet high, and that he had been accustomed to move such stackers and derricks from place to place along nearly every road in the county in that vicinity, and so used them up to 1908. A. Joseph, a farmer in the Lisbon district of Yolo county, testified that he bought and used a Jackson Eclipse stacker as early as 1903; that he was accustomed to transport it from place to place along the county roads; that he owned two places about 30 miles from where the accident in question occurred, and was accustomed to haul his stacker from one of his ranches to the other along the public highways. O. A. King, a foreman of a ranch near Freeport, in Sacramento county, testified that when he went into the employ of the owners of the ranch in 1910 he found one of the Jackson stackers then in use upon the property, and that it had been in use ever since. George D. Colby, a farmer residing in the vicinity of Clarksburg, Yolo county, testified that he had been using a Jackson stacker since 1902, and used the same on his own place and on places of three or four of his neighbors, and was accustomed in the early years to haul it along the public roads until the telephone wires were strung so low as to prevent him from getting the stacker upon the highways.

M. Madsen, a ranch foreman in Reclamation District 307, in the same region, testified that he used both the Jackson Eclipse and Schmeiser haystackers, and was accustomed to transporting them along or across the public roads under the transmission wires of the Great Western Power Company, which in that region were 35 feet above the highway. J. A. Branscombe, a farmer residing near Freeport for 23 years, and who had previously resided and been engaged in farming in the vicinity of Walsh station, testified that he frequently for years prior to 1906 hauled homemade derricks along the public roads, and that he had also seen the Jackson Eclipse stackers being moved along the highways in that region. Harry Sherwood testified that he had resided at Walsh station for about 24 years; that during the years prior to 1906 that region was more given to hay growing than at present, and that during that period he had seen Jackson stackers and other types of stackers being moved from place to place along the public roads. Ed. Scholfield, whose business was ranching in the vicinity of Walsh station, where he had resided all his life, testified that he had used homemade stackers 25 to 26 feet in height resting on wagons, and had driven along the county roads with these stackers in a stationary and upright position, and that he had seen threshing stationary derricks 2 feet higher—27 to 29—going along the highways. William Wason, who was engaged in farming for about 30 years in the vicinity of Florin, testified that he had hauled derricks built upon wagons along the public roads, which derricks ranged from 20 to 30 feet in height, and that he had seen a dozen or more of the Jackson stackers used in his neighborhood for the stacking of hay.

P. G. Schmeiser testified that he began the manufacturing of the derricks which bore his name in 1904 and 1905 in that region, and that his derricks were approximately 30 feet high, and that prior to his connection with that particular derrick similar derricks had been manufactured by Brown & Donnewith at Davis, from whom he had taken the manufacturing over, and that he had seen derricks in use in that part of the country that he had not sold. Ed. Moranini testified that

a stiff boom Schmeiser derrick had been on the Cowell ranch at Perkins, about 3½ miles from the Humphrey place, since 1904, and that he had used it there in 1905, and had driven it back and forth along the highway and under the high power wires of the Great Western Power Company.

[2] All of the testimony showed that the movement of derricks exceeding in height that at which the wires were strung along the highway and across the Humphrey lane was not an infrequent or uncommon occurrence. It was not, it is true, as ordinary and usual a use of the highways as that of wagons, automobiles, and other vehicles; but in the haying and threshing season, when their use was called for, these derricks are shown to have been quite properly and frequently conveyed over the highways, a fact which it was the duty of the defendant to have ascertained before stringing its wires, so as to make provision for the free passage of these derricks under them.

[3] It is in evidence that many telephone and high power wires like those of defendant were strung along the highways at heights the same and even lower than the wires of defendant; but this is of no consequence, and can afford no protection to the defendant in its invasion of the right of those who were entitled to a safe and unobstructed ordinary use of the highways. It only increased the danger and liability to injury of those who had a right to an unobstructed passage under them.

[4] As the evidence justified the verdict we proceed now to a consideration of other points. It is claimed by defendant that plaintiff was guilty of contributory negligence as matter of law. We cannot agree with this claim. This is not a case where one had knowledge that electricity would injure and kill if he placed himself in actual contact with it, and who nevertheless carelessly and recklessly does so. Plaintiff at the time of the accident was only 18 years of age, and while he had a general knowledge that electricity was dangerous if one touched the wires over which it was being conducted, he testified that he did not know that the wires of the defendant were high power transmission wires, and was entirely ignorant of the propensity of electricity of that high power, when some conducting material is brought into close proximity to it, though not in actual contact, to arc or leap over the intervening space. It does not appear that any of the parties engaged in moving the derrick were aware of the propensity of electricity to so leap or spark over. Plaintiff and these others thought there was entire safety if the derrick boom should be brought under the wires without coming into actual contact with them, no matter how near to the wires it might otherwise be. In this belief with respect to electricity they took the precaution by actual observation to ascertain whether the boom could be brought under the wires without contact with them, and, being of opinion that it could, made the effort which resulted so disastrously to the plaintiff.

The claim of the defendant was that in fact no precautions were taken to ascertain whether the boom could be brought under the wires or not, and that in attempting it there was an actual contact with the wires, or, if not, there was no precaution taken to keep the boom as far from the wires as possible. On the other hand, there was very substantial evidence that there was no contact between the boom and the wires, and that notwithstanding the ignorance on the part of all engaged in moving the derrick that electricity might by arcking connect with the boom, though not in actual contact with it, they nevertheless used every effort to keep the boom as far from the wires as possible. Under these circumstances it could not be said as matter of law that the plaintiff was guilty of contributory negligence. It was a question of fact for the jury, taking into consideration the youth of the plaintiff, his knowledge or ignorance of electricity and its propensities, and the acts which it is claimed were performed in attempting to get the derrick under the wires, to say whether the plaintiff had exercised ordinary care in doing so or was guilty of contributory negligence.

[5] Defendant complains of the refusal of the court to give several instructions asked by it, and of the giving of one with a modification. An inspection of the record shows that the court instructed the jury quite fully as to all matters of law necessary for their enlightenment and instruction in determining the rights of the parties to the action. No complaint is made by it as to any of these instructions. The instructions tendered by defendant and refused by the court were in our judgment proper or pertinent to the case or its consideration by the jury. The instruction that was modified as presented by defendant stated that the defendant had a right to maintain its pole line along the Middle Jackson road. This was not questioned in the case. The modification complained of was in the court adding to it, in effect, that this was true, provided the defendant exercised a high degree of care in placing its pole line, as had been fully explained to them by other instructions. No reasonable exception can be taken to this modification. It is unnecessary to refer particularly to the other three instructions, the refusal to give which is assigned as error. Two of them were properly refused, as going to the weight of evidence, and in so far as any of them contained any legal principles the jury were fully informed as to them by instructions given in the general charge.

Several rulings of the court respecting evidence are assigned as error, but a careful

examination satisfies us they have no merit; so we do not discuss them.

Having considered all the points made for a reversal, and finding no reason why the judgment and order should be disturbed, they are both affirmed.

We concur: MELVIN, J.; WILBUR, J.

179 Cal. 126

NICKEL et al. v. STATE et al. (S. F. 8537.)

(Supreme Court of California. Oct. 4, 1918.)

1. QUIETING TITLE ⟸34(1)—PLEADING—SUFFICIENCY.

In a suit to quiet title, an allegation of title in plaintiffs, and that defendant's claim is without right, is ordinarily sufficient to require an answer by defendant setting up its title to the property in question.

2. TAXATION ⟸861 — INHERITANCE TAXES — STATUTES.

The inheritance tax law in force at the time of a transfer of corporate shares is controlling as to whether or not there is a tax upon the transfer and the amount thereof.

3. TAXATION ⟸879(2)—INHERITANCE TAXES —PLEADING AND PROOF.

To establish the liability for a tax on transfer of corporate shares, under the Inheritance Tax Law of 1911 the state must allege and prove that the consideration for the transfer was not valuable and adequate.

4. TAXATION ⟸905(1) — TRANSFER TAXES — REMEDY AGAINST ENFORCEMENT—PLEADING.

In a suit to quiet title as against a lien claimed by the state, under the Inheritance Tax Law of 1911, on a transfer of corporate shares, where the conveyance recites a consideration of $10 and other good and valuable considerations, an allegation that the claim of the state is without right sufficiently alleges a valuable and adequate consideration.

5. PLEADING ⟸67—NEGATIVING DEFENSES—NECESSITY.

A pleader need not negative defenses.

6. TAXATION ⟸905(1) — TRANSFER TAXES — REMEDY AGAINST ENFORCEMENT — QUESTIONS OF FACT.

In a suit to quiet title as against claim of state to a lien, under Inheritance Tax Law of 1911, upon a conveyance of corporate shares, the question of whether the transfer was made in contemplation of death is one for the jury.

7. TAXATION ⟸879(2)—INHERITANCE TAXES —TRANSFER OF STOCK—CONSIDERATION.

A conveyance of shares of corporation stock made in contemplation of death is not taxable under the Inheritance Tax Law of 1911, if made for a valuable and adequate consideration.

8. TAXATION ⟸905(1) — INHERITANCE TAX — REMEDY AGAINST ENFORCEMENT—TENDER.

In a suit to quiet title as against a lien by the state for inheritance taxes on transfer of corporation stock, plaintiff need not pay or tender the tax.

9. COURTS ⟸50 — DEPARTMENTS — SUPERIOR COURT.

A suit to quiet title as against the state's claim of lien for taxes under the Inheritance Tax Law of 1911 is properly brought in the superior court, notwithstanding that proceedings in the estate are pending in one of its departments.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Suit by Nellie Miller Nickel and another, as trustees, and others, against the State of California and others. Judgment for defendants on demurrer, and plaintiffs appeal. Reversed, with instructions.

Edward F. Treadwell, of San Francisco (Delger Trowbridge, of San Francisco, of counsel), for appellants. U. S. Webb, Atty. Gen., Charles M. Fickert, Dist. Atty., of San Francisco, Robert A. Waring, Inheritance Tax Atty., of Sacramento, and William A. Sullivan, Asst. Inheritance Tax Atty., and Hartley F. Peart, Special Counsel for State Controller, both of San Francisco, for the State.

WILBUR, J. This is an appeal brought by the plaintiffs from judgment against them on demurrer. As authorized by section 18b, Statutes 1913, p. 1066, they brought suit against the state to quiet title as against the claims of the state to a lien for an inheritance tax upon certain shares of stock transferred to them by a trust agreement dated April 17, 1913, and recorded October 20, 1916. The complaint alleges that the plaintiffs were grantees or beneficiaries of a transfer made by Henry Miller to them of 119,839.75 shares of stock in the Miller & Lux Company, a corporation; that on the 14th day of October, 1916, Miller died, leaving estate in the city and county of San Francisco; that he was a resident thereof at the time of his death; and that his estate had been probated in the superior court thereof. It is alleged that the plaintiffs were the owners and holders of said stock; that the state was asserting a right to an inheritance tax thereon under and by virtue of the laws of 1911, 1913, and 1915; that each and every of these claims was without merit; and that the state had no interest in and to the stock in question and no lien thereon; and prayed that plaintiffs' title thereto be quieted. Plaintiffs attached as an exhibit to the complaint the conveyance under which they claim title. The state demurred upon the ground that the complaint did not state facts sufficient to constitute a cause of action, and that the court had no jurisdiction of the case.

[1] The allegation of title on the part of plaintiffs, and that the defendant's claim to the property was without right, would ordinarily be sufficient to require an answer on the part of the defendant setting up its title in and to the property in question. The state claims, however, that, upon the facts alleged in the complaint and the terms of the conveyance under which plaintiffs claim, the complaint affirmatively shows that the state is entitled to an inheritance tax upon the property in question.

[2-5] The law in force at the time of the transfer as alleged was the inheritance tax

law of 1911, and that statute controls in determining whether or not there is a tax upon the transfer and the amount thereof. Hunt v. Wicht, 174 Cal. 205, 162 Pac. 639, L. R. A. 1917C, 961; Estate of Felton, 169 Pac. 392; Estate of Gurnsey, 170 Pac. 402. The inheritance tax law of 1911 provides that in order that a transfer should be taxable it must not only be made in "contemplation of death," but also without "a valuable and adequate consideration therefor." Stats. 1911, p. 713, § 1, subd. 3. In order to establish the liability for a tax, it is essential that the state should allege and prove that the consideration for such a transfer was not "valuable and adequate." McDougald v. Boyd, 172 Cal. 753, 159 Pac. 168. The conveyance in question contains a recital that the transfer is made "in consideration of ten dollars and other good and valuable considerations." Respondent claims that, in default of an allegation to the contrary, it must be presumed that "the consideration was not valuable and adequate." But the allegation that the claim of the state is "without right" is in effect an allegation that there was "a valuable and adequate consideration" for the transfer. The consideration recited in the conveyance includes "other good and valuable considerations" not specifically mentioned, and does not negative the claim that the conveyance was for a valuable and adequate consideration. The pleader is not required to negative a defense. Jaffe v. Lilienthal, 86 Cal. 91, 24 Pac. 835; Jacobson v. Oakland, etc., Co., 161 Cal. 432, 119 Pac. 653, Ann. Cas. 1913B, 1194; Woodroof v. Howes, 88 Cal. 184, 194, 26 Pac. 111. Hence the complaint is not defeated by reason of failure to affirmatively allege the existence of "a valuable and adequate consideration."

[6, 7] Upon the question of whether or not the complaint by inference and presumption affirmatively shows that the transfer was made "in contemplation of death," it is sufficient to say that it is conceded by both parties that ordinarily the question of whether or not a gift is made "in contemplation of death," and for that reason liable to tax, is one of fact to be determined by the trial court from the nature and character of the instrument of conveyance and from all the circumstances surrounding its execution, and, even if we should hold from the face of the instrument in question that it conclusively appears that the transfer was made "in contemplation of death," if it was made for a "valuable and adequate consideration," the transfer would not be taxable under the law of 1911. McDougald v. Boyd, supra.

[8] Defendant claims that the demurrer should have been sustained for the reason that the plaintiff has failed to pay or tender any tax, citing Trippet v. State, 149 Cal. 530, 86 Pac. 1084, 8 L. R. A. (N. S.) 1210. That was an action to quiet title against a valid tax, on the ground that the repeal of the law providing for its collection, in effect, defeated the accrued and still existing right of the state to the tax. It was properly held there that under the circumstances the plaintiff could not invoke the assistance of a court of equity to remove the lien for the tax, without paying or offering to pay the same. In the instant case the plaintiff's claim is that the state has no right to a tax and no lien therefor. It is not necessary in such a case to tender anything. The complaint therefore states a cause of action.

[9] Jurisdiction: The statute under which the action is brought (section 15) determines what superior court shall have jurisdiction thereof. The respondent contends that, inasmuch as the proceedings in the estate are pending in one of the departments of that court in probate, this fact, under the law, deprives the other departments of that superior court of jurisdiction. The statute expressly places the jurisdiction in the superior court of the county in which the estate is being administered, namely, the superior court in and for the city and county of San Francisco, in the instant case. This action is separate and distinct from the probate proceeding and is in the same court, there being no probate court and no distinction in law between the several departments of the superior court. The action was therefore brought in the proper court. If it shall be determined in this action that the estate is subject to an inheritance tax, it is not necessary to fix the amount of the tax in the judgment; but it may be fixed in the manner and form provided by law in the probate proceedings. The purpose of this action is, not to have the tax fixed, but to have it adjudged that no lien therefor exists upon the property. If the state, as alleged, claims that the property is liable for an inheritance tax, the necessary facts to establish that claim should be alleged in the answer.

Judgment reversed, with instructions to the trial court to overrule the demurrer and allow the defendant to answer the complaint.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; SHAW, J.; LORIGAN, J.; RICHARDS, Judge pro tem.

---

179 Cal. 130

## BEGGS v. SUPERIOR COURT OF SANTA CLARA COUNTY et al. (S. F. 8765.)

(Supreme Court of California. Oct. 4, 1918.)

CRIMINAL LAW ⇐1192 — APPLICATION FOR SUSPENDED SENTENCE—TIME FOR MAKING.

After judgment of conviction has been affirmed on appeal, the trial court has no power, under Pen. Code, § 1203, to suspend execution of sentence, since its power to suspend under such section expires, in view of section 1191, with pronouncement of judgment follow-

ed or accompanied by no order of suspension, and does not attach anew after affirmance on appeal in view of sections 1263 and 1265.

Richards, Judge pro tem., and Lorigan, J., dissenting.

In Bank. Application by Will M. Beggs for a writ of mandate against the Superior Court of Santa Clara County and J. R. Welch, Judge thereof. Petition for peremptory writ denied, and alternative writ dismissed.

A. H. Jarman and R. P. Henshall, both of San Francisco, and R. C. McComish and James P. Sex, both of San Jose, for petitioner. Arthur M. Free and C. C. Coolidge, both of San Jose, for respondents.

MELVIN, J. An alternative writ of mandate was issued to the superior court upon application of petitioner, who had made a request to the superior court for the suspension of the execution of sentence; such request having been denied upon the ground of lack of jurisdiction in that court to entertain it.

The sole question before this court relates to the power of the superior court to act upon a petition for suspension of sentence pronounced upon a convicted person after affirmance of the judgment of conviction upon appeal.

Petitioner was convicted of the crime of extortion. Upon appeal the judgment was affirmed. Upon the going down of the remittitur he made application, under section 1203 of the Penal Code, for suspension of the execution of the sentence, and his counsel here contend that under the terms of that section the superior court has jurisdiction to determine, upon the merits, whether or not sentence shall be suspended at any time between the conviction of a defendant and his surrender by the sheriff to the warden of the penitentiary in which the commitment as originally made directed his imprisonment.

Section 1203 of the Penal Code, by reason of which, as petitioner asserts, he is entitled to the relief for which he prays, was traced in its historical development by the learned judge of the superior court to whom application for suspension of judgment was made. He pointed out the following facts: As originally enacted in 1872, the section provided that a court in its discretion could consider, before pronouncing judgment, any facts or circumstances in aggravation or mitigation of the punishment about to be imposed. As amended in 1903, the law empowered the court to suspend the imposing of sentence where the punishment was imprisonment alone and to suspend execution of the sentence of imprisonment and to place the defendant on probation, to the end that he might earn the money with which to pay his fine where the punishment for the offense was both fine and imprisonment. By the amendment of 1911, the court was authorized in any case not only to suspend sentence but to suspend the execution of sentence. But the section does not confer an unrestrained and unlimited power upon the trial court. It deals with and provides machinery for probation of a defendant where the court, in the exercise of a sound discretion, decides to suspend the imposing or the execution of sentence. The learned judge of the superior court upon consideration of the history and development of this part of the law therefore correctly concluded that the section under analysis is one dealing with the subject of probation; that it is limited accordingly by any other provision relating to the time in which, after conviction, a defendant may seek probation; and that section 1191 of the Penal Code contains such a limitation. Section 1191, so far as pertinent to this question, is as follows:

"After a plea or verdict of guilty, or after a verdict against the defendant on a plea of former conviction or acquittal, or once in jeopardy, the court must appoint a time for pronouncing judgment, which must not be less than two, nor more than five days after the verdict or plea of guilty; provided, however, that the court may extend the time not more than ten days for the purpose of hearing or determining any motion for a new trial, or in arrest of judgment; and provided, further, that the court may extend the time not more than twenty days in any case where the question of probation is considered in accordance with section twelve hundred and three of this code; provided, however, that upon the request of the defendant such time may be further extended not more than ninety days additional."

It is clear from the foregoing that probation is a subject which must be considered during the brief period after conviction, which is limited by the section from which the above quotation is taken, and that the court's power to suspend the execution of sentence under section 1203 of the Penal Code expires with the pronouncing of a judgment followed or accompanied by no order of suspension. It is to be noted that each of these two sections opens with the phrase "after a plea or verdict of guilty." In the earlier section this expression, undoubtedly, refers to the time before judgment, and in the latter the same words in our opinion indicate the same period.

That the authority of the court under said section 1203 does not attach anew to the judgment after affirmance thereof on appeal is evident from the language of sections 1263 and 1265 of the Penal Code which are mandatory in their terms. The former provides that, "If a judgment against the defendant is affirmed, the original judgment must be enforced," and the latter is as follows:

"After the certificate of the judgment has been remitted to the court below, the appellate court has no further jurisdiction of the appeal or of the proceedings thereon, and all orders necessary

to carry the judgment into effect must be made by the court to which the certificate is remitted."

It is clear, from a reading of these provisions, that after a judgment of conviction in a criminal case has been affirmed by an appellate tribunal judicial power to alter or suspend it has ceased.

The petition for a peremptory writ of mandate is denied, and the alternative writ is dismissed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.

WILBUR, J. (concurring). I concur in the judgment on the ground that the express provisions of section 1263, Penal Code, require, in the event of an affirmance, that "the original judgment be enforced." The judgment required that the petitioner be imprisoned in the state's prison. The purpose of suspending the execution and granting probation would be to secure the reform of the petitioner, and the consequent dismissal of the charge against him. Section 1203, sub. 5. In that event he would never have the judgment enforced against him.

RICHARDS, Judge pro tem. I dissent. I cannot agree with the conclusion arrived at by Mr. Justice MELVIN, that proceedings for probation must be initiated by or on behalf of the convicted person before the time of pronouncing judgment and must be acted upon by the trial court prior to or at the time of pronouncing such judgment; and that its jurisdiction to extend the merciful intent and provisions of section 1203 of the Penal Code to a defendant ceases at the time such judgment is pronounced. Section 1203 does not expressly so declare. The opening paragraph of said section empowers the trial court "of its own motion," and at any time after plea or verdict of guilty so long as it retains jurisdiction of the case and whenever there are circumstances in mitigation of the punishment either by the report of the probation officer or otherwise which show that the ends of justice would be subserved thereby, to place the defendant upon probation. The foregoing is the plain intent of this section of the Penal Code as expressed in its opening paragraph, and this intent should be given effect in harmony with the beneficent purpose for which the probation law was enacted, unless this intent and the time of its operation is limited either by the succeeding clauses of the section itself or by other and controlling provisions of the Penal Code. That it is not limited by the succeeding clauses of the section, but, on the contrary, is enlarged and expanded so as to be expressly and definitely extended to a period subsequent to the pronouncement of judgment, is made plain by what follows in the section itself, and by the history of its amendment so as to give expression to this enlarged intent. The second subdivision of the section begins with the statement that "the court, judge, or justice thereof may suspend the imposing" or the execution of sentence, etc.; and continues that "in case of such suspension of imposition or execution of sentence the court shall place such person on probation," etc.; and further provides that, "where the maximum possible term of such sentence is less than two years, then such period of suspension of imposition or execution of sentence may continue for not over two years," but that where the offense consists in a violation of certain other sections of the Penal Code "such suspension of imposition or execution of sentence may in the discretion of the court continue for not over five years." The phrase in the above-quoted portion of this section, "or execution of sentence," as the section read prior to its amendment in 1911, was limited to cases where the punishment was both fine and imprisonment, the reason being to give a defendant the opportunity, when occasion afforded, to work out his fine; but in the year 1911 the Legislature broadened this provision of the section so as to give it application to every case wherein the discretion of the court to grant probation might be exercised. The obvious reason for this enlargement of the power of the trial court after the pronouncement of judgment in every case to suspend "the execution of sentence" was to enable it to act in granting probation in every case whenever it appeared that "the ends of justice should be subserved thereby," so long as it retained jurisdiction over the case. The succeeding subdivisions of the section in question further disclose and illustrate this intent; subdivision 3 thereof, under the title "Rearrest," provides that the person admitted to probation may be brought before the court upon the charge of violating the terms or the spirit and purpose of such probation and the court may thereupon revoke and terminate such probation; and in such case the court may, "if the sentence has been suspended, pronounce judgment after the said suspension of the sentence for any time within the longest period for which the defendant might have been sentenced, but if the judgment has been pronounced and the execution thereof has been suspended, the court may revoke such suspension, whereupon the judgment shall be in full force and effect." Subdivision 4 of the section provides that—

"The court shall have power at any time during the term of probation to revoke or modify its order of suspension, of imposition or execution of sentence. It may, at any time, when the ends of justice will be subserved thereby, and when the good conduct and reform of the person so held on probation shall warrant it, terminate the period of probation and discharge the person so held."

It would seem to be an irresistible conclusion to be drawn from the foregoing provi-

sions of section 1203 of the Penal Code that it was the intent of the Legislature in the phrasing of the section in its present form to empower trial courts to grant probation to convicted persons at any time before or after pronouncing judgment and to change its order made in that respect, whenever the ends of justice would be subserved by either making or modifying such orders so long as it had jurisdiction of the case. Ex parte Sizelove, 158 Cal. 493, 111 Pac. 527. It is insisted, however, that the time within which the trial court must act in the exercise of its original power to grant probation under the provisions of section 1203 of the Penal Code is limited by the terms of section 1191 of said Code. This last-named section of the Code has reference solely to the time within which judgment must be pronounced. As section 1191 read at the time of its original inclusion in the Penal Code in 1872, it provided in substance that after a plea or verdict of guilty the court should appoint a time for pronouncing judgment which should be at least two days after the verdict. With some slight amendment the section stood in the above substantial form until the year 1909. Prior to this latter date, however, and as early as 1903, the probation plan of dealing with offenders deserving its application, embodying the main features and provisions of the statute in its present form, was ingrafted upon section 1203 of the Penal Code. It is thus plain that section 1191 and section 1203 had originally no correlation as to their terms or as to the changes made or to be made in either section. Under these two sections of the Penal Code, as they stood between the years 1903 and 1909, the trial court could, under section 1191, take its own time in the matter of pronouncing judgment after the expiration of two days from the date of the verdict; and the trial court could also, under section 1203, deal with the subject of probation at its own time and even on its own motion, either before or after pronouncing judgment, so long as it had jurisdiction of the case. The argument that this view as to the powers of the trial court under the latter section would invest it with power to take offenders from the state prison at any time after the execution of their sentence had begun and grant such persons probation has no force for the reason that the jurisdiction of the trial court over the case ends when the execution of its sentence begins; and a reasonable reading of section 1203 of the Penal Code gives to the trial court the power only to suspend the operation of its judgment before the defendant has been removed from its presence and custody in the course of its execution.

It being thus seen that the changes made in these two sections of the Code had no original connection, the inquiry arises as to why section 1191 was changed to the form it took in the year 1909 and was later changed again to its present form. The reason for the change in section 1191 of the Penal Code in 1909 is not far to seek. It is a matter of well-remembered public history that this section was then amended for the sole purpose of shortening the time within which trial courts must pronounce their judgments on account of the delays in so doing which had in some instances become a public scandal. It was then for the first time provided that the trial court must pronounce its judgment within 5 days after a verdict or plea of guilty, or, in any event, within not more than 20 days beyond said time; and that this, the sole intent of said amendment of the section, might be more effective, section 1202 of the Penal Code was at the same time adopted, which provides that the defendant should be entitled to a new trial unless judgment was pronounced upon him in conformity with the requirements of time embraced in section 1191. That portion of the provisions of section 1191 which refers to the subject of probation, and which provides for the slight extension in the time for pronouncing judgment where the question of probation is under consideration, was obviously included for the purpose of giving the trial court a brief period within which to determine a pending inquiry upon that subject, but was not designed or inserted with a view to affecting, and certainly not with a view to limiting, the already existing provisions of section 1203. To hold otherwise is to place the Legislature of 1909 in the inconsistent position of expanding the merciful features of section 1203 by its amendment at that session in other respects, and yet at the same time, and by indirection, contracting and limiting the time within which the trial court might act in the exercise of these expanded benefactions. Had the Legislature intended to limit the power of the trial court in the matter of probation to a time not later than the moment of pronouncing its judgment, it would have said so; it would have stricken from section 1203 its repeated phrases respecting the power of the court to suspend "the execution of the judgment" and also the power of the court to alter from time to time its orders made in that regard. The Legislature not having done so, this court should not do so, since so to do would be to take a backward step in the direction of restricting the power of trial courts to extend the merciful provisions of the probation law to all cases where "the ends of justice shall be subserved thereby." It is true that in the year 1911 the Legislature amended both of these sections of the Penal Code in certain particulars. The changes then made in section 1203 were along the line of a further expansion of its beneficent provisions. The amendment then made to section 1191 simply added the provision that extension in the time of pronouncing judgment should not exceed 90 days. My conclusion

therefore is that the Legislature did not intend to limit the full powers conferred upon trial courts by virtue of section 1203 by anything later inserted in section 1191 with obviously a different purpose in view. It is, however, insisted that there are certain other sections of the Penal Code which finally conclude this matter. These are sections 1263 and 1265, the former of which provides that, "If the judgment against the defendant is affirmed, the original judgment must be enforced" and the latter of which provides for the transmission of the judgment of the appellate tribunal to the clerk of the trial court upon the affirmance of its judgment. Both of these latter sections of the Penal Code were inserted therein at the time of its adoption in 1872 and have remained unchanged ever since. It cannot therefore be claimed that either of them was intended to have application to conditions arising out of the operation of probation laws which were as yet unborn, and a simple illustration will serve to show the absurdity of such attempted application. Suppose that a defendant is convicted and a judgment pronounced confining him in state prison for a term of years, but the court, at the time of pronouncing such judgment, suspends its execution, as it is conceded, under the strictest construction of sections 1191 and 1203 of the Penal Code in their present form, the trial court has power to do. Suppose the defendant nevertheless appeals from the judgment of conviction, and that, within a time long before the term fixed for his probation has expired, the judgment of conviction is affirmed, what effect would section 1263 of the Penal Code have upon such a state of facts? Obviously none. The order of suspension of the execution of the judgment is no part of the judgment, no more than an order staying execution in any case is a part of the judgment. Yet how could section 1263 of the Penal Code be given effect in the way of compelling the enforcement of a judgment which had been suspended as to its execution by a valid order of court under section 1203 of the Penal Code?

The sole question is as to when the power of the trial court ends in the matter of granting probation. Is it reasonable, is it in harmony with the pronounced advance during recent years in our more merciful methods of dealing with persons convicted of crime, to require such persons to immediately apply for probation before the ink is dry upon the verdict, no matter how unjust or how illegal they may deem that verdict to be; and to make such application before the court shall have pronounced its judgment and hence before the defendant can have been made aware as to its terms or as to how severe its penalties are to be? If he shall not make this application under the strict ruling of Mr. Justice MELVIN'S opinion, before he takes his appeal, his chance for obtaining probation is gone forever. Such a ruling seems to me to be utterly inconsistent with the trend of modern thought and theory in the treatment of persons accused or convicted of crime. An appeal from a judgment does not operate to deprive the trial court of all jurisdiction over the case pending the appeal, but only over so much of it as is directly affected by the appeal. Bliss v. Superior Court, 62 Cal. 543; Durbrow v. Chesley, 23 Cal. App. 627, 138 Pac. 917. The trial court still has power to correct clerical errors, to supply lost records, to discharge receivers, or dispose of attached property, and the like. Buckman v. Whitney, 24 Cal. 267; Fay v. Stubenrauch, 141 Cal. 573, 75 Pac. 174; Pease v. Fink, 3 Cal. App. 371, 85 Pac. 657; Baughman v. Superior Court, 72 Cal. 572, 14 Pac. 207; Loveland v. Alvord, 76 Cal. 565, 18 Pac. 682; Broder v. Conklin, 121 Cal. 289, 53 Pac. 797. The trial court has also in criminal cases the power to grant a writ of probable cause after an appeal has been taken and even after a sentence has been partly executed. Pen. Code, §§ 1243, 1244, 1245. The effect of an order of probable cause by the trial court is to suspend the execution of a judgment pending an appeal. Why should not the trial court, which has jurisdiction to issue a writ of probable cause at any time pending an appeal, be held to have been also given jurisdiction to place a defendant upon probation at any time subsequent to the taking of an appeal and prior to the execution of the judgment, whenever it shall be made to appear that the interests of justice will be subserved thereby?

There are numerous criminal cases wherein the persons are not criminals by nature and have not acted with criminal intent in the violation of a particular law, but have acted in good faith in so doing, believing the law to be unjust or unconstitutional or not to have application to their conduct in the doing of the act. Upon being convicted they may still in good faith retain this belief and take an appeal in full confidence that the law will be declared unjust, or unconstitutional or inapplicable to their case by the court of last resort. Why in reason should such a person be compelled to seek probation with its certain humiliating features under a judgment which he is honestly, though it may be mistakenly, appealing from as founded upon an unjust or illegal statute? Why should not such a person be permitted to go free and hold his head erect under his appeal bond while this appeal is pending; and why should not such a person, when the appellate tribunal has finally declared that his view of the injustice or illegality of the statute is a mistaken one, be permitted to apply for probation? And why should not the trial court in such a case and at any time before the execution of the sentence has begun have power, on application of the defendant or on its own motion, to suspend the execution of such sentence in the interests of justice, in preference

to sending to jail one who is not a criminal at heart or in intent, and whose further punishment or disgrace would be violative of the very essential ends and objects of the laws relating to probation? It is claimed by the petitioner that this is such a case, and, whether or not this be true, the rule now to be laid down would apply to all such cases, and this appears to me to furnish the best possible reason why the rule asserted in the opinion of Mr. Justice MELVIN should not receive the approval of this court.

I concur: LORIGAN, J.

---

38 Cal. App. 148

## MATHEWS et al. v. WILSON et al.

(Civ. 2571.)

(District Court of Appeal, Second District, California. Sept. 5, 1918.)

1. MORTGAGES ⟸295(1) — ASSIGNMENT TO MORTGAGOR—CANCELLATION OF INTEREST IN MORTGAGE.

Assignment of a half interest in note and mortgage to owner of equity of redemption cancels such interest in the mortgage by merging it in the fee.

2. BILLS AND NOTES ⟸324—LIABILITY OF SELLER.

Where vendor has sold and received benefit of purchase-money note, secured by mortgage, which later, on discovery of fraud of vendor's agent, which induced execution, the vendor and vendee agree to rescind, the vendor is obligated on the note and mortgage, precisely as if she had made the note and executed the mortgage, in view of Civ. Code, §§ 3517, 3521, 3543.

3. BILLS AND NOTES ⟸167—NEGOTIABILITY—NOTE SECURED BY MORTGAGE—ACCELERATION OF MATURITY.

A note, containing an acceleration of maturity clause and secured by mortgage, is nonnegotiable.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Emma V. Mathews and others against Frank O. Wilson, Nelle Bromley, as administratrix of Maud T. Taylor, and Thomas Ball. Judgment for defendants. From an order denying motion for new trial, plaintiffs Mathews and Page appeal. Reversed as to defendants Bromley and Ball; affirmed as to defendant Wilson.

C. F. Holland, of Los Angeles, for appellants. Avery & French, W. A. Martin, and Charles Thompson, all of Los Angeles, for respondents.

SHAW, J. In this action plaintiffs sought a decree foreclosing a mortgage made and executed by Frank O. Wilson to secure the payment of a promissory note in the sum of $10,000 given by him to Maud T. Taylor and Minna Jantzen. Judgment went for defendants, whereupon plaintiffs moved for a new trial, which the court denied, and they appeal from such order.

[1] Stripped of surplusage and matter which can have no bearing upon the merits of the case, the complicated record discloses the following facts which in considering the appeal we deem pertinent to the controversy: On May 5, 1909, Mrs. Taylor, since deceased, and for whom, as defendant, Nelle Bromley, her administratrix, has been substituted, was the owner of the land thereafter made the subject of the mortgage, and, desiring to sell or exchange it, she appointed Christian Jantzen as agent to negotiate such sale or exchange, and at his request conveyed the land to his wife, Minna Jantzen, as trustee. Thereupon Christian Jantzen effected an exchange of the property with Frank O. Wilson, to whom he caused it to be conveyed by Minna Jantzen, and as a part of the consideration therefor said Wilson executed his note to Maud T. Taylor and Minna Jantzen for the sum of $10,000, and as security for the payment thereof executed the mortgage in question covering the land conveyed to him by Minna Jantzen. In consummating the transaction Christian Jantzen was guilty of fraud and deceit practiced upon Wilson, as a result of which the latter was thereby induced to execute the note and mortgage. Upon discovering that he had been defrauded he, in May, 1911, notified Mrs. Taylor of such fact, and she repudiated the acts of Christian Jantzen. Thereupon it was agreed by Mrs. Taylor and Wilson that the transaction should be rescinded. In order to effect such rescission, Wilson, at Mrs. Taylor's request, conveyed the land to Thomas Ball in trust for her, and at the same time she caused Minna Jantzen's one-half interest in the note and mortgage to be assigned to Ball, the effect of which was to cancel such interest in the mortgage by merging the same in the fee. Prior to the rescission, however, to wit on October 31, 1910, as found by the court, Mrs. Taylor assigned her one-half interest in the note and mortgage to one George Jude, from whom, by mesne transfers and assignments, these plaintiffs, in consideration of $2,500 paid therefor, acquired it. As to this last transaction, it appears from the findings that Mrs. Taylor, before learning of the fraud and deceit practiced by Jantzen as her agent upon Wilson in negotiating the exchange, agreed, in consideration of $5,000, to sell her interest in the note to Christian Jantzen, or Jude, as his assignee, $500 of which sum was to be paid within 30 days, upon the making of which payment an assignment placed in escrow was to be delivered to Jude, and the balance of $4,500 was to be paid by Jantzen when his profits from certain property should enable him to liquidate the same. The conveyance of the land by Wilson to Ball was in express terms made subject to the mortgage, the existence of which was thus recognized.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[2] Briefly stated, it appears that Mrs. Taylor, through her trustee, conveyed the land to Wilson, who, by means of fraud practiced by Jantzen, the grantor's agent, was induced to give his note secured by a mortgage upon the land for $10,000, a one-half interest in which note was owned by Mrs. Taylor; that after Mrs. Taylor had for a valuable consideration sold and transferred her interest in the note and mortgage, the fraud was discovered, and it was agreed by Mrs. Taylor and Wilson that the transaction should be rescinded, to effect which Wilson reconveyed the land, subject to the existing mortgage given to secure the note, one-half of which Mrs. Taylor had theretofore, by mesne assignments, transferred to plaintiffs. Conceding, as claimed by respondents, that the interest in the note acquired by plaintiffs was not the interest assigned by Mrs. Taylor to Jude, but that originally vested in Minna Jantzen as a dummy for Christian Jantzen, and who throughout the entire transaction acted in bad faith with all parties concerned, we must nevertheless hold that as to plaintiffs Mrs. Taylor's position was precisely the same as though she had made the note to the former and executed the mortgage securing the same. She, through Jantzen as her agent, must be deemed to have received the benefits of the transaction and her estate must bear the burden. Section 3521, Civ. Code. Under the circumstances, to hold otherwise would not only be a monstrous doctrine, but would violate fundamental maxims of justice, among which are: "No one can take advantage of his own wrong." Section 3517, Civ. Code. And "where one of two innocent persons [as plaintiffs are conceded to be] must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." Section 3543, Civ. Code. Assuming as true all that respondents claim as to the wrongs committed by Jantzen, both as to Mrs. Taylor and others, it was due solely to her acts that he was clothed with the powers under which he acted. As to Mrs. Taylor's administratrix, Nelle Bromley, and defendant Ball, her trustee, the order must be reversed.

[3] Not so, however, as to defendant Wilson, against whom, as maker of the note, a deficiency judgment is asked. As we have seen, Wilson was induced to make the note by means of fraud. It contained a clause under which the maturity thereof might be accelerated, which fact and the fact that it was secured by mortgage rendered it nonnegotiable (Smiley v. Watson, 23 Cal. App. 409, 138 Pac. 367; Meyer v. Weber, 133 Cal. 681, 65 Pac. 1110; Briggs v. Crawford, 162 Cal. 129, 121 Pac. 381); and hence, notwithstanding the sale and transfer thereof before maturity, it was subject to the defense based upon the fraud and deceit practiced upon Wilson in procuring it.

As to defendant Wilson, the order appealed from is affirmed; as to the other defendants, the same is reversed.

We concur: CONREY, P. J.; JAMES, J.

---

38 Cal. App. 146

## LUGIANI v. LANDAU ECONOMIC SYPHON CO. (Civ. 2405.)

(District Court of Appeal, First District, California. Sept. 3, 1918.)

1. PLEADING ⊂⊃403(3)—DEFICIENCY IN COMPLAINT—SUPPLY BY ANSWER.
In action for price of automobile, any defect in complaint, for insufficiency of allegation of nonpayment, which was that amount claimed had been demanded and refused, and that whole was due from defendant to plaintiff, was supplied in defendant's answer, which alleged amount of demand had been paid in full.

2. APPEAL AND ERROR ⊂⊃171(3)—THEORY OF CASE BELOW—PLEADING.
Where case was tried on theory that nonpayment of price of automobile sued for was in issue, defendant on appeal cannot be heard successfully to question sufficiency of plaintiff's allegation of nonpayment.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Henry Lugiani against the Landau Economic Syphon Company. From judgment for plaintiff, defendant appeals. Affirmed.

Louis H. Brownstone, of San Francisco, for appellant. Devoto, Richardson & Devoto, of San Francisco, for respondent.

PER CURIAM. This is an appeal by the defendant from a judgment in favor of the plaintiff in an action for the sum of $450, the agreed price of a certain automobile.

[1, 2] With respect to the appellant's contention that the complaint contains no sufficient allegation of nonpayment, the allegation criticized is that the amount claimed has been demanded and refused, and that "the whole thereof is now due and owing from said defendant to said plaintiff." Standing alone this perhaps is not a sufficient allegation of nonpayment (Ryan v. Holliday, 110 Cal. 337, 42 Pac. 891); but the defendant in its answer supplied the defect in the complaint by specifically alleging that the amount of plaintiff's demand had been paid in full. Aside from this, however, the case was tried upon the theory that such nonpayment was an issue in the case. For these reasons the defendant cannot now be heard to successfully question the sufficiency of the allegation of nonpayment. Schwind v. Hall, 129 Cal. 40, 43, 61 Pac. 573.

On the question of the sufficiency of the evidence to sustain the findings of the trial court, it is sufficient to say that we have carefully read the record, and find appellant's contention in this regard to be without merit. It is true that the bill of sale

of the automobile was taken in the name of one Udall. Still he was the manager of the defendant corporation, and the automobile was at once put into use by Udall in the business of the defendant, and was so used for ten months and until it was wrecked in a collision. Repairs thereto at the instance of Udall were charged to and paid by the defendant. Much of the testimony introduced on behalf of the defendant failed for obvious reasons to commend itself to the favorable consideration of the court and was of a character which tended in effect to support the plaintiff's case.

The judgment is affirmed.

---

38 Cal. App. 138

## STATE BANK OF RAMONA v. CLELLAND et al. (Civ. 2181.)

(District Court of Appeal, Second District, California. Sept. 3, 1918. Rehearing Denied by Supreme Court Oct. 31, 1918.)

1. CHATTEL MORTGAGES ⟸11 — PROPERTY SUBJECT TO MORTGAGE—POTENTIAL EXISTENCE.

Civ. Code, § 2955, permits the mortgaging of any personal property which may have only a potential existence at the time of the creation of the mortgage.

2. APPEAL AND ERROR ⟸766 — BRIEFS — ALTERNATIVE METHOD OF APPEAL.

Where, on appeal brought under the alternative method, the briefs do not contain a sufficient transcript of the testimony to illustrate the point to be decided, the judgment may for that reason alone be affirmed.

3. APPEAL AND ERROR ⟸837(8) — REVIEW — EVIDENCE.

Affidavits on motion for new trial cannot be considered, as far as the presentation of the evidence is concerned, in aid of the case made at the trial and upon which the judgment is based, although they contain evidence of essential facts.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by the State Bank of Ramona against F. G. Clelland and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Bischoff & Thompson, of Escondido, for appellant. Wirt Francis, of San Diego, for respondents.

JAMES, J. This appeal is taken by the plaintiff from an adverse judgment and is presented by the alternative method of appeal.

Defendant Clelland resided in the county of San Diego and was engaged in the business of farming and bee keeping. Being indebted to the plaintiff bank, he executed a chattel mortgage covering a number of animals and various kinds of machinery and implements, including those connected with his business as bee keeper. Among the property described was the following:

"All my bees, bee material, and implements, and hives and produce of bees."

In the year 1915 a quantity of honey in excess of the value of $300 was sold by Clelland to the defendant Produce Company. Plaintiff, contending that this honey was subject to the lien of the chattel mortgage, brought this action to recover the value of the honey and incidental damages. The trial judge, in determining the facts, made the following finding:

"That the defendant F. G. Clelland, during the months of June, July, August, and September, 1915, sold to the defendant Coast Produce Company honey of the market value of $374.07; that the evidence fails to show that said honey was honey previously mortgaged by the chattel mortgage herein mentioned; that said sale was without the knowledge and consent of plaintiff, but that said plaintiff was not damaged in the sum of $375, or any other sum, or at all by said sale. * * *"

[1] Counsel for appellant first contend that by this finding it was the purpose of the court to determine that honey to be produced by the mortgagor after the date of the mortgage was not, under the statute, included under the lien of the mortgage. We agree with the appellant that the statute does permit the mortgaging of any personal property which may have a potential existence at the time of the creation of the mortgage. Arques et al. v. Wasson, 51 Cal. 620, 21 Am. Rep. 718; Wilkerson et al. v. Thorp et al., 128 Cal. 221, 60 Pac. 679. The statute (section 2955, Civ. Code) formerly contained an enumeration of various kinds of property which might be made the subject of a chattel mortgage, and this list was added to at various sessions of the Legislature. However, by the last amendment made, the terms of the statute were entirely changed, and as it now reads it provides that mortgages may be made upon growing crops and upon "any and all kinds of personal property," except certain things not necessary here to be enumerated. Passing the point first presented, it will be noted that by the finding the court determined that "the evidence fails to show that said honey was honey previously mortgaged"—in other words, the finding is that the plaintiff failed to show that the honey sold to the Produce Company defendant was honey covered by the chattel mortgage. In the absence of any showing to the contrary, we must assume that the evidence supported the finding of the trial judge.

[2] Under the alternative method of appeal the parties are required to print in their briefs such portions of the testimony as they desire to call attention to. We find no sufficient transcript of the testimony in the briefs to illustrate the point, and for that reason alone would be justified in affirming the judgment. Barker Bros. v. Joos, 171 Pac. 1085. However, without any obligation so to do, we have examined to some extent the transcript of the testimony on file in typewritten form, and are of the opinion that

the plaintiff did not sustain the burden of proof and show that the particular honey purchased by the Produce Company was honey which had been produced by Clelland from the bees and apiary stock included in the mortgage. For aught that is shown by the testimony expressed in the record, Clelland may have purchased all or a part of the honey which he sold to the Produce Company, and if such was the case plaintiff would have had no lien thereon.

[3] The affidavits used on the motion for a new trial, which present evidence as to this essential fact, cannot be here considered in aid of the case as made out at the trial and upon which the judgment of the court was based.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

---

38 Cal. App. 155

## D. SAMUELS REALTY CO. v. NUNAN et al.

(Civ. 2419.)

(District Court of Appeal, First District, California. Sept. 7, 1918. Rehearing Denied by Supreme Court Nov. 4, 1918.)

APPEAL AND ERROR ⟹1010(1)—FINDINGS—REVIEW.

There being some evidence to sustain finding of trial court, the court on appeal will not interfere, although reasonable minds might differ.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the D. Samuels Realty Company against Frank Nunan and others. Judgment for defendants. From an order denying motion for a new trial, plaintiff appeals. Affirmed.

Charles W. Slack, of San Francisco, for appellant. Garret W. McEnerney, of San Francisco, for respondents.

STURTEVANT, Judge pro tem. This is an action on a written guaranty executed to secure the performance of the terms of a written lease. The defendants had judgment in the trial court. The plaintiff moved for a new trial, the motion was denied, and from the order denying said motion the plaintiff appealed, and has brought up the evidence in a bill of exceptions.

If there was a surrender of the lease by the original lessees, and an acceptance of the premises by the landlord, it is conceded that the judgment should be affirmed. The defendants in their answer pleaded a surrender and acceptance, and the trial court made findings sustaining the defense. The question, as presented to this court, is solely as to whether such findings are sustained by the evidence. It is not contended that there is any direct evidence in the record on this issue; but the defendants contend that the record contains evidence from which the only fair inference to be drawn is the inference that a surrender took place. They further contend that the function of determining what inferences might be drawn from the evidence was with the trial court, and that an appellate court may not disturb such finding, unless it appears that there is no evidence to support it, or that the evidence is so clearly preponderating against the finding as to amount, in legal effect, to a want of substantial evidence (Williams v. Kidd, 170 Cal. 631, 151 Pac. 1, Ann. Cas. 1916E, 703), and that the powers of this court are also limited where opposing inferences may be reasonably drawn from disputed facts (Rice v. Carey, 170 Cal. 748, 754, 151 Pac. 135). The plaintiff does not controvert these contentions, but maintains that the record does not disclose any evidence supporting, or tending to support, the inference which the trial court drew. To solve the problem, there is little evidence in the record. August 15, 1906, Maurice V. Samuels, as owner, leased to F. J. Bonney and J. V. Owens the southeast corner of Eighth and Clementina streets. Said lease had attached to it a written guaranty signed by Matthew Nunan; the lease was for a term of five years from October 1, 1906. The lessee entered and held possession till February 20, 1907. Speaking of about that date the lessor testified:

"I know that a man named Michel was in possession of the premises after Owens and Bonney left. One of my brothers, as I remember it, wrote to me in New York that Owens and Bonney wanted to get out, and that Matthew Nunan was willing to guarantee another man named Michel. I don't know whether Owens and Bonney were quarreling, or didn't pay, or something. I think the letter giving me this information was received by me some time around February 20, 1907. Q. Prior to the execution of this letter you were advised by one of your brothers, or one of your relatives out here, that Owens and Bonney wished to go out, and that there was a man named Michel who wished to go in? A. That is my impression. Q. And Mr. Nunan was willing to guarantee the payment of the rent by Michel if you were agreeable to that course; is that correct? A. That is my impression. Q. You stated that you were? A. I was quite willing, certainly, as long as Mr. Nunan, who was responsible, was there. I didn't care who was in there. Q. And Messrs. Owens and Bonney did leave the premises at or about that time did they not? A. I think so, because the reports received in New York read 'Michel.'"

On February 20, 1907, Nunan wrote to the owner's brother:

"Confirming my phone message to you of yesterday, beg to state that I will allow my name to remain on the bond of M. Michel, Suc. to James V. Owens & Co., corner 8th and Clementina St."

There is no evidence that any bond except the guaranty was signed by Nunan. Thereupon the original lessees vacated the premises and Michel entered. He remained a tenant till September, 1907, at which time he and Marchand went to J. L. Samuels, and Marchand says:

---

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

"Michel presented me to Mr. Samuels, and asked Mr. Samuels if he wanted me for a tenant. Mr. Samuels said, 'Yes; so long as I paid the rent.'"

In June or July, 1908, Marchand sold to Berton, and at that time the two called on J. L. Samuels and Marchand says:

"When I went to see Mr. Samuels at the store, I told him I had sold out the place to Berton, and asked him if he wanted that man for his tenant. He said, 'Yes; so long as he pays the rent.'"

The rent was paid to J. L. Samuels. The receipts were made out in different ways; some receipting to Michel, some to Berton, and at least one to J. B. Johnson, who had backed Berton. While it will be conceded that the story, as gathered from the foregoing recitals, contains but very little touching the subject of surrender, yet we think it cannot be successfully maintained that there was no evidence on the subject. While reasonable minds may differ as to whether a surrender was intended, this court is not entitled to interfere. Williams v. Kidd, Rice v. Carey, supra.

The judgment should be affirmed; and it is so ordered.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

---

38 Cal. App. 144

GISH et al. v. HUCKABY. (Civ. 2579.)

(District Court of Appeal, Second District, California. Sept. 3, 1918.)

1. LANDLORD AND TENANT ⟸66(2)—ADVERSE POSSESSION.

Owner of house, a small portion of which was situated on adjoining land, part of which land he at times, with owner's consent, farmed, who at no time notified such owner that he disclaimed the relationship of landlord and tenant as to the ground included within fence around house, did not merely, by alleging ownership of house, occupy such land adversely to owner.

2. ADVERSE POSSESSION ⟸89 — PAYMENT OF TAXES.

Where claim to prescriptive title to land is not founded upon a written instrument, judgment, or decree, claimant must show, in support of his claim, that he had paid all taxes levied and assessed against the property, as required by Code Civ. Proc. § 325.

Appeal from Superior Court, Inyo County; J. P. Wood, Judge.

Action by J. L. Gish and another against Emily Huckaby, administratrix of the estate of George W. Huckaby, deceased. Judgment for plaintiffs, and defendant appeals. Affirmed.

P. W. Forbes, of Independence, and S. E. Vermilyea and S. L. Carpenter, both of Los Angeles, for appellant. A. H. Swallow, of Bishop, for respondents.

JAMES, J. Action to quiet title. Defendant appeals from a judgment entered in favor of the plaintiffs.

[1, 2] At about the year 1889 plaintiffs' predecessor in interest was the owner of two parcels of land; one parcel being described as lots 3, 6 and 7, and the other parcel being a certain 40 acres immediately adjoining thereto, a portion of which is involved in this suit. Plaintiffs' predecessor with his family lived upon the property; his dwelling house being mainly located upon lot 7, but a portion of the house extended over upon the adjacent 40 acres. An inclosed yard extended also upon the 40 acres immediately surrounding, as we understand it to be, the rear of the house. At about the year 1894 plaintiffs' predecessor moved from the house and took his family away, and did not thereafter reside in that vicinity. A creditor of plaintiffs' predecessor obtained a judgment against him and levied upon lots 3, 6, and 7, before mentioned, which lots were later sold under execution. Defendant's intestate was the purchaser at the execution sale. This purchaser was at the time occupying the house located as we have described it, and at the time he purchased the property under the execution sale he was aware of the fact that the house stood partly upon lot 7 and partly upon the adjacent 40 acres, title to which latter remained undisturbed in plaintiffs' predecessor. There is nothing in the record presented which tends to show that by the execution sale any property in excess of lots 3, 6, and 7, was pretended to be sold to the defendant's intestate. However, at a later date defendant's intestate set up a claim of title to all of that portion of the 40 acres included within the inclosed yard at the rear of the house which he was occupying. During the early part of his occupancy of this house, and continuing down until after the year 1906, defendant's intestate farmed portions of the 40 acres belonging to plaintiffs' predecessor, with the consent of plaintiffs' predecessor expressed in communications by letter. In letters written by defendant's intestate to plaintiffs' predecessor, such intestate referred to the ground as the ranch of plaintiffs' predecessor, and it is very clear from the correspondence which is exhibited by the record that the entire 40 acres belonging to plaintiffs' predecessor was included in the term "ranch." The trial judge found that defendant's intestate had occupied the land continuously and that his possession had been open and notorious, but determined that such possession not been adverse to plaintiffs' predecessor. It was further found that plaintiffs and their predecessor had paid all taxes levied and assessed against the property.

It is appellant's contention that the evidence does not justify the finding of the court as to either of these propositions. We cannot agree with this contention, especially as to the first question presented. Admittedly the possession by defendant's intestate of the 40 acres of land was at all times in the nature of a tenancy with the consent of plaintiffs'

predecessor. No showing was made indicating that defendant's intestate ever notified plaintiffs' predecessor that he disclaimed any relation of landlord and tenant as to the ground included within the fence. The only hint of such a contention is found in the statement of defendant's intestate to the effect that, when at one time plaintiffs' predecessor wrote him suggesting that the house should be painted, he replied that he would paint it when he thought it needed it, as he claimed it as his own. As the larger portion of the building was located upon lot 7, which defendant's intestate had purchased under the execution sale, his notification of alleged ownership to plaintiffs' predecessor was wholly consistent with his occupation of the 40 acres as a tenant. As to the second proposition, assuming that the evidence did not show that plaintiffs and their predecessor had paid all taxes levied and assessed against the property, it does not appear that defendant's intestate had made such payments; and we think that it was essential in support of the claim of title by prescription that it be shown that all taxes levied and assessed against the property had been paid by the adverse claimant, as required by the provisions of section 325 of the Code of Civil Procedure. Reynolds v. Williard, 80 Cal. 605, 22 Pac. 262; McGrath v. Wallace, 85 Cal. 622, 629, 24 Pac. 793. The claim of prescriptive title made by defendant's intestate was not founded upon a written instrument, judgment, or decree.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

---

38 Cal. App. 141

## ENGEBRITSEN et al. v. LATIN-AMERICAN PUB. CO. et al. (Civ. 1809.)

(District Court of Appeal, Second District, California. Sept. 3, 1918.)

1. APPEAL AND ERROR ⊂=931(1) — ASSIGNMENT OF ERROR—ABSENCE OF FINDINGS—PRESUMPTION.

Where error is claimed because of the absence of a finding on a material issue, it must affirmatively appear that evidence was presented from which the trial judge would be required in writing to determine the fact, and in the absence of such showing it will be presumed there was no evidence.

2. PLEDGES ⊂=33 — PLEDGOR'S CROSS-COMPLAINT FOR DAMAGES—BURDEN OF PROOF.

In an action on a promissory note for printing, which was secured by the retention by plaintiff of certain books, and defendant cross-complained that such books had never been delivered to it, the burden was on plaintiff to show facts in excuse of its refusal to deliver the books on demand.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by E. D. Engebritsen and H. White, doing business under the name of the Standard Printing Company, against the Latin-American Publishing Company and others. Judgment for defendants on their cross-complaint, and plaintiffs appeal. Affirmed.

Tyrrell, Abrahams & Brown and Chas. W. Fricke, all of Los Angeles, for appellants. Milton K. Young and W. D. Finch, both of Los Angeles, for respondents.

JAMES, J. Prior to September, 1913, plaintiff copartnership contracted with defendant copartnership to print and bind a certain lot of text-books for defendant. When the work was completed defendant copartnership was unable to pay the full amount due to the plaintiff on the contract, and a supplemental agreement was thereupon entered into, whereunder the defendant executed to the plaintiff its promissory note in the sum of $300, and it was agreed between the parties that 3,000 copies of the book then ready for delivery should be held by the plaintiff as security for the payment of the promissory note. In this action plaintiff sought to recover judgment on the $300 promissory note. The defendant, by answer and cross-complaint, pleaded that the 3,000 books had never been delivered to it. Answering the cross-complaint, the plaintiff set up that the 3,000 books had been destroyed by fire while in its hands. Affirmative judgment for the sum of $200 damages was entered in favor of the defendant. This appeal is taken from that judgment, and is presented on the judgment roll alone.

In the supplemental agreement hereinbefore referred to the plaintiff agreed as to the 3,000 books held as security that it would "store and keep the same safely at its own risk, except as to conditions beyond its control, and will deliver the same to the Latin-American Publishing Company, or its order. * * *" Referring to the destruction of the books, the plaintiff in its answer to the cross-complaint alleged:

"That said fire was caused by matters and things without and beyond the control of cross-defendants, and was wholly without any negligence or fault of cross-defendants."

Touching this issue, the court in its findings of fact determined as follows:

"That while said 3,000 books were still in the possession of said plaintiff and being stored at its own risk, except as to conditions beyond its control, the said books were destroyed by fire, on the 1st day of February, 1914; that said fire took place at the printing house of the plaintiff and cross-defendant, but that the destruction of said books by said fire was not a condition beyond the control of said Standard Printing Company."

It is argued on behalf of appellant that this finding is insufficient to support the judgment, first, because the court neglected and omitted to affirmatively find upon the allegation contained in the plaintiff's answer to defendant's cross-complaint, wherein the plaintiff alleged that the fire was caused without any negligence on its part. The case being presented on the bare judgment roll, we have no means of knowing whether there was evidence heard in the trial court upon that question.

[1] It is well settled that, where error is claimed because of the absence of a finding on a material issue, it must affirmatively appear that evidence was presented from which the trial judge would be required in writing to determine the fact; and in the absence of such a showing it will be presumed that there was no such evidence. Coats v. Coats, 160 Cal. 671, 118 Pac. 441, 36 L. R. A. (N. S.) 844; Mohr v. North Rawhide Mining, etc., Co. et al. (Cal.) 170 Pac. 600. But, argue counsel for appellant, it was incumbent on the defendant to show, not only a failure to deliver the books on demand, but also that such failure was not excusable —citing Wilson v. Southern Pacific R. R. Co., 62 Cal. 164. In the opinion in that case it is said that a prima facie case of negligence is made out against a warehouseman who refuses to deliver property stored with him upon proof of demand and refusal. And the opinion continues:

"But if it appears that the property, when demanded, was consumed by fire, the burden of proof is then on the bailor to show that the fire was the result of the negligence of the warehouseman."

In this case, there being an absence of any showing as to what the evidence was, and therefore no showing of the time when the property was destroyed, and it appearing by the answer of the plaintiff to the defendant's cross-complaint that the former assumed the burden of showing why it refused to deliver the books, a different situation is presented from that considered in the Wilson suit, supra.

[2] We have not found it necessary to determine whether, under the agreement of the plaintiff to store the books at its own risk, it assumed a larger responsibility than that of using ordinary care in their safekeeping. For the purposes of this decision, we have adopted the view of the appellant that, if the destruction of the books was brought about without any negligence on the part of the plaintiff, it might be excused. However, as already indicated, we are of the view that the burden was upon the plaintiff to show facts in excuse of its refusal to deliver the books upon the demand of the defendant. Our duty being to construe the findings of the trial judge in such a way as will support the judgment, we think, for reasons stated, that the judgment should be affirmed.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

---

38 Cal. App. 178

PEOPLE v. MIRANDI. (Cr. 606.)

(District Court of Appeal, Second District, California. Sept. 10, 1918.)

CRIMINAL LAW ⊂=721(2) — ARGUMENTS OF PROSECUTING ATTORNEY.

In prosecution for unlawfully maintaining place where intoxicating liquors are sold, it was misconduct for the prosecuting attorney, after defendant had testified, to argue to the jury that accused's counsel wisely refrained from asking her about any illegal sales of liquor, in view of Pen. Code, § 1323.

Appeal from Superior Court, County of San Bernardino; J. W. Curtis, Judge.

Sari Mirandi was convicted of unlawfully maintaining a place where intoxicating liquors were sold, and she appeals. Reversed.

J. Vincent Hannon, of Los Angeles, and A. S. Maloney, of San Bernardino, for appellant. U. S. Webb, Atty. Gen., Joseph L. Lewinsohn, Deputy Atty. Gen., and Jerry H. Powell, of Los Angeles, for the People.

CONREY, P. J. Defendant was convicted of the crime of misdemeanor committed by willfully and unlawfully maintaining and carrying on a place in the county of San Bernardino where intoxicating liquors were sold, etc., contrary to an ordinance of that county. The defendant appeals from the judgment.

At the trial the defendant was sworn as a witness in her own behalf, but did not testify concerning any illegal sales of liquor at the winery, which was owned by her and conducted by her son-in-law, one Jean Fages. In the course of his address to the jury, the district attorney made the following statement:

"I wish to call your attention to a remarkable thing. The defendant was placed upon the stand, but she was not asked regarding any illegal sales of liquor. Mr. Hannon did not ask her a question concerning this matter. He was too good a lawyer, and I give him credit for having too much respect for his client's feelings than to have placed her in an embarrassing position by asking her such questions."

Defendant's attorney thereupon objected to the statement so made, and asked the court to instruct the jury that it was not incumbent upon the defendant to make any denial of anything pertaining to the matter mentioned by the district attorney. To this the court replied:

"The law don't require the defendant to take the stand at all; but, when the defendant has taken the stand, I don't think she is protected after that. I think the district attorney is within his rights."

The district attorney then continued his address, amplifying and emphasizing his previous remarks upon the failure of the defendant to testify about illegal sales of liquor at her place of business.

We have no doubt that in making said statements to the jury the district attorney was guilty of misconduct, and that the court erred in overruling defendant's exceptions thereto. Section 1323 of the Penal Code provides that the neglect or refusal of a defendant in a criminal action to be a witness "cannot in any manner prejudice him nor be used against him on the trial or proceeding." This section has been held to protect a defendant against adverse comment upon his

failure to testify, not only where the defendant was not a witness, but also where the defendant was a witness, but omitted to testify concerning some of the elements of fact at issue in the case. People v. McGungill, 41 Cal. 429; People v. Sanders, 114 Cal. 216, 231, 46 Pac. 153; People v. Morris, 3 Cal. App. 1, 84 Pac. 463.

We think that this misconduct and error was so far prejudicial to the defendant that justice requires a reversal of the judgment. The evidence in the record fails to show that defendant had any knowledge of the illegal sale of liquor which constituted the principal item of evidence on the part of the prosecution until after that transaction had been completed, and also fails to show that she had knowledge of any previous violations of the law by her agent until after they had occurred. There is no direct evidence that she ever advised or approved of those illegal acts. She did not reside at, and was not usually present at, said place of business. In effect, the evidence against her is circumstantial, and is not so far conclusive that we are warranted in using section 4½ of article 6 of the Constitution as a ground for affirming the judgment.

Some other questions of importance are discussed in the briefs, but they probably will not arise in connection with a second trial of the case.

The judgment is reversed.

We concur: JAMES, J.; SHAW, J.

179 Cal. 140

## CALIFORNIA ADJUSTMENT CO. v. ATCHISON, T. & S. F. RY. CO.

(Sac. 2584.)

(Supreme Court of California. Oct. 5, 1918. Rehearing Denied Nov. 4, 1918.)

1. CARRIERS ⊜202 — VIOLATION OF RATE REGULATIONS—REMEDY OF SHIPPER.

Public Utilities Act, § 71, providing for due reparation by the Railroad Commission for the imposition of excess freight charges, applies only where an examination of evidence as to a disputed matter of fact is necessary to determine whether the public utility has imposed excessive charges, and does not give the commission jurisdiction to the exclusion of the courts of violations of the long and short haul clause of the Constitution.

2. COMMERCE ⊜61(3)—RATE REGULATION—CONSTITUTIONALITY.

Const. art. 12, § 21, respecting freight charges for long and short hauls, is not unconstitutional, as being in conflict with the commerce clause of the federal Constitution (article 1, § 8, cl. 3).

3. CARRIERS ⊜202 — RATES — OVERCHARGE—RIGHT OF ACTION.

In view of St. 1909, p. 511, § 34, St. 1911, pp. 24, 36, §§ 22, 41, and Public Utilities Act 1911, any person injured by discrimination through a violation of the long and short haul clause of the Constitution (article 12, § 21) has a right of action whether such right existed at common law or not.

4. CARRIERS ⊜12(1) — RATE REGULATION —RAILROAD COMMISSION.

Under the constitutional provisions as to rate regulation as they existed prior to October 10, 1911, the Railroad Commission was authorized to fix reasonable rates, so that rates relating to long and short hauls in violation of constitutional provisions were void, although fixed by the commission, and afford no defense in an action by a shipper for the exaction by a carrier of illegal rates.

5. CARRIERS ⊜12(6½)—RATE REGULATION —RAILROAD COMMISSION.

Under Const. art. 12, § 21, as amended, relating to freight rates, the Railroad Commission can relieve a carrier from the prohibition of the long and short haul clause only on application by the carrier after investigation.

6. CARRIERS ⊜202—EXCESS CHARGES—RECOVERY—PAYMENT WITHOUT PROTEST.

Where a consignee is compelled to pay exorbitant freight charges to obtain a shipment, he may bring an action to recover the excess charges without having tendered payment, or having made payment under protest; payment so made not being voluntary.

7. CARRIERS ⊜202—EXCESSIVE RATES—RECOVERY OF PAYMENT—PLEADING.

Where a consignee seeks to recover from the carrier excess freight charges exacted in violation of the long and short haul clause of the Constitution, he need not show that, when shipments to intermediate points were made, there were contemporaneous shipments made to more distant points.

In Bank. Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by the California Adjustment Company against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

E. W. Camp, U. T. Clotfelter, and M. W. Reed, all of Los Angeles, for appellant. Hoefler, Cook, Harwood & Morris and Alfred J. Harwood, all of San Francisco, for respondent.

LORIGAN, J. This is an appeal by the defendant from a judgment against it for $34,242.31. The complaint set up 15,207 causes of action, each based on the alleged violation by defendant of the long and short haul clause of the Constitution of this state and representing an alleged illegal overcharge collected by defendant from shippers of freight over its road; the claim for damages thereon against the defendant having been by said shippers assigned to plaintiff. The freight shipment in each instance was over the road of the defendant from San Francisco to some point or station along the line between San Francisco and Los Angeles and the allegation was that the rate charged, demanded, and paid on each shipment to said intermediate point exceeded the rate contemporaneously charged for like shipment from San Francisco to Los Angeles. The demand in each cause was for the difference between the through rate from San Francisco to Los Angeles and the rate paid and the total amount of these excessive

charges on the 15,207 shipments amounted to about $25,000, with interest. Many of these freight shipments were made before October 10, 1911, and the rest after that date and up to June 12, 1912. The significance of the date of October 10, 1911, it may be mentioned here, is that on that date the long and short haul clause of the state Constitution was amended. As it stood before October 10, 1911, that clause (section 21, art. 12) read:

"No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for the transportation of the same classes of freight or passengers within this state, or coming from or going to any other state. Persons and property transported over any railroad, or by any other transportation company or individual, shall be delivered at any station, landing, or port, at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station, port, or landing. Excursion and commutation tickets may be issued at special rates."

As amended October 10, 1911, said section 21 reads:

"No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for the transportation of the same classes of freight or passengers within this state. It shall be unlawful for any railroad or other transportation company to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates: Provided, however, that upon application to the Railroad Commission provided for in this Constitution such company may, in special cases, after investigation, be authorized by such Commission to charge less for longer than for shorter distances for the transportation of persons or property, and the Railroad Commission may from time to time prescribe the extent to which such company may be relieved from the prohibition to charge less for the longer than for the shorter haul. * * *"

Another section amended at the same time and applicable to the matter under consideration here is section 22 of said article 12, which, as amended, is as follows:

"* * * No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Railroad Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Railroad Commission in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution. The provisions of this section shall not be construed to repeal in whole or in part any existing law not inconsistent herewith, and the 'Railroad Commission Act' of this state, approved February 10, 1911, shall be construed with reference to this constitutional provision and any other constitutional provision becoming operative concurrently herewith. And the said act shall have the same force and effect as if the same had been passed after the adoption of this provision of the Constitution and of all other provisions adopted concurrently herewith, except that the three commissioners referred to in said act shall be held and construed to be the five commissioners provided for herein."

Defendant in its answer, among other things, set up several defenses, one of which was that all rates collected for transportation of each and all shipments described in the causes of action were rates fixed by the Railroad Commission of the state pursuant to section 22, article 12, of the Constitution as it stood from the year 1879 up to October 10, 1911, and that such rates were at the time of their collection and are now conclusively just and reasonable and the only lawful rates. As a further separate defense defendant set up that on or about October 26, 1911, it applied to the Railroad Commission of the state under section 21, article 12, as amended October 10, 1911, for permission to maintain the higher rates at intermediate points and to maintain lower rates from San Francisco to Los Angeles for all shipments moving after October 26, 1911, and that on or about February 15, 1912, the Railroad Commission, after investigation, made its order permitting the defendant to maintain such higher and lower rates and that such order has ever since been in full force and effect. As to these defenses the findings of the court were against them.

Preliminarily to considering the points presented by appellant for a reversal, it may be stated that an action—California Adjustment Co. v. Southern Pacific Co. (D. C.) 226 Fed. 349, practically identical with this but against another transportation company for similar overcharges—was commenced in the District Court of the United States about the time this suit was instituted and judgment there went for plaintiff. That judgment was affirmed by the Circuit Court of Appeals (Southern Pacific Co. v. California Adjustment Co., 237 Fed. 954, 150 C. C. A. 604), and on writ of certiorari the cause is now pending in the Supreme Court of the United States. All the points made here for a reversal were likewise urged in the United States District and Circuit Courts, and determined adversely to the defendant there.

Proceeding now to a consideration of the grounds urged for a reversal:

[1] 1. It is insisted first that the court had no jurisdiction of this action. The specific point made under this general objection is that jurisdiction to award any reparation for deviation from the long and short haul clause is with the Railroad Commission in the first instance and not with the courts. In this regard it is urged that since March 23, 1911, when the Public Utilities Act (St. 1911 [Ex. Sess.] p. 18) went into effect a shipper who had been compelled to pay a larger amount for an intermediate or short haul shipment than the carrier is charging for a longer haul and who claims reparation therefor must first apply to the Railroad Commission and have determined by it the amount of reparation to which he is entitled and obtain an order requiring its payment by the carrier,

and until this has been done the courts have no jurisdiction in the matter. Section 71 of the Public Utilities Act relied on is as follows:

"When complaint has been made to the commission concerning any rate, fare, * * * or commodity furnished or service performed by any public utility, and the commission has found, after investigation, that the public utility has charged an excessive or discriminatory amount for such product, commodity or service, the commission may order that the public utility make due reparation to the complainant therefor, with interest from the date of collection: Provided, no discrimination will result from such reparation."

It is upon this section that the appellant bases its point. It is quite clear, however, that this section applies only to cases in which an examination or investigation of evidence as to some disputed matter of fact is necessary in order to determine whether the public utility has or has not charged an excessive or discriminatory amount. It could not apply to a situation such as we have here where there is nothing for the Railroad Commission to investigate or examine. When a charge has been paid to a carrier or a demand exacted in violation of the long and short haul clause of the Constitution there is nothing which can call for the action of the Railroad Commission. As the transaction fixes conclusively the liability of the carrier the transaction itself furnishes the measure of damage which the shipper suffered as soon as it occurred and the commission could neither decrease nor enlarge it. The Constitution by prohibiting the discrimination determines conclusively that a violation of it shall be unwarranted and unjustified as matter of law and as this is a legal question the commission can have nothing to do with it. It is a question for the courts as is recognized by the Public Utilities Act itself, and the right of the shipper comes within the terms of section 73, subdivision (a) of that act, which authorizes an aggrieved party to prosecute an action in the courts for any loss or injury arising from a failure of a carrier to do any act or thing required to be done by the Constitution or any law of the state or any order or decision of the commission. Texas & Pacific Ry. Co. v. Abilene, etc., Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; Pennsylvania R. R. Co. v. International Coal Co., 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315; Southern Pacific Co. v. California Adjustment Co., supra; Southern Pacific Co. v. Superior Court of Kern Co., 27 Cal. App. 240, 150 Pac. 397, 404.

[2] 2. It is next claimed that section 21, respecting the long and short haul clause, both as it stood prior to October 10, 1911, and as amended on that date, is unconstitutional, because in conflict with the commerce clause of the federal Constitution (article 1, § 8, cl. 3). This is based, as to section 21, article 12, as it stood prior to the amendment of October 10, 1911, in the opening clause thereof, which refers to transportation of freight or passengers "within this state or coming from or going to any other state," which counsel claims was an attempt on the part of the state to regulate interstate commerce and therefore void. Conceding, without deciding, that this is true, still only the opening clause containing that language would be affected. None of the subsequent clauses of the constitutional provision are so related to or dependent on it as to be affected by the invalidity of this opening clause. On the contrary, they are independent and severable from it. They comprise in themselves a complete scheme of legislative prohibition against discrimination in charges by carriers as to long and short hauls, and this without aid from or connected with the opening clause of the provision at all and with it entirely eliminated. These subsequent clauses contain no reference to interstate commerce and are complete in their prohibition as to long and short hauls. True, they do not limit the prohibition in terms to transportation within the state; but, as that was the sole territorial extent to which they could apply, the construction must be that they were intended only to apply to it. As far as this same point is urged against the constitutional provisions, as amended on October 10, 1911, it is entirely without merit, for the simple reason that there is not the slightest reference anywhere in the constitutional provisions to interstate transportation.

[3] 3. The next point presented is that neither by common law nor statute is an action for damages for a violation of a long and short haul clause given. There is no necessity for discussing both grounds urged by the appellant. If the right of action is conferred either by the common law or by statute, it is immaterial to consider whether it existed under both, and that it is expressly conferred by statute in this state is readily apparent. The statutes conferring it are the acts of 1909 (St. 1909, p. 499), the act of 1911 (St. 1911, p. 13), and the Public Utilities Act (St. Ex. Sess. 1911, p. 18). Some of the causes of action sued on here accrued when the statute of 1909 was in force, others while the act of 1911 was in operation, and the remainder while the provision of the Public Utilities Act prevailed. While neither the act of 1909 nor the act of 1911 expressly refers to the constitutional provisions against discrimination, they were both passed in pursuance of the terms of section 22 of article 12 of the Constitution relative thereto, and must be deemed to have reference to the provisions of that instrument upon that subject, and both acts declare discrimination by carriers between persons and localities unlawful and both acts confer a cause of action upon any person damaged by such discrimination. As to the sections of the act upon the subject, section 34 of the act of 1909 declares:

"It shall also be unjust discrimination for any such transportation company to make or give any undue or unreasonable preference or advantage to any particular person, * * * or locality, or to any particular description of traffic, in any respect whatsoever, * * * or to subject any particular person, * * * or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Sections 22 and 41 of the act of 1911 prohibit discrimination in language similar to that quoted from the act of 1909, and in more extended terms; and as to the right of action for a violation of the prohibitory clause arising from such discriminations section 38 of the act of 1909 declares that:

"In case any transportation company subject to this act, or any person or corporation within the provisions hereof, shall do, cause to be done, or permit to be done, * * * any matter, act or thing in this act prohibited or declared to be unlawful, * * * such transportation company, * * * shall be liable to the penalties hereinbefore provided for, and shall, in addition, be liable to the person or persons, firm or corporation injured by such act or omission for the damages proximately resulting therefrom. * * *"

Section 43 of the act of 1911 declares:

"In case any railroad or other transportation company subject to this act shall do, cause to be done, or permit to be done any matter, act, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing herein required to be done by it, such railroad or other transportation company shall be liable to the person or persons, firm or corporation injured thereby for the damages sustained in consequence of such violation."

A charge of more for a short haul than a long one has been decided to be discrimination. It is so held in Southern Pacific Co. v. Superior Court of Kern County, 27 Cal. App. 240, 150 Pac. 397, where it is said:

"It should be kept in mind that section 21 of article 12 of the Constitution, both before and after the amendment of October 10, 1911, contains a prohibition against discrimination in charges between places, and that the so-called long and short haul clause, following the general provision against discriminations, is a particular application of the rule as first stated in general terms."

In addition to these acts declaring discrimination unlawful and providing for an action in case of such discrimination, a right of action is also given by the Public Utilities Act of 1911, heretofore referred to. Section 73 (a) thereof declares as follows:

"In case any public utility shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, * * * either by the Constitution, or any law of this state, * * * such public utility shall be liable to the persons or corporations affected thereby for all loss, damages or injury caused thereby or resulting therefrom. * * * An action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any corporation, or person."

It is quite apparent, we think, from these provisions of the two acts, respectively of 1909 and 1911, and the Public Utilities Act of 1911, that a right of action is conferred on any person injured by discrimination through a violation of the long and short haul clause of the Constitution and without any regard to whether a right of action existed at common law or not.

4. As we have said, some of the shipments charged were prior to October 10, 1911, and prior to the adoption of the amendments to sections 21 and 22 of the Constitution and the others subsequent thereto. It is insisted by appellant that the rates charged for all shipments prior to October 10, 1911, were established by the Railroad Commission and that those rates, as they existed when the amendments referred to were adopted, were continued in force and effect by such constitutional provisions. This contention is based upon what is known as the Railroad Commission Act of 1911 and section 22 of article 12 of the Constitution, above quoted. Sections 17 and 18 of the Railroad Commission Act (St. 1911, p. 13), mentioned in the constitutional provision, provided:

"All rates of charges for the transportation of passengers and freight * * * shall remain in effect until changed by the commission." Section 18.

"* * * Until the establishment of such rates and classifications or the establishment of others in lieu thereof, the said railroad or other transportation company filing such schedules or tariffs and classifications, and parties thereto, shall charge and collect the rates and fares in effect at the time of the passage of this act." Section 17.

[4] Now it is quite apparent that as far as the defense is made that the rates charged prior to October 10, 1911, had been established by the Railroad Commission, and were therefore valid and a protection to defendant, it cannot be sustained. While it is true that during the period from 1879 to the time of the amendment of October 10, 1911, the railroads were powerless to fix rates themselves and the only authority to do so was vested under the Constitution in the Railroad Commission, still the latter body could only fix rates which were authorized by the Constitution. Counsel do not pretend to point out where the commission derived the power or authority to fix rates discriminatory as to a short or long haul. As a matter of fact, none existed. All the commission was authorized to do was to fix reasonable rates—legal rates. And as the Constitution absolutely prohibited the charging of rates in contravention of the long and short haul provision thereof, the acts of the commission in attempting to do so were clearly void and afforded no protection to the carrier. The only theory upon which the claim of appellant could be sustained would be that the constitutional provision as it stood prior to October 10, 1911, was void as contravening the commerce clause of the federal Constitution; but, as we have seen that it was not, the defense of appellant vanished with it.

As to the further claim that the said amendments adopted on October 10, 1911, continued in effect existing rates as shown in established tariff lists on file with the commission. This applies to the charges

made by appellant subsequent to October 10, 1911. It will be noted that the amendment to section 21, article 12, provides that on application of the transportation company to the Railroad Commission the commission "may, in special cases, after investigation, be authorized by such commission to charge less for longer than for shorter distances. * * *" On October 26, 1911, an order was made by the commission on its own initiative requiring railroads or other transportation companies then charging rates not in conformity with the long and short haul clause to file with the commission a schedule of such rates, and if it wished to justify such charges to then file also an application to be relieved from the prohibition of the constitutional provision as to long and short haul charges. On November 20, 1911, and on January 16, 1912, other orders were made by the commission of its own volition in favor of railroads and other transportation companies granting them permission to file with the commission a list of such changes in rates and fares as would occur in the ordinary course of their business "continuing under the present rate basis or adjustment higher rates or fares at intermediate points, provided a discrimination against intermediate points was not greater than it existed October 10, 1911," but expressly declaring "that the commission does not hereby indicate that it will approve any rates and fares that will be filed under this permission or conceding the reasonableness of any higher rates to intermediate points, all of which rates and fares will be investigated at the hearing to be held January 2, 1912."

Now, it appears from the record in this case that the defendant never filed any application pursuant to said orders, or at all, until December 30, 1911, and February 15, 1912, on which dates it filed applications showing deviations by it from the prohibition of the long and short haul clause and asking for relief from the prohibitory constitutional provision. The record, too, affirmatively shows that no investigation was had on these applications, the same being continued from time to time, the last continuance prior to this action being till April 4, 1912, and it does not appear that any order was finally made approving any rates or fares contained in the schedules filed by the defendant. The position of the defendant is that these orders continued in effect the charges existing when the amendments to sections 21 and 22 were adopted; that the commission was given power to establish such as the rates under the permission of section 15 of the Railroad Commission Act, authorizing it to fix rates, which act is referred to in said amendment to section 22 and must be construed in connection with the terms of said section 22, which declares that:

"No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Railroad Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Railroad Commission in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution."

These same points which defendant is making here were made by the defendant in the Southern Pacific case in the Circuit Court of Appeals, which we have heretofore referred to and cited. In disposing of these points it is said in that decision:

"But it does not appear that the defendant filed such an application until December 30, 1911, or that an investigation was ever had by the commission, or that it ever made an order finally approving any of said rates or fares. If, indeed, the orders of the commission may be construed as expressly giving by their terms authority to continue in effect until an investigation of the rates then in existence, which deviated from the constitutional provision as to the long and short haul, it is obvious that the commission erroneously assumed that the act of 1911 gave it the power to make such an order. The amendment of 1911 gives the power to authorize a deviation from the prohibition of the Constitution only upon the application of the carrier, and after an investigation by the commission, for it does not, as does the act of Congress giving authority to the Interstate Commerce Commission, authorize the fixing of temporary rates pending investigation. Assuming that under such a temporary order the defendant continued to make charges forbidden by the Constitution, it would be necessary for it to show, in defending an action for the recovery of such charges, that the commission finally approved the rates, and made them valid by an order made after an application and investigation as required by the statute."

And answering the claim as to the power given to the commission under the provisions of section 22 immediately above quoted, the court continues:

"We think it is very clear that an act authorizing the commission to establish rates regardless of the provisions of section 21 of the amended Constitution would be inconsistent with that section. While section 22 declares that the Legislature may confer upon the commission powers additional to those conferred upon it by the Constitution, it erects a barrier which the Legislature cannot pass, in providing that such powers must not be inconsistent with the powers conferred upon the commission by the Constitution. The Constitution specifically points out the method whereby relief can be had from the prohibition as to the long and short haul, and it is clear that any statute which provides a method for obtaining such relief other than the method therein prescribed is inconsistent with it."

[5] While this decision of the Circuit Court is not a final one, we agree with the reasons and conclusions just quoted denying any efficacy in the position taken by defendant. It is apparent that while the authority is given to the Legislature to confer similar or different power upon the Railroad Commission than is directly granted by the constitutional provision, this authority is coupled with the limitation that the power so conferred must not be inconsistent with the constitutional power expressly given. The method or procedure under which the commission may relieve the carrier from the prohibition

of the long and short haul is provided in the Constitution itself. It can be invoked only through an application filed by the railroad or other transportation company. Relief can only be granted after an investigation, which, of course, means an investigation for the purpose of determining what are reasonable rates and by an order finally made on the application approving the rates which constitute the deviation. Its authority to act and the method of procedure to be pursued being thus expressly prescribed by the Constitution, any other method would be inconsistent with the method prescribed and nugatory.

Two other points are made by defendant: First, that as no protest was made against the payment of the freight charges when exacted the payment must be treated as voluntary and no action for their recovery back can be maintained; second, that in order to sustain a claim for discrimination it was necessary for plaintiff to show that when the shipments to intermediate points were made for which the higher rates were charged, there were contemporaneous shipments made to the more distant points. These objections need no extended discussion.

[6] As to the matter of protest: Plaintiff alleged that all plaintiff's assignors, who were the consignees of the shipments, were compelled to pay the charges in order to obtain their consignments and defendant in its answer admitted that if the payments had not been made the consignees could not have obtained the goods. It would have been an idle waste of words to have made a payment under protest and the rule is that money thus paid is not voluntarily paid but may be recovered back without protest. Mobile & Montgomery R. R. Co. v. Steiner et al., 61 Ala. 559; Chicago & Alton R. R. Co. v. C. V. & W. Coal Co., 79 Ill. 121.

[7] Nor do we think it material whether, when the shipments to intermediate points complained of as excessively charged for were made, no contemporaneous shipment to the more distant point was made. Under the constitutional provision the legitimate maximum charge for the shorter haul is the charge the carrier makes for the longer one and it is only necessary to show in proof of an illegal discrimination that the shipper paid a larger sum for the short haul than the defendant would have charged for the longer one. Actual shipment for the longer distance is not required to be shown. All that is required is a showing that the defendant held out and published to the shipping world that it would charge certain rates for the transportation of a certain class of merchandise from San Francisco to Los Angeles. This was shown, and, when shown, for the purpose of determining whether discrimination was practiced or not, the rates so held out to be charged are deemed in law to have been charged.

These are all the points made by defendant, and, as we do not find any of them tenable, the judgment is affirmed.

We concur: WILBUR, J.; SLOSS, J.; MELVIN, J.; SHAW, J.; RICHARDS, Judge pro tem.

---

179 Cal. 153

## CHINN v. PENN et al. (L. A. 4612.)

(Supreme Court of California. Oct. 7, 1918.)

1. GUARANTY ⊂⊃36(3)—CONSTRUCTION—MORTGAGEE'S INDORSEMENT OF NOTE.
The rule that a note and mortgage executed as parts of one transaction constitute one contract, to be construed together, does not render a mortgagee who has guaranteed the note liable for attorney's fees and other charges provided for in the mortgage, but not in the note.

2. BILLS AND NOTES ⊂⊃135 — MORTGAGE AS PART OF NOTE.
The words "Note secured by a mortgage," immediately above the body of the note, do not make the additional obligations contained in the mortgage a part of the note.

3. MORTGAGES ⊂⊃401(4) — ACCELERATION OF DUE DATE — NOTICE — COMMENCEMENT OF SUIT.
The commencement of suit to foreclose a mortgage after default of interest payments was an exercise of mortgage provision to declare the whole sum due at holder's option, and no previous notice to defendants was necessary.

Department 1. Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Suit by J. B. Chinn against Harry Penn and others for mortgage foreclosure. Judgment for plaintiff, and defendant G. L. Crenshaw appeals. Reversed with directions.

Hickcox & Crenshaw, of Los Angeles, for appellant. James, Smith & McCarthy and Herbert Freston, all of Los Angeles, for respondent.

SHAW, J. The defendant Crenshaw appeals from the judgment foreclosing a mortgage executed by the defendant Harry Penn to Crenshaw, and by Crenshaw indorsed to the plaintiff. The note secured by the mortgage contained no obligation except the promise to pay the principal thereof, $3,500, with interest at 7 per cent., payable quarterly, to be compounded if not paid when due, and providing that the whole sum of principal and interest should become due, at the option of the holder, upon failure to pay any installment of the interest when due. The mortgage declared that it was made to secure, not only the principal and interest of the note, but also all advancements made by the holder thereof for taxes and assessments which were liens on the property mortgaged, attorney's fees for foreclosing the same, and fees for searching the title preparatory to such foreclosure. Crenshaw sold and assigned the note and mortgage to the plaintiff. The guaranty of the note by Crenshaw was

evidenced by an indorsement on the back of the note in these words:

"Pay J. B. Chinn or order, payment guaranteed, protest waived.

"[Signed] G. L. Crenshaw."

The court below gave judgment of foreclosure for the amount of the note and interest then due, together with $200 as attorney's fees and the amounts advanced by the holder of the note for the payment of taxes and assessments on the property and $15 as a fee for searching the title, amounting in the aggregate to $4,391.03. This sum was made a personal charge against Crenshaw and the judgment provided that if the property did not sell for enough to pay the same, a judgment for the deficiency should thereupon be entered against Crenshaw. In support of his appeal Crenshaw insists that the guaranty upon which alone he was held runs to the note only, and cannot be held to be a guaranty of payment of the attorney's fees and other charges provided for in the mortgage, but not in the note.

[1, 2] We think the appellant's contention must be sustained. It is true that for many purposes a note and mortgage executed as parts of one transaction are to be treated as constituting one contract, and are to be considered and construed together. Meyer v. Weber, 133 Cal. 683, 65 Pac. 1110; Trinity Co. Bank v. Haas, 151 Cal. 555, 91 Pac. 385. But it does not follow from this that one who in terms guarantees payment of the note must also be held to have guaranteed the payment of other and different obligations contained only in the mortgage. The transfer in this case was manifested by an assignment duly executed by Crenshaw. This assignment referred both to the mortgage and the note and purports to transfer the same to the plaintiff, but it contained no guaranty of the payment of the obligations of either instrument. The guaranty was manifested solely by the indorsement on the note, and there is nothing in the language thereof which can be construed as extending it to other obligations not specified in the note. It was not executed at the same time as the note and mortgage, nor as part of the same transaction, but was made afterwards as a part of the sale and transfer of the note from the holder to the plaintiff. The words "Note secured by a mortgage," immediately above the body of the note, do not make the additional obligations contained in the mortgage a part of the note. Crenshaw had the right to sell the note and mortgage on such terms as he chose to make, and to limit his guaranty to a part only of the obligations of the entire contract. His indorsement of the note, guaranteeing that instrument, cannot be extended by implication, so as to cover other obligations contained only in the mortgage. Having thus limited his guaranty by his written contract declaring the same, he is bound only by its terms. The court erred in rendering judgment against Crenshaw for the tax liens and fees provided for only in the mortgage. To this extent the judgment is erroneous.

[3] There is no merit in the appellant's contention that the action was prematurely begun. Installments of interest fell due May 1 and August 1, 1914, and were not paid. Thereupon the holder declared the entire sum due, and on August 9th filed his complaint in foreclosure. The commencement of the action was an exercise of the option to declare the whole sum due, and no previous notice to the defendants was necessary. Hewitt v. Dean, 91 Cal. 5, 27 Pac. 423; Trinity Co. Bank v. Haas, supra.

The contention that the court failed to find on the disputed allegation that the installment of interest falling due on August 1, 1914, had not been paid is not sustained by the record. The findings declare that no part of the interest had been paid, except the installment falling due on February 1, 1914.

The mortgage provided for foreclosure upon nonpayment of interest. At the time the judgment was rendered the note had come due according to its terms, without any acceleration of payment by reason of the nonpayment of the interest and the exercise of the option of the holder to declare it to become due. Under these circumstances the court was authorized to render a judgment foreclosing the mortgage for the entire amount and directing the sale of the property to satisfy the same, even if the payment had not been accelerated as claimed. Orange Growers' Bank v. Duncan, 133 Cal. 256, 65 Pac. 469; Bostwick v. McEvoy, 62 Cal. 502; Code Civ. Proc. § 728. For this reason the point, which the appellant suggests, that the holder of the note, by his indulgence after the nonpayment of the May installment of the interest, had deprived himself of the right to declare the entire principal due, has become immaterial. We may say, however, that we know of no case which would support the point, on the facts found, even if it were important.

A new trial does not appear to be necessary. The findings cover all the issues, and it is clear that there is no defense to the action, except the one above noted in behalf of Crenshaw. The judgment should have declared for a deficiency judgment against Crenshaw only for the amount of the note and interest and costs, without including the other obligations for fees and taxes and liens paid on the property. We are unable to ascertain the manner in which the court made its calculations as to the amounts, and therefore we cannot modify the judgment directly by ordering a deduction from the amount thereof. The error can be rectified by remanding the case to the court below, directing a new judgment to be entered there.

It is ordered that the judgment be reversed, and that the cause be remanded to the court below, and that thereupon that court

enter a new judgment of foreclosure in accordance with this opinion.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

---

37 Cal. App. 411

## FRAME v. BARNUM, County Auditor.

(S. F. 8804.)

(Supreme Court of California. Aug. 2, 1918.)

1. COUNTIES ⟸164—WARRANTS—PRESENTATION OF CLAIM.

Under Pol. Code, § 4091, making it duty of county auditor to draw warrant in payment of claims against county, where amounts are fixed by law, claim of copyist in county recorder's office for compensation for work during any month, not fixed by section 4324, subd. 3, must be allowed by supervisors before auditor is authorized to draw warrant for it.

2. REGISTERS OF DEEDS ⟸3—COPYIST—COMPENSATION.

Under Pol. Code, §§ 4130, 4234, subd. 3, copyist in county recorder's office is entitled to be paid only for words actually copied by her into books of record, not for printed words in forms which she fills in.

In Bank. Petition for mandamus by Lillian Frame against Charles E. Barnum, County Auditor of Fresno County, Cal. The writ was discharged by the District Court of Appeal, and petitioner petitions for hearing by the Supreme Court. Judgment of the District Court of Appeal affirmed in part.

The following is the opinion of Kerrigan, J., in the District Court of Appeal, concurred in by Zook and Beasly, Judges pro tem.:

This is a proceeding in mandamus, brought by petitioner, a copyist in the office of the county recorder of Fresno county, against the auditor of that county, for the purpose of compelling said auditor to draw a warrant upon the county treasurer for the payment of $599.10, alleged to be due to her as such copyist for her services during the months of February and March, 1918, the amount of said demand being approved by the county recorder. The auditor justifies his refusal to issue the warrant upon two grounds, namely, that in computing the number of folios covered by the demand the copyist had included a large number of words not actually written by her, but which were printed in the books of record in which her work of copying was done; and, second, that the demand of petitioner had not been presented to nor allowed by the board of supervisors of the county.

As to the first of these points, section 4130 of the Political Code (which relates to the duties of the county recorder of Fresno county) provides that the recorder must procure such books for records as the business of his office requires, and that such books may contain printed forms of deeds or other instruments of general use. Elsewhere it is provided that he shall charge and collect 10 cents per folio for recording in such books papers presented therefor. In subdivision 3 of section 4234 of said Code it is provided that the recorder shall have such copyists as are necessary to perform the duties of the office at a compensation of 6 cents per folio. In the present case the recorder procured books containing such printed forms, and it is admitted that a large number of the folios contained in the petitioner's demand covered these printed words; the documents upon which petitioner's work was done being written upon one of the standard forms thus carried into the recorder's books. It is the contention of the respondent that the petitioner is only entitled to be paid for the words actually copied by her into the books of record.

It appears in paragraph VI of the petition for the writ that for many years last past the recorder has kept in his office such books containing printed forms of instruments of general use, and that the compensation of copyists in his office has, until the time of the refusal of the respondent to honor petitioner's present demand, been calculated upon the basis of computing the printed matter of these forms as a part of the work copied. This is not denied by the respondent, although he disclaims that he had knowledge of the fact. During the time that this practice has been in vogue the law governing the office of the county recorder of Fresno county has been amended by the Legislature on several occasions; and we think it reasonable to infer that in establishing the rate to be paid to the copyist at 6 cents per folio the Legislature had this practice in mind. To any one familiar with this kind of work it is apparent that, if the Legislature had intended that only the words actually written by the copyist in filling in these prepared printed pages should be included in arriving at the amount to be paid therefor, the rate fixed would have been much higher, for the reason that the writing of such insertions must necessarily proceed at a much slower rate than would the writing of an equal number of words where the whole document is copied, the words comprising such insertions being names, dates, quantities, and descriptions—in a word, the most difficult part of the documents, and that requiring the most time to copy. Taking a broad view of this question, and bearing in mind that the county recorder is authorized by the same act to charge and collect from the public for recording an instrument nearly twice the rate per folio paid to the copyist for incorporating it into the records, and that in his charge to the public he treats the printed words as written ones, we are of the opinion that the petitioner was correct in computing her demand as she did.

This brings us to the next question, namely, whether such demand should have been presented to the board of supervisors for allowance. Section 4091 of the Political Code makes it the duty of the county auditor to draw a warrant (1) in payment of claims that have been legally examined, allowed and ordered paid by the board of supervisors; (2) in payment of debts and demands against the county where the amounts are fixed by law; and (3) in payment of debts and demands when approved and allowed, and are such as are authorized by law to be allowed by some person or tribunal other than the board of supervisors. It is not contended by the petitioner that her demand is one that is authorized to be allowed by some person or tribunal other than the board of supervisors; but it is urged that it comes within the category of amounts fixed by law, for the reason, as alleged, that the payments made to copyists are salary or compensation of a county officer, deputy, or assistant. Four cases are cited to the effect that the board of supervisors has no power to pass upon matters concerning salaries or compensation of such persons. An examination of the cases cited discloses that they have no application to the case at bar. Three of them deal with the question of the constitutionality of enactments, either by the Legislature or by the board of supervisors of a county, which purport directly or indirectly to increase the

compensation of a county officer during his term, and the fourth, namely, Agard v. Shaffer, 141 Cal. 725, 75 Pac. 343, if applicable to this case, would deprive the petitioner of any compensation at all, at least out of the county treasury.

We think it very clear that the compensation payable to a copyist in the recorder's office for work performed during any one month is not fixed by law, but that the law merely establishes a basis or standard by which the amount due may be determined. Such a claim, therefore, must be presented to and allowed by the board of supervisors before the county auditor is authorized to draw a warrant for its payment. This procedure has been held to be compulsory in paying the compensation of an expert employed by the grand jury under section 928 of the Penal Code, in paying for the services of the coroner on the basis of fees fixed by law, or the fees due to a constable. The present case comes within the authority of Woody v. Peairs, 170 Pac. 660, where the court had under consideration the question as to whether the auditor of Kern county should draw his warrant in favor of a detective who had been employed by the grand jury of that county, and whose claim had been approved by the foreman and secretary of that body. After referring to sections 4307, 4075, 4076, and 4091 of the Political Code, the court said: "There are, it is true, some cases in which claims against a county may be made upon the order of the judge of the superior court, as in a certain instance we have in mind (Pen. Code, § 869; McAllister v. Hamlin, 83 Cal. 361, 23 Pac. 357) by a magistrate. These cases, however, are exceptions to the general rule laid down upon the subject by the Legislature. In such cases the law expressly confers upon the judge or magistrate the power to order the claims to be paid. * * * But, unless there is some provision of law expressly authorizing a different course of procedure, all claims or charges against a county must be presented and filed and approved and allowed as provided by the sections of the Political Code above named, in which cases only is the auditor required to interpose his official approval as a prerequisite to the payment thereof by the treasurer."

For the foregoing reasons the writ is discharged.

Short & Sutherland and Carl E. Lindsay, all of Fresno, for petitioner. M. F. McCormick, Dist. Atty., of Fresno (R. G. Retallick, Deputy Dist. Atty., of Fresno, W. F. Schuermeyer, Dist. Atty., of San Diego, Ezra W. Decoto, Dist. Atty., of Oakland, and A. A. Rogers, Deputy Dist. Atty., of San Leandro, of counsel), for respondent.

ANGELLOTTI, C. J., and SHAW and WILBUR, JJ. On petition for hearing by the Supreme Court after decision by the District Court of Appeal:

[1, 2] While all of the justices of this court concur in the judgment of the District Court of Appeal discharging the writ of mandate, and in what is said in the opinion as to the necessity of presenting such a claim as that of petitioner to the board of supervisors for allowance, we are not in accord with the views of that court upon the first question discussed in the opinion. To the contrary, we are clearly satisfied that the contention of respondent that petitioner is entitled to be paid only for the words actually copied by her into the books of record is well based.

179 Cal. 173

## MAYNE v. SAN DIEGO ELECTRIC RY. CO.

(L. A. 4470.)

(Supreme Court of California. Oct. 16, 1918.)

1. STREET RAILROADS ⇐117(3) — QUESTIONS FOR JURY—DEFECTS IN PAVEMENT.

In minor's action for injuries when struck by street car, evidence *held* to present jury question as to negligence of company in failing to repair pavement.

2. STREET RAILROADS ⇐117(34)—QUESTIONS FOR JURY—PROXIMATE CAUSE OF INJURY.

In minor's action for injuries when struck by street car, evidence *held* to present jury question whether negligence of company in failing to repair pavement was the proximate cause of the accident.

3. STREET RAILROADS ⇐117(31) — QUESTION FOR JURY.

Where seven year old boy was struck by street car while crossing track, the question of his contributory negligence as a bar to recovery was for the jury.

4. APPEAL AND ERROR ⇐1078(1)—ABANDONMENT OF ISSUE—FAILURE TO PRESS ON APPEAL.

In minor's action for injuries when struck by street car, where the issue of the parents' contributory negligence, raised in the trial court, was not urged on appeal, it must be considered as having been abandoned.

Department 1. Appeal from Superior Court, San Diego County; W. M. Conley, Special Judge.

Action by Harold Mayne, a minor, by George L. Mayne, his guardian ad litem, against the San Diego Electric Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Read G. Dilworth, of Coronado, and E. S. Torrance and E. Swift Torrance, both of San Diego, for appellant. William G. Mirow and Henning & McGee, all of San Diego, for respondent.

RICHARDS, Judge pro tem. This is an appeal from a judgment in plaintiff's favor, for the sum of $5,000 damages, in an action for personal injuries alleged to have been caused by the negligence of the defendant. The accident out of which the plaintiff's injuries arose, occurred on Fifth street, about midway between B and C streets, in the business portion of the city of San Diego. The time of its occurrence was about 4:45 o'clock in the afternoon of December 16, 1913. At that time, and for some years prior thereto, the defendant was engaged in operating an electric street railway system in said city, and on and along Fifth street therein, having a double line of tracks on said street, and running cars to and fro frequently thereon. Just prior to the accident the plaintiff, who was then a lad 7 years 8 months old, following another boy of about the same age, undertook to cross from the west to the east side of Fifth street, about midway in the block between B and C streets. The companion of the plaintiff, being in advance of him, succeeded in crossing safely; but

the plaintiff was struck by one of the cars of the defendant and seriously injured. He alleges in his complaint that his injuries occurred through the negligence of the defendant's agents and employés in charge of said car, in operating the same at an excessive rate of speed, and in failing to ring a bell or gong, or sound a whistle or other warning of the near and dangerous approach of the car, and that he had no warning thereof. He also alleges that the portion of the pavement of the street lying next to and between the tracks of the defendant, and which it was its duty to keep in repair and flush with the street, under the ordinances of said city and the franchise of said defendant, it had negligently and carelessly permitted to remain out of repair, and to become and be in a dangerous and defective condition, and that the plaintiff, in his attempt to cross said street, caught his foot in a rut or breach in that portion of said pavement thus out of repair, thereby causing him to stumble and fall in front of the approaching car, which ran against and over him with great force, causing the injuries complained of. He further alleges that the defendant was negligent in permitting the fender upon the car which struck him to be in a dangerous and defective condition, which fact further contributed to cause his injuries. The defendant denies that it was guilty of negligence in any of the respects asserted by the plaintiff, and affirmatively avers that the plaintiff was guilty of contributory negligence which was the proximate cause of his injuries, and further alleges that the parents of the plaintiff were negligent in permitting him to go unattended by a proper custodian upon the streets of said city where the cars of the defendant were being operated, and that such negligence on their part proximately contributed to his injuries.

[1, 2] The appellant urges two main contentions upon this appeal: First, that there was no evidence to prove or tend to prove any negligence whatsoever on the part of the defendant or any of its servants or employés; second, that the plaintiff's own contributory negligence was the proximate cause of his injuries. As to the first of these propositions, the record shows that upon the trial of the cause, and at an early stage in the plaintiff's presentation of his case, a witness named W. S. King, who qualified as a civil engineer, was produced on plaintiff's behalf, who testified as to the condition of the pavement along and between the defendant's tracks at and near the place of the accident, stating that the roadway at these points was in bad condition; that there were depressions or holes in the pavement two feet wide, three or four feet long, and two inches deep, the edges of which were rough, where the asphalt was broken off by the wheels of traffic, and that the pavement had been in this condition for many months. He presented a plat of that portion of the street illustrating his evidence in respect to its condition. Another witness for plaintiff, named McCoy, testified that he observed the state of the pavement on the morning after the accident occurred; that it was very rough and uneven; that there were places a foot and a half or so wide, the edges of which were curled up and rough and uneven along the rails; and that he noticed the blood spots upon the rails where the plaintiff had been struck and his arm crushed at the immediate point where these rough and uneven and curled up places were. The plaintiff was about to produce other witnesses to the same effect, when counsel for the defendant offered to admit:

"That for the period of a year before the happening of the accident, and at the time of the accident, Fifth street, in this city, between A street on the north and Broadway or D on the south, was out of repair; that is, the whole roadway was out of repair and in the same general condition described by the witness King, and as shown by this diagram which has been introduced in evidence."

The diagram referred to was one drawn by King, illustrating his evidence as to the condition of the defendant's roadway at the place of the plaintiff's injuries. The foregoing admission was suggested by the defendant and accepted by the plaintiff as obviating the need of further witnesses upon this branch of the plaintiff's case. The plaintiff had already testified that he had stumbled and fallen at the place where he was struck by the car, and that it was the holes along the car track which caused him to stumble and fall. In support of this testimony given by the plaintiff, the witness Washburn testified that he saw the plaintiff at the time he fell, and that he saw his foot go down into one of the holes along the track when he stumbled and fell. It is a conceded fact that the state of the defendant's roadbed at the point of the plaintiff's injury was in violation of the terms of its franchise and of the ordinances of the city requiring it to keep its roadbed in repair. It is not contended that the plaintiff as a pedestrian did not have the right to cross the street at the place of his injury. In this state of the record it is idle to attempt to argue that there was not ample evidence of the defendant's negligence in respect to keeping the roadbed alongside its tracks in repair, and that its negligence in that regard caused the plaintiff to stumble and fall in the path of an approaching car, to have justified the court in submitting that issue under a proper instruction to the jury, and also to have justified the verdict of the jury in plaintiff's favor upon that issue. The defendant's offered instruction that "there is not sufficient evidence in this case to justify you in finding a verdict for the plaintiff; you are therefore directed by the court to return a verdict for the defendant," was therefore properly refused. Upon the other averments of the plaintiff's complaint as to the rate of

speed at which the car was going just prior to the accident, and as to whether any warning signals of its approach had been given, and as to whether the cars of the defendant were equipped with suitable fenders, some testimony both ways was elicited, sufficient, in our opinion, to have justified the trial court in submitting these matters to the jury under proper instructions. We have examined the instructions which the trial court gave in respect to these several matters, and find them to have been very full, fair, and clear, and that they more correctly state the law in relation to the matters covered by them than the defendant's offered and rejected instructions do, and hence that the latter were properly refused by the trial court.

[3] The next point upon which the appellant relies is that of the plaintiff's contributory negligence. The appellant argues that upon the undisputed facts in the case contributory negligence is a matter of law to be imputed to the plaintiff, and hence that it was entitled to have its requested instruction given to the jury to return a verdict in the defendant's favor. We have examined the array of cases cited by the appellant in support of this view, and we find that, with the exception of a few scattered cases presenting peculiar and exceptional conditions, they show that as a rule courts upon appeal have not interfered with the discretion of trial courts in referring or in refusing to refer to juries the question as to whether the contributory negligence of children of the age of 14 years or under was such as to prevent their recovery for injuries sustained by them. This court, in the case of Cahill v. Stone & Co., 153 Cal. 571, 96 Pac. 84, 19 L. R. A. (N. S.) 1094, after review of the leading cases bearing upon this subject in this and other states, said:

"There is no precise age at which, as a matter of law, a child is to be held accountable for all his actions to the same extent as one of full age. Consolidated, etc., Ry. Co. v. Carlson, 58 Kan. 66 [48 Pac. 635]. In that case it is said: 'The question as to the capacity of a particular child at a particular time to exercise care in avoiding a particular danger is one of fact, falling within the province of a jury to determine.' The child there referred to was ten years of age. In Biggs v. Consolidated, etc., Wire Co., 60 Kan. 223 [56 Pac. 4, 44 L. R. A. 655], the same rule was applied to a boy of fourteen years; the court saying: 'We cannot say, as a matter of law, at what age a boy would be possessed of such intelligence, foresight and judgment as to charge him with contributory negligence in a case like the present.' In the case at bar the question of plaintiff's possession of sufficient intelligence and foresight is foreclosed, so far as the pleading is concerned, by the allegation that 'he was too young and inexperienced to foresee the danger.' It may be conceded that many boys of the age of twelve years would have perceived the danger attending the acts of the plaintiff which led to his injury. There is, however, no conclusive presumption that a twelve year old boy is able to foresee such danger, or that he has sufficient wisdom to avoid it."

The above ruling of the court was upon demurrer; but when the same case was again before this court after a trial and verdict for the plaintiff, wherein the same question was presented upon appeal, the court in commenting upon its former ruling, and upon a further review of cases from other jurisdictions touching the subject, stated that:

"While it is the general rule in regard to an adult or grown person that, to entitle him to recover for an injury resulting from the fault or negligence of another, he must have been free from fault himself, it is not the general rule applied to the conduct of children. Minors, as well as adults, are required to exercise ordinary care; but it is well settled that the ordinary care which a child is required to exercise must be determined by a different rule than is applied in the case of adults. The care which a child is required to exercise is only that degree of care which children of his maturity and capacity under similar circumstances ordinarily exercise; and this, except in a case where there can be no doubt under the evidence that the child not only knew, but at the time realized and appreciated, the danger of his conduct, is to be determined from the circumstances of the particular case in which his conduct is involved, and under the evidence there presented to the jury. The rule is clearly declared by this court on the former appeal in this case heretofore referred to (Cahill v. Stone Co., 153 Cal. 571 [19 L. R. A. (N. S.) 1094, 96 Pac. 84]), as it has often theretofore been declared. On that appeal it was said: 'There is no precise age at which, as a matter of law, a child is to be held accountable for all his actions to the same extent as one of full age.' Consolidated, etc., Ry. Co. v. Carlson, 58 Kan. 66 [48 Pac. 637]. In that case it is said: 'The question as to the capacity of a particular child at a particular time to exercise care in avoiding a particular danger, is one of fact, falling within the province of a jury to determine.' The child there referred to was ten years of age. In Biggs v. Consolidated, etc., Wire Co., 60 Kan. 223 [44 L. R. A. 655, 56 Pac. 6], the same rule was applied to a boy of fourteen years, the court saying: 'We cannot say, as a matter of law, at what age a boy would be possessed of such intelligence, foresight and judgment as to charge him with contributory negligence in a case like the present.' Laying down the same rule are Barrett v. Southern Pacific Co., 91 Cal. 296 [25 Am. St. Rep. 186, 27 Pac. 666]; Foley v. California Horseshoe Co., 115 Cal. 184 [56 Am. St. Rep. 87, 47 Pac. 42]; Jensen v. Will & Fink Co., 150 Cal. 398 [89 Pac. 113]. As said in the Foley Case: 'These matters, and the further question whether the minor duly exercised such judgment as he possessed, must, therefore, as a rule, be left as considerations of fact for the jury's determination; and it would be an exceptional case which would present them as unmixed questions of law for the determination of the court.' See, also, Pierce v. United Gas & Elec. Co., 161 Cal. 176 [118 Pac. 700]." Cahill v. Stone Co., 167 Cal. 126, 138 Pac. 712.

In the case of Pierce v. United Gas & Elec. Co., 161 Cal. 176, 118 Pac. 700, this court held an instruction of the trial court to be erroneous which took from the jury the question as to whether or not under the circumstances of that case the deceased children of the ages of 13 and 11 years, respectively, were to be held guilty of contributory negligence. In conformity with these rulings we are of the opinion that under the circumstances of the case at bar, the trial court, having before it all of the facts and witnesses in the case and particularly having an opportunity to hear the testimony, observe the actions, and deter-

mine the intelligence of the injured boy, did not err in determining that the question of his contributory negligence as a bar to his right of recovery in the action was one which should properly be submitted to the jury.

[4] As to the question whether the parents of the child were guilty of contributory negligence in permitting him to go unattended upon the public streets, this issue, while raised in the defendant's answer, has not been pressed upon appeal, and must therefore be considered as having been abandoned.

No other questions being presented requiring our consideration, the judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.

---

179 Cal. 166

## SAN FRANCISCO THEOLOGICAL SEMINARY v. MONTEREY COUNTY GAS & ELECTRIC CO. (S. F. 8149.)

(Supreme Court of California. Oct. 14, 1918. Rehearing Denied Nov. 11, 1918.)

1. GUARANTY ⊂⊃27—CONSTRUCTION OF GUARANTY CONTRACT—LIABILITY.
A guarantor cannot be held beyond the express terms of the contract of guaranty.
2. GUARANTY ⊂⊃47—CONTRACT—CONSTRUCTION—MORTGAGE PROVISION—ACCELERATION OF DUE DATE.
Where bonds referred to the securing mortgage for holders' rights, and terms and conditions of issue, and guarantor contracted to see that the sums named in the bonds were paid in the manner and time therein stated, when the bonds were declared due under a mortgage provision for accelerating due date, the guarantor's liability for the principal of the bonds accrued.
3. GUARANTY ⊂⊃77(1)—CONTRACT—ENFORCING PAYMENT—MORTGAGE FORECLOSURE.
Where obligation of guarantor of bonds is not secured by the mortgage securing the bonds, suit may be maintained on it without reference to any proceeding against the principal debtor or the security.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the San Francisco Theological Seminary, a corporation, against the Monterey County Gas & Electric Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Chickering & Gregory, of San Francisco, for appellant. W. F. Williamson and W. H. Conlin, both of San Francisco (R. H. Cross, of San Francisco, of counsel), for respondent.

SLOSS, J. This is one of a group of 17 cases, in each of which the defendant appeals from a judgment against it. The several actions were brought by different plaintiffs, as holders of bonds issued by Monterey & Pacific Grove Railway Company (herein called the "Railway Company"), to recover on a written guaranty by the defendant (herein called the "Gas Company") of the payment of such bonds. In each action the plaintiff had judgment for the full amount of the principal of the bonds so held, together with accrued interest. In some of the cases, the defendant failed to answer after the overruling of its demurrer to the complaint, and judgment went against it by default. In others, an answer was filed, and judgment was rendered after trial; the court making findings in substantial accord with the allegations of the several complaints. Notwithstanding this difference, the material facts and the legal questions to be decided are the same in all the cases, and all have been submitted together.

In 1907, the Railway Company took the necessary steps for the creation of a bonded indebtedness in the sum of $300,000, evidenced by 300 bonds, in the sum of $1,000 each. The bonds were issued under date of July 1, 1907, and were made payable July 1, 1937, with interest at the rate of 6 per cent. per annum, payable semiannually. Coupons for the interest installments were attached. The indebtedness was secured by a mortgage or deed of trust made by the Railway Company to the Mercantile Trust Company of San Francisco. The Gas Company was the owner of all of the capital stock of the Railway Company. It guaranteed the payment of the bonds by executing a printed form indorsed upon each bond. The guaranty was in these words:

"Guaranty of Payment.

"For value received, Monterey County Gas & Electric Company, a corporation, agrees, to and with the holder of this bond and the attached coupons, that if the several sums of money agreed to be paid hereby are not paid in the manner therein stated, as they severally become due, then and in that event the Monterey County Gas & Electric Company will pay the same. This contract is duly authorized by a resolution of the board of directors of the Monterey County Gas & Electric Company.

"Monterey County Gas & Electric Company.
"By George Heazelton, President.
"Attest: Burke Corbet, Secretary."

Each of the bonds set forth, on its face, a promise by the Railway Company to pay $1,000 on the 1st day of July, 1937, and to pay interest thereon at the rate of 6 per cent. per annum, as per coupons attached, on the 1st days of January and July in each year. It went on to declare that:

"This bond is one of a series of first mortgage 6 per cent. bonds of the Monterey & Pacific Grove Railway Company, of the denomination of one thousand dollars ($1,000) each, * * * issued and to be issued * * * under the provisions of and to be equally secured by a mortgage, dated July 1, 1907, executed by the Monterey & Pacific Grove Railway Company to the Mercantile Trust Company of San Francisco, as trustee, to which mortgage reference is hereby made for a description of the property, rights and franchises mortgaged, the nature and extent of the security, the rights of holders of bonds under the same, and the terms and conditions upon which the bonds are issued and secured."

Article 5 of the mortgage provided that in case of default by the Railway Company in the payment of interest on any bond, and a continuance of such default for 90 days,

"the trustee may, and upon the written request of the holders of a majority in amount of the bonds hereby secured and then outstanding shall, by notice in writing delivered to the Railway Company, declare the principal of all bonds secured hereby and then outstanding to be forthwith due and payable, and thereupon the same shall become and be immediately due and payable, anything in this indenture or in said bonds contained to the contrary notwithstanding."

Article 5 goes on to provide that after such declaration that the principal is due, if all arrears of interest be paid and all other defaults made good, the holders of a majority in amount of the bonds then outstanding may by written notice waive such default and its consequences. The Railway Company defaulted in the payment of the interest coupons maturing on the 1st day of January, 1915, and no part of the interest then due has been paid. On June 12, 1915, the trustee, exercising the authority conferred upon it by article 5 of the mortgage, declared the principal sum of all the bonds to be immediately due and payable, and demanded payment thereof from said Railway Company, but said Railway Company has failed to pay the same.

[1] The main contention of the appellant is that the action is premature, in so far as it attempts to make the guarantor immediately liable to pay the principal sum of the bonds. The argument is that by its guaranty the Gas Company merely undertook to pay if the sums agreed to be paid on the face of each bond were not "paid in the manner therein stated as they severally become due"; that by the bond the maker's obligation to pay principal matured on July 1, 1937, and that until there had been a default in making the payment then due, the guarantor could not be held liable for principal. It is settled law, as appellant contends, that a guarantor cannot be held beyond the express terms of the contract of guaranty. Postlethwaite v. Minor, 168 Cal. 227, 142 Pac. 55. If the agreement of the appellant went no further than to guarantee that the principal of the bonds should be paid on July 1, 1937, it could not be called upon to pay this amount at any time prior to such due date. The guarantor was not a party to the mortgage, and did not guarantee performance of the obligations imposed upon the Railway Company by the mortgage alone. The principle is well illustrated by the recent decision of Department 1 of this court in Chinn v. Penn (L. A. No. 4612), 175 Pac. 687. There the payee of a note secured by mortgage had assigned the note and mortgage, indorsing upon the note the words "Payment guaranteed." It was sought to hold the guarantor liable for the payment of attorney's fees, taxes, and assessments on the property; the mortgage providing that it secured these items, but the note making no reference to them. The court declared that the payee's—

"indorsement of the note guaranteeing that instrument cannot be extended by implication so as to cover other obligations contained only in the mortgage. Having thus limited his guaranty by his written contract declaring the same, he is bound only by its terms."

[2] But in the present case the undertaking of the Railway Company, expressed on the face of each bond, and guaranteed by the Gas Company, was not so closely limited as the argument of the appellant assumes. The bond not only promises to pay the principal on July 1, 1937, but it makes express reference to the mortgage in such manner as to incorporate the provision of that instrument for accelerating the maturity of the principal upon default in the payment of interest. It is true that the bond refers to the mortgage for specified purposes only, but the terms of the reference are broad enough to include the acceleration provision. Reference to the mortgage is made, so the bond declares, not only for a description of the property mortgaged and the nature and extent of the security, but for "the rights of holders of bonds under the same, and the terms and conditions upon which the bonds are issued and secured." One of the rights of holders of bonds under the mortgage is that the principal may be declared immediately due upon default, sufficiently long continued, in the payment of interest. That the due date of the principal may be so advanced is also one of "the terms and conditions" upon which the bonds are issued. Under any reasonable interpretation of the language of the bonds, the provisions of article 5 of the mortgage must be held to be included in the reference. In effect, the bond does not merely bind its maker to pay the principal upon the 1st day of July 1, 1937. By referring to the provisions of the mortgage, it qualifies the promise to pay, and declares that in certain contingencies the principal may become due at an earlier date. When, then, the guarantor bound itself to pay the several sums of money agreed to be paid by the bond if they were not "paid in the manner therein stated, as they severally became due," it made itself liable for the payment of the principal of the bonds whenever such principal should become due, whether on the 1st day of July, 1937, or at such earlier time as might be fixed under the mortgage provisions incorporated in the bond.

We are unable to see that the provision of the mortgage authorizing the holders of a majority of the bonds to waive past defaults has any bearing upon the question we have been discussing. By the declaration of the trustee, the principal has become due, and the liability of the guarantor has accrued. There is no occasion to consider the effect on such liability of a waiver, if the bondholders should take the necessary steps to effect a waiver. It is not suggested that

they have, in fact, done so. The question of the extent of the guarantor's liability is simply one of construction.

The appellant relies upon two decisions of other courts, but we find that each of them is readily distinguishable, in respect to the form of words under consideration, from the case before us. In Union Trust Co. v. Detroit Motor Co., 117 Mich. 631, 76 N. W. 112, the writing provided that the makers "guarantee the prompt payment of the same [the bonds], both principal and interest, at the time and times specified in the bonds, and in each of them." The bonds merely stated that they were secured by a certain mortgage. They contained no reference to the provisions in the mortgage for accelerating the due date, and the decision was, accordingly, that the guarantors could not be held liable until default in payment "at the times specified" in the bonds themselves. In Dougan v. Evansville, etc., Railway Co., 15 App. Div. 483, 44 N. Y. Supp. 503, the court considered two causes of action, based on separate guarantees of different bond issues. The first cause of action was based on an instrument, by which the defendant guaranteed "the payment of the principal and interest mentioned in the within bond according to the tenor and effect thereof." There was a provision in the mortgage with reference to acceleration, but it did not provide that the principal should become due upon default in the payment of interest; it merely provided that upon such default, continuing for six months, the principal should become collectible out of the mortgaged premises. The court held that by this clause of the mortgage the maker of the bonds did not bind itself to pay the principal at any time before the ultimate due date. And it was for this reason that the guarantor was relieved of any liability to pay the principal before such date. In other words, the decision did not go upon the ground that the terms of the mortgage were not incorporated in the bond. The guarantor was not bound because the borrowing corporation itself was not liable for the principal until the expiration of the total period of the loan.

As bearing generally upon the questions discussed, and tending in some degree to sustain the views here announced, we may cite that part of the opinion in the Dougan Case, supra, which deals with the second cause of action, one based upon a bond issue and guaranty executed under conditions more closely analogous to those here presented; also Crump v. J. I. Case Threshing Machine Co., 136 Ky. 60, 123 S. W. 333.

[3] The appellant contends, further, that the liability here sought to be enforced is dependent upon the mortgage, and therefore can only be enforced by means of the action of foreclosure provided for in section 726 of the Code of Civil Procedure. The claim is without merit. The guarantor's obligation rests solely upon its contract of guaranty. The mortgage is looked to merely to interpret and measure the extent of the guaranty. The guarantor's obligation is not secured by the mortgage, and suit may be maintained upon it without reference to any proceeding against the principal debtor or the security. Adams v. Wallace, 119 Cal. 67, 51 Pac. 14; Kinsel v. Ballou, 151 Cal. 754, 91 Pac. 620; Martin v. Becker, 169 Cal. 301, 146 Pac. 665, Ann. Cas. 1916D, 171.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; RICHARDS, Judge pro tem.; WILBUR, J.; MELVIN, J.; LORIGAN, J.

---

179 Cal. 812, 813, 814

## HEAZELTON v. MONTEREY COUNTY GAS & ELECTRIC CO.

(S. F. 8022–8027, 8144–8148, 8150–8153, 8336.)

(Supreme Court of California. Oct. 14, 1918.)

In Bank. Appeals from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Actions by Mary B. Heazelton, by J. B. Feustmann, by J. A. Fairchild, by M. P. Lilienthal, by Henry H. Meyers, by James M. Hunt, by B. S. Hubbard, by T. J. Field, by D. B. Fifield, by G. W. Fisher, by H. S. Ball, by the Bank of E. Cooke Smith, Incorporated, by the International Banking Corporation, by Margaret Lutts and others, by the Redding Savings Bank, a corporation, and by the John Tennant Memorial Home, a corporation, against the Monterey County Gas & Electric Company, as guarantor of certain bonds. Judgment for the plaintiffs in each case, and from each judgment the defendant appeals. Each judgment affirmed.

Chickering & Gregory, of San Francisco, for appellant. Carter P. Pomeroy, Frank P. Deering, W. F. Williamson, and W. H. Conlin, all of San Francisco (R. H. Cross, of San Francisco, of counsel), for respondents.

PER CURIAM. In each of the above-entitled cases the judgment is affirmed, on the authority of San Francisco Theological Seminary v. Monterey County Gas & Electric Co. (S. F. No. 8149) 175 Pac. 693.

---

179 Cal. 179

## HUNTINGTON LAND & IMPROVEMENT CO. v. WALLACE et al. (L. A. 4458.)

(Supreme Court of California. Oct. 18, 1918.)

APPEAL AND ERROR ⇐641—FAILURE TO AUTHENTICATE RECORD.

Where record does not contain authentication of trial judge, required by statute to authorize court on appeal to consider affidavits upon which motion for injunction pendente lite was based, appeal from order granting such injunction will, where assailed upon sole ground that affidavits are insufficient to support it, be dismissed.

Department 1. Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by the Huntington Land & Improvement Company against Jenneth Wallace and

others. From an order granting the plaintiff an injunction pendente lite, defendants appeal. Affirmed.

Conrad Jensen and Lee Roy E. Keeley, both of Los Angeles, for appellants. Gibson, Dunn & Crutcher and O. R. Robinson, all of Los Angeles, for respondent.

PER CURIAM. This is an appeal from an order granting the plaintiff an injunction pendente lite.

The appellants assail the order upon the sole ground of the insufficiency of the affidavits upon which the motion was based to support said order, but the record as prepared does not contain the authentication by the trial judge required by the statute which would authorize us to consider those affidavits. The order appealed from must therefore be affirmed, for want of a record upon which the alleged error can be considered.

So ordered.

---

(38 Cal. App. 175)

PEOPLE v. SMITH. (Cr. 440.)

(District Court of Appeal, Third District, California. Sept. 10, 1918. Rehearing Denied Oct. 10, 1918; Denied by Supreme Court Nov. 7, 1918.)

PARENT AND CHILD ⊂=17(6)—WILLFUL FAILURE TO SUPPORT—EVIDENCE.

Evidence *held* insufficient to show that defendant's failure to furnish necessaries for his minor child was willful and without lawful excuse, within Pen. Code, § 270, since defendant was financially unable to support child, voluntarily provided for by others.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

F. J. Smith was convicted for failure to provide for his minor child, and appeals from an order denying his motion for new trial. Order reversed.

R. Platnauer, of Sacramento, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Appellant was convicted of the offense designated as "failure to provide for a minor child." He moved for a new trial, which was denied, and he appealed from said order.

Defendant and one Bessie Worth were married in Alameda county in November, 1909. While they were living together in Yolo county in 1911, and about a month before the birth of the child in question, defendant's wife left him, and they have been living separate and apart ever since. During its entire life the child has been in the custody of its mother. The defendant, at the time of the trial and for six years prior thereto, resided in Sacramento. The mother of the child at the time of the trial and for three years prior thereto resided at Nelson, Butte county. During the first six months of the year 1917 the defendant paid to the wife for the support of the child the sum of $75—$15 per month for January, February, and March, and $10 for each of the remaining months. It appears, also, that the child had a good home with its mother and its wants were amply provided for. It is true that the mother claimed that the child needed some winter clothing, but certainly such need was not very urgent on the 1st of September, when the offense is alleged to have been committed. Indeed, in response to questions on cross-examination, the wife testified that she provided a good home for the child; that it had enough clothes to keep it warm, and plenty to eat; and that "she had all those things during the last year from January on."

Appellant contends:

"First, that the superior court of Butte county has no jurisdiction to try him for the alleged offense, but that, if any offense was committed, it occurred in the county of appellant's residence, namely, Sacramento county. Secondly, appellant was and is under no legal liability to support the child, for the reason that he and his wife are and have been living separate, and the latter has at all times had the custody of the child. Thirdly, that, the child having been voluntarily provided with necessaries by persons other than its father, the latter has committed no crime."

It is further claimed that the prosecution failed to prove the ability of the defendant to support the child, and that the court committed grievous error in permitting the wife to testify against the defendant without his consent. All these propositions are learnedly argued, but we consider it necessary to notice specifically only the one relating to the ability of the father to contribute to the support of his child; and we consider the question as it bears upon and relates to the element of willfulness, which is an essential factor in the crime charged. The offense is defined in section 270 of the Penal Code as follows:

"A parent of either a legitimate or illegitimate minor child who willfully omits, without lawful excuse, to furnish necessary food, clothing, shelter, or medical attendance for his child, is punishable," etc.

It is plain, therefore, that the omission to furnish such necessities must be willful and without lawful excuse to justify a verdict of conviction. A careful reading of the record, however, satisfies us that in this respect the case fails to meet the requirement of the law. The evidence shows that appellant is a laborer owning no property, his work consisting of cleaning house, picking fruit, cutting grass, and doing odd carpenter work. He worked off and on whenever he could find employment until early in June, 1917, at which time he went to the hospital for medical treatment, and remained until July 27. After the care and treatment of the doctor ceased, appellant went to work cutting grass, and as a result he had a relapse and took to his bed with a fever. Upon his recovery he sought and found temporary work at different jobs. This continued during the latter

half of the year. He also worked for his mother, at general housework and taking care of the yard, for which he received his board and lodging. It is fair to say that from June to December he earned not more than $60 in money. His hospital and medical bill was $58. A portion of this—but how much does not appear—was furnished by his mother. He still owes the doctor $100 for his services. It is thus apparent that he was financially unable to support his child. Furthermore, the evidence shows that defendant worked whenever he could obtain employment and was able to work, and also that he searched for employment without success. It cannot be said, therefore, that his impecuniousness was chargeable to indolence, nor is there evidence that he was guilty of any misconduct which prevented better results. If a defendant, without fault, is financially unable to support his minor child with the necessaries of life, he cannot, of course, be justly charged with willful failure in that respect. In re McCandless, 17 Cal. App. 222, 119 Pac. 199; People v. Turner, 29 Cal. App. 193, 156 Pac. 381; People v. Forester, 29 Cal. App. 460, 155 Pac. 1022.

The only possible answer to this position is that he should have devoted his meagre income to his child rather than to have used it for the payment of his debts. There would be force in this contention if the child had been in need of the necessaries of life. But as it was receiving from its mother all that it required for its support and comfort, we think the father's conduct under the circumstances should not be characterized and denounced as felonious. It is pleasing to add that when the appeal was taken the appellant was able to give a bond for the payment of $25 per month for the support of his child, and it is to be hoped that he will be willing and able to continue such payment.

The order is reversed.

We concur: CHIPMAN, P. J.; HART, J.

---

36 Cal. App. 164

## WILLITS WATER & POWER CO. v. LANDRUM. (Civ. 1763.)

(District Court of Appeal, Third District, California. Sept. 10, 1918.)

1. APPEAL AND ERROR ⟸1011(1) — FINDING OF COURT—SUFFICIENCY OF EVIDENCE.
In a suit involving water rights, to which defendant claimed a prescriptive title, where the evidence as to permissive use was conflicting, the finding of the trial court is controlling.

2. WATERS AND WATER COURSES ⟸152(10)—APPROPRIATION OF WATER—SUFFICIENCY OF FINDING.
In a suit involving water rights, to which defendant claimed to have title by prescription, it was error to fail to definitely find what quantity of water, if any, was continuously appropriated by defendant; a finding of an equivalent quantity of water not being sufficient.

3. WATERS AND WATER COURSES ⟸152(8) — APPROPRIATION OF WATER—SUFFICIENCY OF FINDING.
In a suit involving water rights, which defendant claimed by prescription, evidence *held* not to support a finding that defendant used 2½ inches of water continuously under claim of right.

4. ESTOPPEL ⟸93(7) — APPROPRIATION OF WATER RIGHTS—PERMITTING IMPROVEMENTS.
In a suit by a water company involving water rights, defendant was not estopped to claim title thereto by prescription, because plaintiff was a public service corporation and defendant stood by and made no objection to the construction of its flumes.

5. WATERS AND WATER COURSES ⟸152(8) — APPROPRIATION OF WATER RIGHTS — EVIDENCE.
In a suit by a water company involving water rights, evidence *held* to sustain a finding that defendant, who claimed title by prescription, had a right to use the ditch and flume for the purpose of conveying water to his premises, notwithstanding an alleged change in the point of diversion.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Suit by the Willits Water & Power Company against Joseph Landrum. From a judgment for defendant, plaintiff appeals. Reversed.

Mannon & Mannon, of Ukiah, and Lilienthal, McKinstry & Raymond, of San Francisco, for appellant. Preston & Preston, of Ukiah, for respondent.

BURNETT, J. The appeal is by the plaintiff from a judgment in favor of the defendant, decreeing that he was entitled to divert and devote to beneficial use the natural flow of a stream of water known as Southard creek, in Mendocino county, to the extent of 2½ miner's inches measured under a 4-inch pressure, and also that he was the owner of a certain flume and ditch and a right of way across plaintiff's land for a diverting system for the appropriation of said water.

The main controversy is as to the sufficiency of the evidence to support the material findings of the court; the claim of respondent being that he proved a prescriptive title. That a quantity of water had been for many years diverted from said creek and conveyed through a ditch and flume across plaintiff's land, and used upon the land of defendant for domestic purposes and for the irrigation of a small tract of land, is abundantly shown, and, indeed, is not disputed by appellant. It is, however, the contention of the latter that the use originated and continued in permission or license, and not under a claim of right, and therefore could not be held to be adverse.

The witness, W. F. Van Bibber, testified that he first became acquainted with the ditch and flume "about 1881," but that he could not tell whether the water ran at that time to the Landrum place, but that it was running in that direction. In 1902, when the

plaintiff's water system was constructed and established, the witness was living on the old Southard place, and he testified that—

"We used the water of Southard creek right along all the time. We used the same ditch and flume that is there now. Well, probably it has been overhauled; but then it came from the same direction. * * * When I was on the Southard place, and Mr. Sherman was on the Landrum place, he irrigated the same as we did. We took the water from about, you know, a couple of days apiece. There were four families of us engaged in this. * * * We different people who were using the water at that time had a kind of an agreement between ourselves, simply a neighborly proposition. We tried to make what water we had go as far as it would."

There is nothing in this testimony to show that he asked permission of appellant or of any one to use the water, or that he recognized the authority of any one, either before or after the contention of appellant arose, to question his right to the use of the water. The only fair inference from his testimony is that he used the water as though he owned it, and the only matter of argument was as to its division among the neighbors. It is true he stated:

"During this time that I was on the Williams place, the question arose between me and the company as to whether or not I had the right to take the water."

He was not interrogated, however, any further in reference to it, and we must assume that, when the question arose, he asserted his right, and that it was acquiesced in by the company.

Mr. Eugene McPeak, also, knew something of the situation in early days. His place was about a mile and a half from the Landrum place. He bought it in 1877, and he lived there until 1910. He testified:

"When I moved on my ranch in 1877 there was a ditch or flume from Southard creek running through the Southard ranch. The water was being conveyed to a mill at that time, and the mill was situated on the east side of the road."

After stating that the mill was destroyed some years ago, he proceeded:

"After the mill was destroyed the water was flowing in the flume, run right on, and went past what we call the Landrum place. * * * While the mill was running they used the water on the Landrum place for irrigation. After the mill was destroyed they continued to use the water on the Landrum place. * * * While I was living on the place where I moved in 1877, to 3 years ago, I cannot recall to mind any year the water was not used to some extent on the Landrum place."

Mr. Frank Davis had lived in the neighborhood for 20 years, and he testified:

"The first time I was on the water ditch across the road at the Landrum place was in 1874. The flume and the water, as I remember it, come in the ditch the way it is now, and the flume come out of the ditch and run above the road. * * * After the mill was discontinued, I know that water ran onto the Landrum land east of the house and down north of the house. I do not know whether or not water was used on the Landrum place for domestic purposes, but they were using it for irrigation; that is, using it for irrigating gardens and stuff they had there. * * * Water was always flowing in that ditch, coming out of the creek, to my memory, since I first seen it. * * * I don't remember I was ever there, but what the water was there in that ditch; used the water all through there all summer; don't remember of ever finding it when the water was not there."

A. J. Smith, another pioneer, purchased the Landrum place in 1892, and he testified:

"I moved upon the place that spring after I purchased it, after I fixed it up a little. * * * When I moved on this place there was no mill there, and there was no water ditch on the place. The water ditch was up to the line of the ranch. Water was flowing in the ditch some of the time at that time. * * * I made use of the water when I was on the ranch. I began the summer of 1892. I used the water there all the time in the summer time. There was D. W. Stoddard, and at that time, when I first went on the ranch, there was George Endicott, on the Tibbets place, and J. B. P. Williams, were using the water. * * * They made use of that water at that time in 1892; they used it in the summer time; that is, we used it alternately. * * * We all used the water; generally Mr. Williams and Mr. Endicott, when he was there, and after he left Mr. Orr and myself, and when it came to me to clean the ditch, why we all got together and said, 'Boys, let's go and clean the ditch,' and we set a day for that, and went and done that work. * * * I didn't get permission from anybody to use the water. The ditch was there, and we cleaned it out, and put the water in and used it. * * * When I used the water, I used all I could get through the ditch at that time, and I would have used more if I could have gotten it. While I was not using the water, some of the other neighbors used it. Taken all together, the time I used it and the time my neighbors used it, it consumed mostly all the time during the irrigating season. * * * I took the water out of the ditch at the north end of the ditch. The ditch ended at the end of the Southard ranch and I extended it. I maintained the ditch in that condition all the while I was on the ranch. * * * None of us made any objection to that work; we all did it together. Mr. Southard always consented to it. Mr. Williams never made any objection to my going and cleaning that ditch. * * * The new flume, constructed five years ago, has a better intake than the old flume, and as a matter of fact it is not the same flume."

The defendant testified that he purchased the place in 1906 and—

"on the 20th day of September, 1906, or thereabouts, when I moved on the place, the water was running into the yard, and off over the west side of the house. * * * The irrigation ditch led to the place. The next irrigating season I was there. That was not the same year I went away. I come back down in the fall. In 1907, the second year I was there, corn, alfalfa, potatoes, and blackberries were irrigated. I suppose I irrigated about 10 acres the first year. We used the water for drinking water, all purposes. During the time I was there the water was used by these other residents."

He further testified that he claimed the water right, and that he "did not get or obtain the permission from anybody to use the water," and furthermore:

"I used this water openly, and it was in plain view of everybody that I was taking the water. Mrs. Hamilton took the place when I left, and two Greeks moved on the place when she left. Mrs. Hamilton stayed on the place something like eight months, and the Greeks stayed about the same length of time. Two Italians went on the place next. Some Italians are on the place now."

He testified that these parties all used the water on the place for irrigation and—

"during the time I owned this property I have repaired the flume and ditch each year and I have put in about 640 feet of new flume. I have repaired it every year since I have been there."

Guy Landrum, son of defendant, testified substantially as his father. Among other things, he said:

"We used the water during the greater part of the time during the irrigating season. We kept the flume in repair, and Mr. Willip helped us the first season, and whoever happened to be on the ranch came up and helped us. We repaired it every year. I entered and went over the right of way for the purpose of repairing that flume every year. I asked nobody's permission to go over there, but Dad. When he said for me to go, I went; and if he wasn't there, when it needed repairing, I went. I had no authority to ask the Willits Water & Power Company for permission to go over this right of way, and I never asked them."

[1] There was other testimony of a similar character and it is quite apparent that the lower court was justified in concluding that the water was appropriated, and the ditch and flume were used, under such circumstances and in such manner as to justify the inference that the defendant and his predecessors in interest were thereby claiming and asserting that said privilege was a right appurtenant to said land. This use continued for many years longer that the statute requires to create a title by prescription, and the evidence upon which the lower court acted was amply sufficient to show the presence and operation of all the elements of adverse possession. Even if one concede that there was some evidence that the use was permissive, the most that can be said is that thereby a conflict was created. The rule or principle that applies to a situation like this is stated and discussed in Gurnsey v. Antelope Creek, etc., W. Co., 6 Cal. App. 387, 92 Pac. 326, and it is sufficient to refer to that decision.

We think that there can be no doubt of the legal stability of the court's conclusion as to the right of respondent to the use of the water and of the ditch and flume for the benefit of his land; but we come to a more difficult question when we consider the quantity of water that was awarded. The court decreed that—

"Cross-complainant, Joseph Landrum, is the owner of the right of way to divert and devote to a beneficial use the natural flow of the said stream known as Southard creek, in the following amount, to wit: A continuous flow of 2½ miner's inches of water measured under a 4-inch pressure."

The corresponding finding of fact is:

"That the cross-complainant and defendant herein and his predecessors in ownership to the lands described in the cross-complaint and in paragraph III hereof, for a period of more than 5 years continuously next prior to July 15, 1912, to wit, for a period of more than 20 years, continuously next prior thereto, used the waters of said Southard creek to an amount equal to a continuous flow of 24 hours each day of 2½ miner's inches," etc., and that said use "was open, notorious," etc.

[2] It is to be observed that the court thus finds, not the amount of water that was adversely used for this long period, but what the court deemed equivalent to the quantity thus used. In his cross-complaint, defendant alleged that he and his predecessors in interest had used "the waters of said Southard creek" and "had conducted it through said ditch and flume to the full capacity of said flume," etc. In the answer to this pleading, plaintiff denied that the amount of water used by cross-complainant and his predecessors in ownership, or either of them, was the full capacity of said flume, or "any greater amount than a depth of one inch in said flume at infrequent and intermittent intervals," and as to this quantity it was alleged the use was by license and permission of plaintiff. This, of course, was a very important issue in the case, and it would appear that the court should have found definitely what quantity of water, if any, was thus continuously appropriated. Riverside Water Co. v. Sargent, 112 Cal. 230, 44 Pac. 560; Hayes v. Silver Creek Co., 136 Cal. 238, 68 Pac. 704. If the award of a different quantity from that used was deemed advisable, it should at least appear what quantity was used. If the evidence showed that respondent and his predecessors in interest had used 10 inches of water for 6 hours continuously every day would it be sufficient for the court to conclude that this was equivalent to the use of 2½ inches for the whole 24 hours and find accordingly? The title by prescription is measured by the manner and extent of the use (section 806, Civ. Code) and does not attach to something else that may be deemed equivalent.

The case would be no different if the court had concluded that the use of another flume and ditch was equivalent to what was claimed and shown by the evidence, and had decreed that respondent was entitled to the equivalent. In section 581 (3d Ed.) of Weil on Water Rights it is said:

"The principle declared by these authorities is that the rights of a party who has acquired a prescriptive title and the rights of one against whom said title is acquired are mutual, and each is entitled to demand that the prescriptive right be exercised in the same manner that it was exercised while it was being acquired."

Turning, now, to the evidence as to the amount of water which was used adversely, we find it not altogether satisfactory. However, Mr. Donahue, the engineer, testified that a short time before the trial he measured the water flowing in the flume and found it to be 16.8 miner's inches. Mr. Landrum was present when the measurement was made, and in his testimony he declared that this was about the amount in the flume when they were irrigating, and that it was all appropriated for that purpose. There is evidence that this was used on four ranches, and it is contended by respondent that the four ranches divided the 24-hour period about equally. That is probably not an unreason-

able inference from the evidence. Assuming, then, that the evidence warranted the conclusion that 16 inches of water were used on defendant's land for 6 hours daily for a sufficient period and under such circumstances as to create a prescriptive right, would that justify the court in determining that the right attached to a continuous flow of 2½ inches? The use was of 16 inches for 6 hours, in other words, and the court finds that respondent is entitled to 2½ inches for 24 hours.

[3] Manifestly, appellant could not complain of the reduction of the quantity, but the time of appropriation might be of considerable moment. It is true that the change might be of advantage to appellant, but we think that the number of hours per day during which the water was used on respondent's land is an important and material element, and that the prescriptive right must correspond in that respect with the evidence. If it be assumed, therefore, that the court found substantially that respondent used 2½ inches of water continuously under a claim of right, etc., we consider it unsupported. At any rate, if the change was to be made, evidence should have been offered that the continuous use of the lesser quantity was equivalent to the intermittent use of the larger and the facts fully found in accordance therewith.

[4] We can see no merit in the claim of appellant that the doctrine of estoppel applied by reason of the fact that plaintiff is a public service corporation, and defendant stood by and made no objection to the construction of its works, and allowed without protest his property to be taken for public use. In support of its contention appellant cites Gurnsey v. Northern Cal. Power Co., 160 Cal. 699, 117 Pac. 906, 36 L. R. A. (N. S.) 185. Therein it was held that when a public service corporation, though it made its original entry upon an owner's land without right, has been permitted without objection to enter thereon and construct its works for which said land was appropriated, and such owner failed to bring any action until public interest by reason of such construction has intervened, the right of the owner to bring ejectment is denied, and he is remitted solely to his action for damages as the measure of his compensation. Said decision was based upon the ground of public policy and is eminently sound as applied to the facts of that case, and, it may be added, that the apparently opposite view advanced in Gurnsey v. Northern Cal. Power Co., 7 Cal. App. 534, 94 Pac. 858, grew out of the effort to state the general rule without particular attention to the well-settled exception. If we concede that there is evidence in the record lending support to appellant's contention in this matter, still, as we are required to view the case from the standpoint of respondent's showing, we must hold that said doctrine has no application herein.

In the first place, respondent did not stand by and allow his property to be taken. The dam and diverting works of appellant were not constructed on the land now owned by respondent. They are on the stream above the intake of the flume of Landrum. Besides, his land was receiving the water at the time said works were constructed and the water system inaugurated, and appellant had notice of the claim to this overflow. This is shown by the reservation in the deed from Samuel Boechtel, a predecessor in interest of respondent, to appellant, as follows:

"Nothing contained herein shall be deemed to waive any rights which I may have in or to any of the waters of Southard creek or to the flume, or water ditch leading from the same."

It is a fair inference, also, that by proper conservation of the water there will be a sufficiency to meet the demands of both parties, and therefore the public interest will suffer no detriment by reason of the claim of the defendant. We may cite as having some relation to the situation the following cases: Burr v. Maclay Rancho Water Co., 160 Cal. 268, 116 Pac. 715; Stevinson v. San Joaquin, etc., Co., 162 Cal. 141, 121 Pac. 398; Southern Pacific Co. v. Spring Valley W. Co., 173 Cal. 291, 159 Pac. 865, L. R. A. 1917E, 680.

It is contended that a change in the location of the flume and the point of diversion of the water has an important bearing upon the question of the right of respondent to conduct the waters along the present course. The right to the use of the water is, manifestly, distinct from a right to convey it along a certain definite channel. As far as the right of way is concerned, it must be shown, of course, that a certain definite line was used under a claim of right for the statutory period. The evidence does show some changes in the flume and ditch, but we think it is a fair inference that said flume and ditch have remained substantially the same since the beginning, and we may add that by the slight variation no greater burden was imposed upon the servient estate. Probably the most serious change was in reference to the point of diversion of the water, but as to this there is nothing to indicate that appellant was injured in the slightest. As to the statutory appropriations, indeed, the statute provides that—

"The person entitled to the use may change the place of diversion if others are not injured by such change and may extend the ditch, flume, pipe or aqueduct by which diversion is made to places beyond that where the first use was made."

It is true that this is not a case of statutory appropriation, but of prescriptive right to the use of the water, but there can be no difference in principle as to a change in the point of diversion. Indeed, in Perry v. Calkins, 159 Cal. 175, 113 Pac. 136, it is said:

"An established right to divert the waters of a stream is not affected by a mere change of the place of diversion if it caused no injury."

[5] The change in the point of diversion in the case is of no importance, except as it involves a change in the location of the flume

leading therefrom. The latter consideration might be important as bearing upon the right of way to conduct the water. We think, as already suggested, however, that the conditions remained so essentially similar, while the water was being used, that it might be said the evidence is sufficient to support the finding of the court that the defendant has the right to use the ditch and flume for the purposes stated in the findings.

Some other points are discussed, but we do not deem them of vital importance.

We are of the opinion that by reason of said defect as to the findings the judgment and order should be reversed; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

---

38 Cal. App. 152

## PACIFIC COAST CASUALTY CO. v. DAVIS et al. (Civ. 2096.)

(District Court of Appeal, First District, California. Sept. 6, 1918.)

INDEMNITY ⟸3 — CONSIDERATION OF CONTRACT—PREJUDICE SUFFERED.

Plaintiff's paying bond, without defendants attempting to stop it or then questioning its validity, was sufficient consideration under Civ. Code, § 1605, as prejudice suffered or agreed to be suffered, for defendants' promise, on which plaintiff gave the bond, to indemnify it against loss from executing bond.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by the Pacific Coast Casualty Company against T. E. Davis, Jr., and others. Judgment for defendants, and plaintiff appeals. Reversed.

Myrick & Deering and James Walter Scott, all of San Francisco, for appellant. James H. Boyer, of San Francisco, for respondents.

STURTEVANT, Judge pro tem. This is an action to recover on an express contract for the payment of money. The lower court ordered judgment in favor of the defendants, the plaintiff appealed therefrom, and has brought up the evidence in a bill of exceptions. The board of works of the city and county of San Francisco awarded to the defendants a contract to build a municipal building; the defendants presented to the plaintiff a written application for two indemnity bonds, one, in the sum of $4,000 for the faithful performance of the contract; and one in the sum of $6,700, running to all persons furnishing materials or performing labor, and which was conditioned for the payment of claims of such persons if the contractors should fail to pay the same. In said written application the defendants agreed, if the plaintiff would execute said bonds, that the defendants would indemnify the plaintiff against all loss, costs, damages, liabilities, etc., which the plaintiff might sustain by reason of its having executed said bonds; the plaintiff executed and delivered said bonds. When the contract was completed, the claims outstanding for materials and labor amounted to $6,728.44; and the money due from the city amounted to $5,354.45; the latter sum was collected from the city and the deficiency, $1,328.33, together with certain costs and expenses, was paid by the plaintiff. The validity of either bond was never questioned prior to said payments, and the defendants stood by and saw the money paid, and at no time attempted to stop payment.

The plaintiff has sued on the express promise contained in said written application. The defendants attempt to sustain their position by citing the case of Loop Lumber Co. v. Van Loben Sels, 173 Cal. 228, 159 Pac. 600, and contend that the bond was without consideration and void. That was an action by a third party to enforce a claim on a bond similar to the $6,700 bond above mentioned, but while the promise remained wholly executory. This action is brought to recover on a contract which has been wholly executed by the plaintiff and rests on a different principle. It may be conceded, without deciding, that the plaintiff could not have been compelled to make payments which it made; but, having made the payments, its claim finds full support in section 1605 of the Civil Code, which provides:

"* * * Any prejudice suffered, or agreed to be suffered by such person (the plaintiff) other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor (the defendants) is a good consideration for a promise."

See, also, Knock v. Haizlip, 163 Cal. 146, 153, 124 Pac. 998, and Bacon v. Grosse, 165 Cal. 481, 490, 132 Pac. 1027.

Let us make the situation still clearer: A. and B. are conversing; C. approaches and asks for a contribution for charity; A. asks B. to pay C. $100, and states that he will repay B.; thereupon B. pays $100 to C. as requested by A. No one, we think, would question the liability of A. to B.

It follows that the judgment should be reversed; and it is so ordered.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

---

38 Cal. App. 189

## HOARE v. GLANN. (Civ. 2434.)

(District Court of Appeal, First District, California. Sept. 10, 1918. Rehearing Denied by Supreme Court Nov. 7, 1918.)

MUNICIPAL CORPORATIONS ⟸353 — IMPROVEMENT CONTRACT—ASSIGNMENT—RESCISSION.

Where the assignment of a street work contract provided that the assignor might take over the work on notice by the board of trustees that the assignee did not prosecute the work to its satisfaction, such notice did not rescind the contract of assignment; the notice not being broader than the contract expressly provided for.

---

Appeal from Superior Court, Marin County; Edgar T. Zook, Judge.

Action by P. H. Hoare against Merrie A. Glann, as executrix, etc., of Nathaniel P. Glann, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

Henry Conlin, of San Francisco, for appellant. B. D. Marx Greene, of Berkeley, for respondent.

STURTEVANT, Judge pro tem. This is an action for damages for breach of contract. The plaintiff was awarded a judgment against the defendant in the lower court, and the defendant has appealed on the judgment roll.

On the 2d day of January, 1913, the town of Larkspur awarded a contract to the plaintiff, P. H. Hoare, to do certain street work. Later, on the same date, with the consent of the board of trustees of said town, the plaintiff assigned his contract to N. P. Glann. By its terms the contract of assignment was made subject to all the terms, provisions, and conditions contained in the specifications and in the original contract entered into between the town of Larkspur and the plaintiff, P. H. Hoare. In the contract of assignment it was provided that in the event of the failure of Glann to prosecute the work under said contract to the satisfaction of the engineer of the town of Larkspur, or the satisfaction of the board of trustees of the town, then, upon written notice to Hoare from the board of trustees, to the effect that said contract was not being properly carried out, that the interest of Glann under the contract should cease and determine, and that Hoare might take up the work and finish it, and that he would be subrogated to all of the claims and rights of Glann under the contract with the town of Larkspur. The Fidelity & Deposit Company of Maryland thereupon executed a bond to P. H. Hoare for the faithful performance of Glann's contract. N. P. Glann did not prosecute the work under the contract to the satisfaction of the board of trustees of Larkspur, and on the 18th day of August, 1913, the board of trustees passed a resolution to that effect, and immediately caused the same to be served on Glann and Hoare. P. H. Hoare, upon receipt of the notice, immediately notified the board of trustees that he was willing to take up the work and finish the same, and was authorized by the board of trustees to do so. Thereupon P. H. Hoare entered upon the performance of the work, and completed the work at an extra cost amounting to $2,869.51, the amount for which the plaintiff recovered judgment. Thereafter on the 5th day of November, 1914, N. P. Glann died, and such proceedings were had that the action was tried against the executrix of his estate.

The defendant executrix contends that the notice by the board of trustees, which it gave on the 18th day of August, 1913, constituted a rescission of the contract between Glann and Hoare. This point is presented in several different ways in the brief. We are not inclined to agree with this view. The notice was no broader than the contract expressly provided for, and therefore did not constitute an act of rescission. Oursler v. Thacher, 152 Cal. 739, 93 Pac. 1007.

We are therefore of the opinion that the judgment of the lower court should be affirmed; and it is so ordered.

We concur: LENNON, P. J; BEASLY, Judge pro tem.

---

38 Cal. App. 158

## LOWRY v. LOS ANGELES COUNTY.

(Civ. 2576.)

(District Court of Appeal, Second District, California. Sept. 7, 1918.)

1. TAXATION ⟸98—TRUSTS—SITUS OF PROPERTY.

While, as a general rule, the domicile of the owner determines the situs of personalty of which he is possessed, such is not the rule where the property is held by others as trustees.

2. TAXATION ⟸99 — CORPORATION STOCK—TRUSTS—SITUS FOR TAXATION.

Where decedent had created a trust in corporation stock, making nonresidents trustees, and empowering them to sell the stock or handle it as they saw fit, its situs for taxation was not the domicile of decedent, but the domicile of the trustees, and his executor could recover from the county the tax paid under the erroneous assessment.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by L. D. Lowry, as executor of the estate of William Morgan, deceased, against the County of Los Angeles. Judgment for defendant, and plaintiff appeals. Reversed.

Jones & Bennett and James S. Bennett, all of Los Angeles, for appellant. A. J. Hill, Co. Counsel, and Robert B. Murphey, Deputy Co. Counsel, both of Los Angeles, for respondent.

JAMES, J. A demurrer to the complaint of plaintiff was sustained, and, plaintiff declining to amend, judgment followed in favor of the defendant. The appeal is from the judgment so rendered. The facts which we will detail are fully expressed in the complaint:

In January of the year 1912 William Morgan died. He was at that time a resident of the county of Los Angeles. In February, 1912, his last will was duly admitted to probate, and the appointment of plaintiff as executor thereof confirmed. Morgan in his will bequeathed his interest in 2,000 shares of the capital stock of a safety vault company (that being a corporation organized and existing under the laws of Illinois and having its principal place of business at the city

of Chicago) to three persons; the interest being divided by apportioning 750 shares to each of two of such persons and 500 shares to the third. The person to whom the interest in 500 shares of the stock was bequeathed at the time of the death of Morgan resided in California. One of the other two was and has continued to be a resident of the state of Illinois, while the third was a resident of the state of Illinois up to the 20th day of November, 1912, and thereafter became a resident of the state of California. On the 3d of March, 1914, the superior court in probate entered its order decreeing that the legacies to the three persons referred to were specific legacies and ordered the distribution thereof. The assessor of the county of Los Angeles made no assessment for the year 1912 as against the interest of Morgan in the shares of stock, but in the year 1913 an assessment was entered against the executor of the estate wherein the total number of shares of stock was assessed at a net valuation of $200,000, and by reason of the stock having been omitted from the assessment in the year 1912 the assessor doubled the valuation for the year 1913, and levied an assessment as for a total value of $400,000 and a total tax of $6,280, which the executor, the plaintiff here, was required to pay. This action is brought to recover from the county that sum of money, on the ground that the assessment was illegal and void, because the property attempted to be assessed was not property having a situs within the state of California, but was property in the hands of trustees all of whom were residents of the state of Illinois.

The further facts appearing by the complaint are: That in the year 1907 William Morgan, being then the owner of the 2,000 shares of stock heretofore mentioned, entered into an agreement by which he transferred to the three trustees in Illinois the shares of stock. Among other terms, the trust agreement contained these provisions:

"This conveyance is made to the grantees as trustees, upon the following uses, purposes and trusts: To have and to hold said stock, to manage and control the same, to vote said stock in their discretion, to collect the dividends thereon, and from said dividends to pay taxes, municipal or other governmental charges, if any, thereon, to pay court and other costs and expenses, and fees of attorneys for services concerning or in connection with litigation, if any, concerning this agreement or the stock herein referred to or the rights and duties of the trustees hereunder, and to pay the net income thereof, and of any share or shares hereof, as and when the said income shall be collected, to the first party or the owner or owners of the beneficial interest or interests in said stock or said share or shares thereof, or the legal representative or representatives of said owner or owners, during the continuance of this trust. The trustees shall have full power to sell, transfer, or otherwise dispose of said stock, or any share or shares thereof, at any time prior to the termination of this trust, upon, but only upon, the joint written agreement of the trustees, on the one side, and the first party or the owner or owners of the beneficial interest or interests in said stock or said share or shares thereof, or the legal representative or representatives of said owner or owners, on the other side. And in the event of a sale, transfer, or other disposition of said stock or of any share or shares thereof, the proceeds of any such sale, transfer, or other disposition shall be by said trustees transferred, set over and delivered to the said first party, or the owner or owners of the beneficial interest or interests in said stock, or in said share or shares thereof, or the legal representative or representatives of said owner or owners, freed from the obligation of this trust. * * * This trust shall continue in force for fifteen (15) years from the date hereof, and until there shall have been made payment by said corporation of its entire bonded indebtedness, and of any extension thereof, and of any renewal thereof, and of any extension of any part thereof, or of any renewal of any part thereof, or of any new bonded indebtedness of said corporation, but not for a longer time than twenty-one (21) years from the date of the death of the last survivor of (the trustees), excepting that this agreement may be terminated at any time as to said stock or any share or shares of said stock by the joint written consent of all the trustees, on the one side, and the first party or the owner or owners of the beneficial interest or interests in said stock or said share or shares thereof, or the legal representative or representatives of said owner or owners, on the other side; and, upon the termination of this trust, as to said stock or any share or shares thereof in reference to which this trust has been terminated, held by the trustees, their successors, successor, survivors or survivor, shall be transferred and set over to the first party or to the owner or owners of the beneficial interest or interests in said stock or in said share or shares of said stock, or to the legal representative or representatives of said owner or owners."

[1] Appellant insists that under the facts stated the legal ownership of the stock was in the trustees, and for purposes of assessment its situs was therefore in the state of Illinois, where the trustees had their residence and where the stock was held. It is clearly expressed by the complaint that the assessment made was upon the whole value of the full number of shares, and was not an assessment upon dividends or upon any contingent or equitable interest of the testator. Respondent supports the right of the county to collect the tax with the argument that as to personalty the presumed situs is always at the domicile of the owner, and that such legal situs is not affected by the fact that the personal property may have its physical location outside the limits of the state. It is true that it is a general rule that the domicile of the owner determines the situs of the personalty of which he may be possessed. This rule has its exceptions. Generally, we think it may properly be said that for the purpose of distributing the estate of a decedent it will be presumed that his personalty or any interest that he may have therein is situated at the domicile maintained by him at the time of his demise. This rule is shown by the decisions not to have invariable application and for purposes of taxation the situs of personalty has been determined under particular facts to be different. In Catlin v. Hull, 21 Vt. 152 (found

in Vermont Annotated Reports, book 8, p. 150), the court said:

"It is undoubtedly true that, by the generally acknowledged principles of public law, personal chattels follow the person of the owner, and that, upon his death, they are to be distributed according to the law of his domicile; and in general, any conveyance of chattels, good by the law of his own domicile, will be good elsewhere. But this rule is merely a legal fiction, adopted from considerations of general convenience and policy, for the benefit of commerce and to enable persons to dispose of their property, at their decease, agreeably to their wishes, without being embarrassed by their want of knowledge in relation to the laws of the country, where the same is situated. But even this doctrine is to be received and understood with this limitation, that there is no positive law of the country, where the property is in fact, which contravenes the law of his domicile; for if there is, the law of the owner's domicile must yield to the law of the state, where the property is in fact situate. But we do not consider this doctrine, in relation to the situs of personal chattels and relating to its transfer and distribution, as at all conflicting with the actual jurisdiction of the state, where it is situate, over it, or with their right to subject it, in common with the other property of the state, to share the burthen of the government, by taxation."

The case from which we have quoted is referred to in Stanford v. San Francisco, 131 Cal. 34, 63 Pac. 145, as being a leading case touching the subject of which it treats. The Vermont court held that property of nonresidents, which consisted of notes and choses in action held against individuals of that state, placed in the hands of an agent with power to handle the proceeds, invest and reinvest, was property within the state and subject to the payment of taxes therein. In that case there had been no transfer of the legal title to the agent, but the agent held the same for the purpose of transacting the business of investing the funds for his principal.

In a Rhode Island case, Anthony v. Caswell, 15 R. I. 159, 1 Atl. 290, the question was—

"whether a trustee, resident in another state, who has no property as trustee in this state, is liable to taxation in the town where his cestuis que trustent reside."

The court decided in the negative. Judge Cooley in his work on Taxation, vol. 1, p. 660, thus declares the rule:

"In general, personal property in the hands of a trustee is to be assessed to him at the place of his domicile, and if one of two trustees is a nonresident the trustee living in the state may be taxed in respect to their interests; but such property is often made taxable to the persons beneficially entitled, if they are residents of the state. If the fund is in charge of a court, it is taxable in the jurisdiction having control of it, although personalty having an actual situs elsewhere may be taxed where it is."

In Mackay v. San Francisco, 128 Cal. 678, 61 Pac. 382, the court made its decision in accordance with this rule. There the property consisted of bonds which were kept in the city of New York. They came into the control of two trustees, one of whom resided in Nevada and one in San Francisco, by a distribution of the estate of Theresa Fair. Theresa Fair was a resident of San Francisco at the time she died, and her will was probated there. The assessment was made after distribution, against both trustees for all of the bonds held by them, and the court decided that as to the trustee resident in Nevada the assessment was void. Respondent lays great stress upon the language of the court expressed in its decision, where it is said:

"In Mackay v. San Francisco, 113 Cal. 397 [45 Pac. 696], these plaintiffs, as executors of the will of Theresa Fair, deceased, contended that the bonds upon which the taxes were levied in this case, or a portion of them, were not property within the state, and not taxable to the estate of Theresa Fair, deceased. But it was held that the bonds had their situs in San Francisco, and were there taxable. The court said: 'The bonds in question were held here. Their situs was the city and county of San Francisco. They could not be taxed in Arizona, where the property mortgaged to secure them is situated.' In that case the court followed the general rule sustained by the weight of authority. The rule is that the personal property of decedents is taxed at the domicile of the decedent. As said by law-writers: 'During the settlement of the estate it must have a situs somewhere, and none so appropriate as where the decedent lived.'"

The court goes on to declare that a different situation was shown after the property had been distributed into the hands of the trustees, one of whom was a nonresident, and Judge Cooley's declaration of the general rule is referred to.

[2] We find no difficulty in enforcing an agreement between the holding there made and the contention as advanced by appellant here, and the question may be propounded: Did the fact that the situs of Morgan's interest in the stock for purposes of probate, fixed itself at the place of his domicile, also fix the situs of the stock for the purpose of an assessment at the same place? We do not think that such a legal situation as last suggested follows. We think the situation is no different than had this same assessment been levied against Morgan's stock by the assessor of Los Angeles county during the lifetime of Morgan and while he was domiciled here. There was not a transfer of interest to the trustees by distribution of the estate under the will, for the trustees for a long time prior to the death of Morgan held the legal title and possession of the stock and continued so to hold it after his death and at the time distribution was had. If the assessor could not have assessed Morgan for the stock while he lived, surely then the executor of his estate could not be subjected to a similar assessment. It seems very clear to us that the stock in the hands of the trustees is within the jurisdiction of the taxing power of the state of Illinois. And to hold that it may be assessed in California also would be to subject it to double taxation, which is never favored unless clearly required by the statute of the particular state which claims that right.

"While it is not practicable to formulate a rule, where the cases depend upon the construction of different state statutes and involve their phraseology, both as to what shall constitute taxable property in the state and as to the place in the state where the personalty shall be assessed, it has been frequently held that where bonds, notes and mortgages have had an independent situs given them in another state and have been localized there through a resident agent, or otherwise, so as to become subject to the taxing power of that state, they were not subject to taxation in the state of the domicile, unless expressly made so by statute. In other words, it is a rule of construction, repeatedly recognized by the courts in taxation cases, that double taxation will not be presumed to have been intended, and will only be enforced under express mandate." Judson on Taxation, § 425, p. 543.

The decisions of our own state, the leading ones of which we have made reference to, by fair interpretation support this rule. Our conclusion is that the 2,000 shares of stock held by the Illinois trustees was property having its situs in that state and is not to be considered as within the jurisdiction of the taxing power of California.

The judgment appealed from is reversed.

We concur: CONREY, P. J.; SHAW, J.

---

38 Cal. App. 101

BOOTH et al. v. STOW et al. (Civ. 2442.)

(District Court of Appeal, First District, California. Sept. 11, 1918.)

1. QUIETING TITLE ⟸39—PLEADING—NECESSITY OF CROSS-COMPLAINT.

Where the sole question in a suit to quiet title relates to the location of a boundary line between plaintiffs and defendants, a judgment for or against plaintiffs is a judgment against or for defendants, and a cross-complaint is unnecessary.

2. QUIETING TITLE ⟸39—PLEADING—CROSS-COMPLAINTS.

In a suit to quiet title, where the sole dispute is as to the location of the boundary between the parties, a cross-complaint filed by defendant will be treated as an answer containing affirmative matter.

3. BOUNDARIES ⟸46(2) — LOCATION BY AGREEMENT—EFFECT.

If a measurement be made in a boundary dispute, and the line agreed on and acquiesced in, the measurement is binding on and applicable to all parties to the agreement and their successors by subsequent deed.

4. REFORMATION OF INSTRUMENTS ⟸44—PAROL EVIDENCE—ADMISSIBILITY.

Where pleadings put in issue the mutual mistake of the parties in framing and executing reciprocal deeds, parol evidence is admissible under Code Civ. Proc. § 1856, subd. 1.

Appeal from Superior Court, Contra Costa County; Henry C. Gesford, Judge.

Action by James E. Booth and others against J. M. Stow and others. Judgment for defendants, and plaintiffs appeal. Modified and affirmed.

A. A. Moore, of San Francisco, Wilder Wight, of Oakland, for appellants. J. E. Rodgers and A. F. Bray, both of Martinez, and A. J. Coogan, of San Francisco, for respondents.

STURTEVANT, Judge pro tem. This is an action to quiet title. The defendants had judgment in the trial court, and the plaintiffs have appealed. The appellants have brought up the judgment roll and a bill of exceptions.

From the record before us, it appears that the dispute arose over the location of a boundary line; the plaintiffs filed a complaint in the ordinary form of an action to quiet title; the defendants appeared separately and filed separate answers and at the same time filed cross-complaints; the plaintiffs answered the cross-complaints, and, among other defenses, they pleaded the statute of limitations. Subdivision 4 of section 338, Code Civ. Proc. The case was tried on the issues made by the above-mentioned pleadings. The trial court made findings which included a finding that the plaintiffs were estopped, and one that the defendants were not barred by the statute of limitations. The finding on estoppel is in the general words that the plaintiffs are estopped, but no facts are set forth, and it appears on the face of the finding that the same is a conclusion of law out of place.

[1, 2] As the sole question that is in dispute is the location of the boundary line between the plaintiffs and the defendants, it is patent that a judgment for or against the plaintiffs is, conversely, a judgment against or for the defendants. In such a case a cross-complaint is unnecessary. Wilson v. Madison, 55 Cal. 5, 8; Miller v. Loco, 80 Cal. 257, 261, 22 Pac. 195. When such is the condition of the record, the court will treat a cross-complaint as an answer containing affirmative matter. Pauly v. Rogers, 121 Cal. 294, 53 Pac. 808; Phillips v. Hagart, 113 Cal. 552, 45 Pac. 843, 54 Am. St. Rep. 369. So treating the pleadings, a finding on the plea of the statute of limitations becomes wholly immaterial. The pleadings alleged and the trial court found: That on March 27, 1909, Lillie B. Gardner and T. B. Jenkins were the joint owners of a ranch in Contra Costa county; on that day the grantors agreed to partition the ranch and to have a survey made dividing the uplands and the lowlands into two equal parts; that immediately afterward they executed, each to the other, two deeds, in one of which T. B. Jenkins conveyed to his cotenant his undivided one-half interest in the north half, and in the other deed Lillie B. Gardner granted to him her undivided one-half interest in the south half; immediately thereafter both grantors deeded the south half to these plaintiffs; that both grantors and these plaintiffs agreed that as soon as the survey was made the grantors would again exchange deeds; all of the foregoing deeds were executed and delivered on March 27, 1909. A few weeks

later the surveyor made the survey; the plaintiffs accepted the survey and went into possession of the tract as surveyed; the plaintiffs and the owner of the north half, Lillie B. Gardner, immediately erected a fence on the line so run by the surveyor; "upon their acceptance by said plaintiff and said defendant Lillie B. Gardner of the tract of land so set part by the said survey as aforesaid, said plaintiff and said defendant Lillie B. Gardner understood and considered that it was not necessary for them to make new deeds of said tract of land so accepted by them aforesaid"; the plaintiff has made conveyances based on the said surveys, and the defendant Lillie B. Gardner has made conveyances based on the said surveys. The plaintiffs commenced this action by filing their complaint on March 24, 1914.

[3] It is clear from the foregoing statement of facts that all of the parties considered that a measurement was necessary. It likewise appears that a measurement was had. In the case of Young v. Blakeman, 153 Cal. 477, at page 482, 95 Pac. 888, 890, Mr. Justice Shaw, writing the opinion, says:

"If a measurement is made and the line agreed on and acquiesced in as required by this rule, it is binding on and applicable to all parties to the agreement and their successors by subsequent deeds."

Silva v. Azevedo, 173 Pac. 929, affirms the rule in Young v. Blakeman, supra, and the facts in the Silva Case are so closely parallel to the facts in the case in hand that it would seem nothing more is necessary than merely to cite that case.

[4] The pleadings put in issue the mutual mistake of the parties in framing and executing their deeds, and there was no error on the part of the trial court in receiving parol evidence. Code Civ. Proc. § 1856, subd. 1; Capelli v. Dondero, 123 Cal. 324, 330, 55 Pac. 1057. The trial court treated the cross-complaint as such and awarded relief accordingly, and it is necessary to modify its judgment. This can be done by striking from the judgment all matter commencing with the words, "Now, therefore" (where those words first appear in the judgment), and down to and including the words "parties respectively," where those two words last appear in the judgment and inserting instead the following:

"Now, therefore, it is by the court ordered, adjudged, and decreed that the plaintiffs are not the owners of or seised in fee simple of all that certain piece or parcel of land situate, lying and being in the county of Contra Costa, state of California, and more particularly described in paragraph 5 of the plaintiffs' second amended complaint."

As so modified, the judgment should be affirmed; and it is so ordered.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

(38 Cal. App. 102)

## OCEAN SHORE DEVELOPMENT CO., Inc., v. HAMMOND. (Civ. 2432.)

(District Court of Appeal, First District, California. Aug. 28, 1918. Rehearing Denied by Supreme Court Oct. 23, 1918.)

1. JUDGMENT ⟸251(1) — CONFORMITY TO PLEADINGS—SCOPE OF RELIEF.
That the relief granted is not as broad as the pleadings is immaterial.

2. APPEAL AND ERROR ⟸1073(1)—HARMLESS ERROR—JUDGMENT—FORM OF ACTION.
Where court decided that action was for specific performance, and allowed amendment of pleading, after demurrer sustained, but amendment did not specifically pray for specific performance, though broad enough to authorize that relief, defendant was not prejudiced by a judgment not granting that relief, but giving the relief demanded by the facts, which was within the pleadings.

3. JUDGMENT ⟸249 — CONFORMITY WITH PLEADINGS AND EVIDENCE.
In code states courts will render such judgments as the evidence and pleadings warrant, regardless of the form of action.

4. VENDOR AND PURCHASER ⟸273 — CONTRACTS—ACTIONS—TENDER.
Where purchaser of land repudiated the contract, tender of the deed by the seller was not prerequisite to his recovery.

5. JUDGMENT ⟸622(2)—MATTER AVAILABLE AS CROSS-COMPLAINT—FAILURE TO PLEAD.
While the matter of foreclosure of vendor's lien upon land was available as a cross-complaint in the vendee's action to recover amounts paid on account of alleged fraud, failure to interpose the same did not bar foreclosure of the lien, since Code Civ. Proc. § 442, as to cross-complaints, is permissive only.

6. VENDOR AND PURCHASER ⟸291—VENDOR'S LIEN — DEFICIENCY JUDGMENT — POWERS OF COURT.
Assuming that Code Civ. Proc. § 726, as to deficiency judgments, applies only in case of mortgage foreclosure, the court nevertheless has inherent power, in foreclosing vendor's lien, to render a deficiency judgment.

Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by the Ocean Shore Development Company, Incorporated, against J. P. Hammond. Judgment for plaintiff, and defendant appeals. Affirmed.

Joseph K. Hutchinson and Walter Slack, both of San Francisco, and Ross & Ross, of Redwood City, for appellant. Byrne & Lamson, of San Francisco, for respondent.

PER CURIAM. This action is based on a contract for the purchase and sale of three lots in San Mateo county. By the terms of the contract the defendant agreed to pay the plaintiff the sum of $2,125 as the purchase price of the lots, in installments as follows: Three hundred dollars on the signing of the contract, and the balance at the rate of $35 per month thereafter until paid; the title to the property was to remain in the vendor until the installments were paid. The defendant paid the sum of $300 on the signing of the

contract and the first installment of $35. No further installments were paid. At the time of the commencement of this action, 46 installments, amounting to the principal sum of $1,610, had become due under the contract. The balance of the installments, amounting to $180, had not yet become due.

This action was brought to foreclose a lien which the vendor had on the property for the purchase price. A demurrer to the complaint was sustained, and an amended complaint filed. The plaintiff asked that the property be sold to satisfy the amount then due, namely, $1,821.15, and that, if the proceeds of the sale were insufficient to satisfy the amount of said lien, then that a personal deficiency judgment be docketed against the defendant. The defendant answered the amended complaint, and, after denying certain allegations therein, set up four separate defenses, numbered and referred to as "second," "third," "fourth," and "fifth" defenses, respectively. The "fifth" defense was conceded by the plaintiff, and the contract reformed in accordance therewith, and need not concern us here. The "second" defense recited that, prior to the commencement of this action, the defendant in this action commenced an action in the superior court of the state of California in and for the county of Mono against the plaintiff herein, entitled "J. P. Hammond, Plaintiff, v. Ocean Shore Development Company, Incorporated, a Corporation, Defendant," in which said Hammond sought to recover from the said Ocean Shore Development Company, Incorporated, the sum of $335 paid under the said contract upon the ground of fraud and false representations made to him by the said Ocean Shore Development Company, Incorporated, concerning the character and situation of the property; that the Ocean Shore Development Company failed to set up in its answer any counterclaim for damages, or for the purchase price of the property, or any of the installments thereof. The "third" defense set up a failure of consideration, and then set forth as a reason for said failure certain alleged false representations made by Ocean Shore Development Company to the said Hammond, which induced the said Hammond to enter into the said contract, and which said alleged false representations were substantially the same as set forth in the complaint previously filed in Mono county by Hammond. The "fourth" defense simply sets forth the same alleged false representations concerning the property, and the fact of a rescission of the contract by the defendant based upon such alleged misrepresentations.

On April 14, 1916, the balance of the installments under the contract having fallen due, the plaintiff filed a supplemental complaint, setting forth that fact, and an amended supplemental complaint was thereafter filed by permission of the court obtained at the time of trial, and which alleged, by way of excusing a tender of a deed, that defendant had repudiated the contract. At the close of plaintiff's case, the defendant moved for a nonsuit; the motion was denied. The defendant then offered to prove the facts alleged in his "third" and "fourth" defenses concerning the alleged false representations made by plaintiff to defendant about the character of the property. The court sustained the plaintiff's objection thereto, for the reason that the judgment rendered against the defendant herein in the action of Hammond v. Ocean Shore Development Co. operated as an estoppel by judgment with regard to those matters. Judgment was thereafter rendered against the defendant, and in favor of the said plaintiff, by which it was decreed that the plaintiff has a lien upon the real property for the sum of $2,123.41, together with costs that the property be sold to satisfy said lien, and that a personal judgment for the deficiency, if any, then be docketed against the defendant. The defendant appeals, and advances many arguments for a reversal of the judgment.

[1-3] One of the questions raised by defendant is whether this is in effect an action for specific performance, or whether this is an action to foreclose a vendor's lien. We think that this was not an action for specific performance. The original complaint stated an action on contract for the amount of the unpaid installments, and asked for a foreclosure of a vendor's lien upon the land. At the trial the defendant interposed a demurrer and argued that the complaint was analogous to one to enforce specific performance, and that facts sufficient to constitute such a cause of action had not been pleaded. The demurrer was sustained, and the plaintiff amended its complaint by adding an allegation that the price to be paid for the land under the contract was not disproportionate to the value of the land. In support of this allegation, the plaintiff introduced evidence of the market value of the land. The defendant contends that as the trial court, in ruling on the demurrer to the original complaint, determined that the action was substantially one for specific performance, and respondent voluntarily adopted the trial court's theory, and amended its complaint in accordance therewith, it cannot on appeal return to the position that the original complaint was sufficient.

We think a return to such position is not necessary to sustain the judgment. Neither the prayer of the amended complaint nor of the supplemental complaint is for specific performance; the decree was not given for specific performance, and therefore could not have been rendered upon the theory that the plaintiff was entitled to such relief. But admitting that the allegations of the amended complaint were framed to state a case for specific performance, and that the court might have so decreed, yet the plaintiff asked and

received of the court a relief that was clearly within the pleadings and therefore the defendant is not prejudiced. In code states, courts will render such judgments as the evidence and pleadings show the parties entitled to regardless of the form of action. Lee v. Coon Rapids Nat. Bank, 166 Iowa, 242, 144 N. W. 630.

In one of the cases relied upon by the defendant in support of his contention (Woodson v. Metropolitan St. R. Co., 224 Mo. 685, 123 S. W. 820, 30 L. R. A. [N. S.] 931, 20 Ann. Cas. 1039), the court said:

"But, further, an instruction cannot be broader than the pleadings, although the facts may take a wider range; nor, on the other hand, can the instruction be broader than the facts proven, although the pleadings may take a broader range." Degonia v. Railroad Co., 224 Mo. 589, 123 S. W. 807.

If the pleadings take a broader range than the facts proven, the court surely has power to give judgment for any relief to which the proof entitles the plaintiff; and where a party proceeds upon the theory that his relief is in equity, but fails to state sufficient facts to entitle him to equitable relief, he will be given the relief to which he appears to be entitled. If the plaintiff is entitled to a money judgment, a money judgment will be rendered. Donovan v. McDevitt, 36 Mont. 61, 92 Pac. 49.

Therefore, conceding that plaintiff did amend his complaint to state an action for specific performance, the court had power to grant any relief within the pleadings, which we think it has done in the judgment rendered. The cases cited by the defendant are in support of the proposition that where a trial court adopts a certain theory of a case, and renders judgment upon that theory an appellate court will not consider a different theory of the case, in order to sustain or reverse the judgment, and that judgment must stand or fall upon the theory upon which it was rendered. In this case, however, the court did not enter a judgment for specific performance, and we are not called upon either to sustain or reverse such a judgment. The judgment was for the unpaid purchase price of the land and for a foreclosure of the vendor's lien; the facts proven entitled the plaintiff to such a judgment, and that the pleadings may have been somewhat broader, we think, is immaterial.

Whether the action is one for specific performance or not, the judgment in the case of Hammond v. Ocean Shore Development Co. acted as an estoppel upon the defendant so as to prevent him from introducing evidence upon his "third" and "fourth" defenses, and therefore the objection of the plaintiff to the introduction of evidence on these matters was properly sustained.

[4] The defendant contends that the tender of a deed was a condition precedent to plaintiff's right of recovery, and that there is no proof of such tender. We think the failure to tender a deed was excused by defendant's repudiation of the contract, which repudiation and attempted rescission was fully set out in the "fourth" defense of defendant's answer. Ehrhart v. Mahony, 170 Cal. 148, 148 Pac. 934.

[5] The defendant argues, further, that as a portion of the installments under the contract was due at the time when the action for rescission of the contract was filed by defendant herein, in Mono county, the plaintiff herein, as defendant therein, was obliged to set up such installments as a counterclaim or lose his right to sue thereon. The case of Mackenzie v. Hodgkin, 126 Cal. 591, 59 Pac. 36, 77 Am. St. Rep. 209, holds that similar matter is matter for cross-complaint and within the meaning of section 442, Code of Civil Procedure. This section is permissive, and does not require matter of cross-complaint to be set up, under penalty of a forfeiture of the right to sue thereon. However, we think that a discussion of the distinction between counterclaims and cross-complaints becomes unnecessary here, for the reason that the plaintiff was clearly entitled to wait until the entire amount to be paid under the contract was due and payable before suing, and therefore he was not required to set up as a counterclaim the amount due at that time.

[6] Finally, it is defendant's contention that the judgment is erroneous because, if the action is to foreclose a vendor's lien, the court must decree a strict foreclosure, and therefore a deficiency judgment is improper. Admitting, as contended by defendant, that the statutory provisions for the entry of a deficiency judgment in mortgage foreclosures, contained in section 726 of the Code of Civil Procedure, do not apply to vendor's liens, yet we think that the court had inherent powers sufficient to enable it to enter such a judgment without any express statutory authority.

The plaintiff clearly had a right under his contract to sue for the full purchase price of the land and he also had a right to foreclose the lien. Under our system of procedure, it cannot be said that, after foreclosing the lien, it would be necessary for him to bring another action at law in order to collect the amount still due him under the contract. The court had general legal and equitable jurisdiction, and had authority thereunder to do full and complete justice in the one action, and we think this has been done by the judgment rendered.

The judgment is affirmed.

179 Cal. 180

VALE v. BOYLE, Auditor of City and County of San Francisco, et al. (S. F. 8771.)

(Supreme Court of California. Oct. 25, 1918.)

MUNICIPAL CORPORATIONS ⊂=236—PURCHASES—NECESSITY OF BIDS—"OTHER NECESSARY ARTICLES."

San Francisco Charter, giving the board of public works control of public utilities, authorizes it to purchase in conformity with the ordinance of the board of supervisors automobile busses as equipment for extension of a public utility operated by the city, notwithstanding the charter provisions requiring purchases of supplies "and other necessary articles" to be made after competitive bidding.

In Bank. Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by Baldwin Vale against Thomas F. Boyle, as Auditor of the City and County of San Francisco, and others. From an order granting an injunction pendente lite, defendants appeal. Reversed.

George Lull, City Attorney, John F. English, John B. Gartland, and Oscar T. Barber, all of San Francisco, for appellants. John L. McNab, of San Francisco, and Byron Cole-

man, of Los Angeles, for respondent. Robert M. Searles, of San Francisco, amicus curiæ.

WILBUR, J. This is an appeal from an order granting an injunction pendente lite, restraining the auditor of the city and county of San Francisco from issuing his warrant in payment for certain White automobile busses purchased by the board of public works of said city, after advertisement inviting bids, as directed by ordinance of the board of supervisors of said city. The main point involved in the case is the construction of the charter of the city and county of San Francisco with reference to the acquisition of equipment for the extension of a public utility owned and operated by the city. Respondent contends that the power to purchase such equipment is vested in the board of supervisors and must be exercised under the provisions of section 1, c. 3, art. 2, of the charter (St. 1899, p. 255), and that such charter power cannot be delegated by the supervisors to the board of public works. Appellants contend that by virtue of section 9, subdivision 8 of chapter 1, article 6 of said charter (Stats. 1899, pp. 286, 287) the supervisors had authority to direct the purchase by the board of public works of the automobile busses as equipment to be used as a public utility. That section provides as follows:

"Sec. 9. The board of public works shall have charge, superintendence and control, under such ordinances as may from time to time be adopted by the supervisors: * * * (8) Of any and all public utilities owned, controlled or operated by the city and county, or which may hereafter be so owned, controlled or operated."

The charter, as originally adopted in 1899, provided in article 12 thereof for the acquisition of public utilities. The automobile busses were purchased for the purpose of extending the service of an existing public utility which was expressly authorized by the provisions of article 12, § 16, subd. d, incorporated into the charter by amendment in 1907 (Stats. 1909, Second Extra Session of 1907, p. 37), which reads as follows:

"Sec. 16. (1) Whenever any public utility shall be operated by the city and county * * * the supervisors may, from time to time, make appropriations from such funds for the following purposes: * * * (d) For extensions and improvements."

Section 14 of the same chapter, added by amendment at the same time, provided as follows:

"Power to Acquire Public Utilities.

"Sec. 14. The city and county shall have power to acquire, construct or complete any public utility from funds derived from taxes levied for that purpose, or from funds derived from the sale of bonds issued for that purpose, as is provided in this charter, and may operate, maintain, sell or lease the same, subject to the other provisions and limitations of this charter."

Full power, therefore, is given by the charter to the city "to acquire, construct or complete any public utility" (section 14, supra), and to utilize certain funds for the purpose of purchasing equipment for extensions and improvements. "Charge, supervision and control" of such public utilities are vested by the charter in the board of public works, under such ordinances as may from time to time be adopted by the supervisors." In the absence of any provision to the contrary in the charter, these provisions, no doubt, authorize the purchase by the board of public works of equipment from funds appropriated therefor by the board of supervisors in the manner provided by the ordinances adopted "from time to time" by the said board of supervisors. But respondent contends that the direct and implied authority derived from the provisions of section 9, subdivision 8 of chapter 1, article 6, supra, is controlled by the provisions of the charter, specifically providing for the purchase of supplies and other articles, and directing that the same shall be purchased by contract awarded to the lowest bidder, after advertisement inviting bids therefor. These provisions (section 1, c. 3, art. 2, supra) are as follows:

"Contracts.

"Section 1. All contracts for goods, merchandise, stores, supplies, subsistence or printing for the city and county, as well as for all subsistence, supplies, drugs, and other necessary articles for hospitals, prisons, public institutions and other departments not otherwise specifically provided for in this charter, must be made by the supervisors with the lowest bidder offering adequate security, after publication for not less than ten days in the official newspaper; and no purchase thereof or liability therefor shall be made or created except by contract.

"Except as otherwise provided in this charter, the board must determine annually what goods, merchandise, stores, supplies, drugs, subsistence and other necessary articles will be needed by the city and county for the ensuing year, and it shall have no power to purchase or to pay for the same unless the provisions in this charter provided as to competitive bidding for supplies are strictly followed, and no contract shall be made for any of the same unless upon such competitive bidding."

It is contended that the automobiles in question are "other necessary articles for * * * other departments not otherwise specifically provided for in the charter," and that therefore this section relating to the purchase of such articles controls, for the reason that there is no specific provision in the charter for the purchase of "articles" for the equipment of a public utility. In considering this contention it should be observed that the section deals with the purchase of supplies used by the city in its various departments and institutions by means of annual contracts for such supplies. The duty of the board of supervisors to determine annually in advance "what goods, merchandise, stores, supplies, drugs, subsistence and other necessary articles will be needed by the city for the ensuing year" is as imperative as the duty to purchase from the "lowest bidder" after advertisement unless otherwise provided in the charter. "It shall have no power to purchase or to pay for the same un-

less the provisions in this charter provided as to competitive bidding for supplies are strictly followed, and no contracts shall be made for any of the same unless upon such competitive bidding." "All contracts * * * must be made by the supervisors with the lowest bidder offering adequate security, after publication for not less than ten days in the official newspaper; and no purchase thereof or liability therefor shall be made or created except by contract." The language of the second sentence of section 1 is almost identical with the first sentence as to the character of goods, etc. Each applies to "goods," "merchandise," "stores," "supplies," "drugs," "subsistence," and "other necessary articles." The first sentence provides for the purchase of such "supplies for hospitals, prisons, public institutions and other departments not otherwise specifically provided for in this charter," while the last sentence uses the shorter form of expression "needed by the city and county for the ensuing year." Under the doctrine ejusdem generis, the words "other necessary articles" used in the second sentence should be construed as applicable only to things of the same general nature or class as those enumerated, namely, supplies of such a general nature used by the city as the board might anticipate and "determine annually in advance" to be so required, and the same words in the first sentence, used in the same connection, should receive the same interpretation. Although this precise question has not been heretofore determined by this court, a similar provision of the Political Code and the County Government Act have been passed upon by the courts of this state. Section 25, subdivision 21 of the County Government Act of 1897 (Stats. 1897, pp. 452, 464) provides as follows (italics ours):

"Sec. 21. The board of supervisors of the several counties shall *annually* advertise, for at least ten days in a newspaper of general circulation in the county (if there be a newspaper published in the county, otherwise by posting notices in three public places), for sealed bids for furnishing the county with stationery, clothing, bedding, groceries, provisions, drugs, medicines, and *all other supplies*. All bids shall be on a schedule showing *all articles* needed in the several offices and departments, prepared by the clerk of the board, shall state separately the price of each article to be furnished, and any person may bid upon any article separately. In considering such bids, the board may accept or reject all or any of them, or may accept or reject a part of any such bid, preference being given, however, to the lowest responsible bidder. All supplies furnished the county, or any officer thereof shall be furnished at a price no greater than is specified in the bid which may be accepted by the board.

"The board shall annually fix the price at which the county shall be supplied with job printing and blank books, from a schedule prepared by the clerk of the board," etc.

It will be observed that this section, literally construed, required the board of supervisors to annually advertise "for all other supplies" furnished the county. In Swasey v. County of Shasta, 141 Cal. 392, 395, 74 Pac. 1031, 1033, in considering the authority of the county to erect a fence, and in analyzing the provisions of the County Government Act, it is said: "Subdivision 21 [requires] that all ordinary county supplies shall be bought after advertisement for sealed bids." This same subdivision was later passed upon by the Appellate Court of the Second District in County of Riverside v. Yawman & Erbe Manufacturing Co., 3 Cal. App. 691, 86 Pac. 900, where it was insisted that the board of supervisors were required to advertise for furnishings for a county courthouse. The court there said:

"It is insisted that furnishings for a courthouse are 'other supplies' within the meaning of the law, and that there being no publication or bids therefor, or schedule prepared as provided, the purchase and payment were therefore without authority of law. We are of opinion that from a reading of the whole subdivision, it is apparent that the term 'other supplies' has reference to ordinary supplies which the board is required to keep for use and replenish annually, if needed, for distribution among the county officers; that furniture for courthouse is not, in the contemplation of such act, ordinary supplies."

It was further said:

"This construction is accentuated by subdivision 8, section 25 of the same act, which confers express authority upon the board to erect, rebuild, or furnish a courthouse, and with reference to which furnishing no publication or competitive bidding is *expressly* required. (Italics ours.) In addition, the board by virtue of section 4 of the act is given authority, generally, to purchase such personal property as may be necessary in the exercise of its powers."

A similar question was presented in People ex rel. Leonard Merrill v. Nellis et al. and Board of Supervisors of the County of Los Angeles, 14 Cal. App. 250, 111 Pac. 631. It is there said:

"It is averred that the supervisors advertised for bids; that the same were received; that one bidder offered to supply the needed furnishings for $150,000, while another bid therefor $247,700; that the goods so to be furnished under such respective bids were in quality, texture, and workmanship the same. It is further averred that the notice given soliciting such bids, and the specifications in said notice referred to and made part thereof, were uncertain in their terms and provided no data upon which intelligent bids could be made; that it was required of the bidders that they furnish their own plans, and in addition give bonds indemnifying the county against all damages for infringement of patents caused by suit or otherwise, all of which it is averred increased the cost of material and furnishings; that when said bids were received the board awarded the contract to the highest bidder."

It will be observed that the situation described in the complaint in that case is almost identical with the complaint made here; that after advertisement on insufficient specifications bids were received from contractors upon their own plans, and the contract was awarded "to the highest bidder." The court there held that under the provisions of the County Government Act, hereinbefore quoted, "the board of supervisors may in their discretion, go into the open market and purchase furnishings for a public building, where such

furnishings form no part of the structure is not disputed. Their authority so to do is determined in Sarver v. County of Los Angeles, 156 Cal. 188 [103 Pac. 917]; Riverside v. Yawman-Erbe Mfg. Co., 3 Cal. App. 691 [86 Pac. 900]." In Sarver v. County of Los Angeles, supra, it was held that the cells of the county jail were a part of the jail furnishings. The court there said:

"In the matter of furnishings, something from the necessities of the case must be left to the sound judgment and honest discretion of the board of supervisors. Desks, chairs, book shelves, carpets, light fixtures, etc., are of different prices and quality. Many of such articles are manufactured under patents and could be procured but from one source. It would be practically impossible to call for the furnishing of a building under pre-adopted plans and specifications adequate to exclude the necessary play of discretion and judgment, and, as we have said, the law has not undertaken so to hamper the boards of supervisors in the performance of this important duty. In the case at bar it may well be, as the appellants plead, that, notwithstanding the Pauly Jail Building Company's bid was higher in terms of money, it was still the lowest and the best in consideration of the quality of work, of material to be used and of patented devices to be employed. That such patented devices may be considered, and, indeed, called for by the board of supervisors, is well settled. Nicholson Pavement Co. v. Painter, 35 Cal. 697; Dunne v. Altschul, 57 Cal. 474."

At the time this decision was rendered, subdivision 21, § 25 (Stats. 1897, p. 464, supra), read substantially as above quoted. In that case the contract had been awarded to the highest bidder, whose bid was alleged to have been over $6,000 in excess of that of the lowest responsible bidder; the supervisors justifying themselves on the ground that the furnishing of cells required the use of patented locking devices, etc., and that therefore they exercised a proper discretion in awarding the contract to the highest bidder. Apparently the attention of the court was not called to the section of the County Government Act requiring "all other supplies" to be purchased after advertisement, and for that reason the case is not direct authority for the precise point involved here. That section 1, supra, was not intended, in the first instance, to apply to the purchase of equipment for the improvement or extension of public utilities, is manifest by the fact that the authority to purchase such equipment and supplies was conferred by amendment to the charter in 1907, while the restrictions of section 1 were embodied in the original charter of 1899, which was a modification of the previous consolidation act adopted and in force in the city and county of San Francisco ever since 1856 (St. 1856, p. 164). This section provided as follows:

"Sec. 69. All contracts for building and printing to be done for the said city and county, and ordinary supplies for subsistence of prisoners must be given by the board of supervisors to the lowest bidder offering adequate security, after due notice published for not less than five days in at least two newspapers in such city and county."

At the time, then, when the charter was adopted, the words, "other necessary articles for * * * other departments * * *" did not include automobile busses purchased for the equipment for an extension or improvement of a public utility. If, however, the amendment of 1907 referred to and incorporated therein by reference the general plan of purchasing of supplies contained in section 1, supra, then, of course, such provision would be controlling. The question, then, is: Do the words "as is provided in this charter," contained in section 14, hereinbefore set forth, relate to the "acquiring, constructing or completing" a public utility, or to the method of acquiring funds for that purpose? It is clear, we think, that they apply to the latter, and not the former. The considerations which led the court to hold that the requirement that contracts for "all other supplies" (section 25, subd. 21, supra) be purchased from the lowest bidder did not limit the power of the county board of supervisors to purchase furniture and jail cells are much more persuasive when applied to the situation presented by the instant case. For, under the charter provisions concerning public utilities, the city and county of San Francisco, through its board of public works, is acting in a proprietary and not in a governmental capacity, and it may well be assumed that, in placing such utilities in charge of one of the boards of the city, it was contemplated that so far as consistent such board should have the usual powers incidental to the operation of such public utility including the power to purchase the necessary supplies and equipment, this power to be exercised under the charter of the city of San Francisco by the board of public works, under such limitations as may from time to time by ordinance be prescribed by the board of supervisors. Section 9, subd. 8, Charter, supra. While it is true that this general consideration alone should not control the express language of section 1, c. 3, art. 2, of the charter, if applicable thereto, it aids us in construing such general provisions of the charter concerning the purchase of supplies, etc., to consider that they were adopted for the purpose of regulating the conduct of the board of supervisors of San Francisco, acting in their governmental capacity. The foregoing considerations and authorities lead to the conclusion that the charter provisions giving the board of public works "charge, superintendence and control" of public utilities authorized them to purchase, in conformity with the ordinance of the board of supervisors, the automobile busses in question, and that the limitations contained in section 1, c. 3, art. 2, do not apply to such purchases.

It is contended, however, that the board of public works did not purchase said automobile busses in the manner directed by the ordinance of the board of supervisors. The ordinance, by reference, incorporated therein

the plans and specifications then on file in the office of the board of supervisors. These plans and specifications also provided for the submission by the bidders of their own detailed plans and specifications for automobile busses that would fill the general specifications of the board of supervisors as to power, capacity, etc. The bids were in exact accord with the ordinance of the board of supervisors, and the contract therefore was valid.

The order granting an injunction pendente lite is reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.; RICHARDS, Judge pro tem.

38 Cal. App. 116

## PEOPLE v. WADEMAN. (Cr. 444.)

(District Court of Appeal, Third District, California. Aug. 31, 1918. Rehearing Denied by Supreme Court Oct. 29, 1918.)

1. RAPE ⟸52(1) — EVIDENCE — TIME AND PLACE.

In a prosecution for rape on a 14 year old girl, evidence *held* to fix the time and place of the commission of the offense with sufficient certainty.

2. RAPE ⟸54(1) — UNCORROBORATED TESTIMONY—SUFFICIENCY.

A conviction for rape may be had on the uncorroborated testimony of the prosecutrix, although she may have made contradictory statements as to the person who had committed the crime and otherwise, in which case the testimony should be scrutinized with discriminating care.

3. RAPE ⟸52(1)—EVIDENCE—SUFFICIENCY.

In a prosecution for rape on a 14 year old girl, evidence *held* sufficient to sustain a verdict of guilty.

4. RAPE ⟸44—EVIDENCE—ADMISSIBILITY.

In rape prosecution, evidence of familiarity not amounting to sexual intercourse may be admitted to show the disposition of the parties.

5. CRIMINAL LAW ⟸656(1) — REMARKS OF TRIAL COURT.

In a prosecution for rape, a remark by the court incidentally referring to prosecutrix as of tender years was not prejudicial, where it was undisputed that the girl was only 14 years old, especially in view of cautionary instructions.

6. CRIMINAL LAW ⟸656(2) — REMARKS OF TRIAL COURT.

In a prosecution for rape on a 14 year old girl, a remark by the trial court that the prosecutrix was not overly bright, made in connection with a ruling as to relaxing the rule against leading questions, was not prejudicial, especially in view of cautionary instructions.

7. CRIMINAL LAW ⟸1170(1) — APPEAL — HARMLESS ERROR—EVIDENCE.

In a prosecution for rape, a ruling excluding questions put to prosecutrix by defendant as to whether she had sexual intercourse with any one else than defendant and as to who was the father of the child, it not being intended to exclude proof, was not prejudicial, whether right or wrong.

8. CRIMINAL LAW ⟸772(4)—INSTRUCTIONS—TIME OF COMMISSION OF OFFENSE.

In prosecution for rape, an instruction that it was not necessary to prove that the crime was actually committed on the day charged, but that it was sufficient if it was committed within three years immediately preceding the filing of the information, was error when standing alone, being in conflict with rule requiring the people to select the day.

9. CRIMINAL LAW ⟸823(4)—INSTRUCTIONS—TIME OF COMMISSION OF OFFENSE—CURE OF ERROR.

An instruction in rape case that it was not necessary to prove that the crime was committed on the date charged, if it was committed within three years before suit, was not error, when considered in connection with subsequent instruction requiring proof of the offense on the particular occasion charged.

10. CRIMINAL LAW ⟸782(7)—INSTRUCTIONS —PRESENCE OF CHILD OF PROSECUTRIX—INFERENCES.

In a prosecution for rape, where the child of prosecutrix was brought into the courtroom, a question to prosecutrix by the district attorney as to who was the father did not necessitate the giving of an instruction as to the inferences arising from the presence of the child.

11. CRIMINAL LAW ⟸772(4)—INSTRUCTIONS —VENUE OF CRIME.

In a prosecution for rape, an instruction undertaking to recite the facts contained in the information was not erroneous as failing to definitely state the venue of the crime.

12. RAPE ⟸60—VERDICT—AGE OF PROSECUTRIX.

Pen. Code, § 264, as amended in 1913, requires a jury in a rape case to determine whether punishment shall be imprisonment in county jail or state prison, only where female is between 16 and 18 years old, and the verdict was sufficient without a finding as to age of prosecutrix, where information charged her age to be under 16 and it was undisputed that she was 14 years old.

13. CRIMINAL LAW ⟸1130(2)—APPEAL AND ERROR—BRIEFS.

Assignments of error for refusing instructions requested by defendant in a rape case would not be considered, where neither the instructions nor the reason why they should have been given are set out in appellant's brief.

14. CRIMINAL LAW ⟸1037(2)—CONDUCT OF PROSECUTING ATTORNEY—OBJECTIONS.

In a prosecution for rape, a question by the district attorney in argument, as to whether "there was any reason to believe that this man is a better man than the Rev. M. S.," was not prejudicial in the absence of a motion to strike out or for a cautionary instruction.

15. CRIMINAL LAW ⟸721(5)—ARGUMENT OF COUNSEL—DEFENSE—FAILURE TO TESTIFY.

Arguments by the prosecuting attorney in a rape case that the testimony of prosecutrix was not contradicted by a single witness did not violate Pen. Code, § 1323, as to comments on the failure of the defendant to testify.

16. CRIMINAL LAW ⟸925½(1)—NEW TRIAL—MISCONDUCT OF JUROR.

In a prosecution for rape, it was not necessary to grant a new trial because a woman juror had incidentally seen the child of prosecutrix during a recess, thereby receiving evidence out of court; it appearing that the baby's eyes were closed and its hair covered and that she looked at it only casually.

17. CRIMINAL LAW ⟸1144(17) — APPEAL — PRESUMPTIONS.

In the absence of any showing to the contrary, other than the mere silence of the minutes, it must be presumed that the judgment speaks the truth as to whether defendant was informed of the nature of the charge against him before sentence was pronounced.

18. Criminal Law ⊂⊃1208(9) — Indeterminate Sentence Law.

In passing sentence on defendant in a prosecution for rape, it is error to impose a sentence of imprisonment from 1 to 50 years, there being under the Indeterminate Sentence Law no minimum punishment for rape.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Fred Wademan was convicted of rape. From the judgment and denial of a new trial, he appeals. Modified and affirmed.

Theodore A. Bell, of San Francisco, and Charles W. Thomas and R. B. McMillan, both of Sacramento, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was informed against by the district attorney of Yolo county for the crime of rape. He was found guilty and thereupon moved for a new trial, which was denied, and the court sentenced him to imprisonment in the state prison at San Quentin. The appeal is from the judgment and the order denying the motion for a new trial.

1. When the information was filed, it charged that the crime was committed within one year prior thereto, upon one Augusta Schwall, a female child of the age of 14 years. Upon demurrer to the information the court permitted the district attorney to amend the information by alleging that the crime was committed "on or about the 20th day of May, 1917," and striking out the words "within one year prior thereto." In his opening statement the district attorney mentioned two different days on which the criminal act was done, the second being a few days after the first. Defendant's attorney thereupon demanded that the district attorney designate the day of the month and hour of the day specifically upon which he relied. The district attorney replied:

"The burden is upon us to elect one particular act of sexual intercourse here, so we elect the first act, the act which I have stated occurred the day that Wademan was there assisting her brother Joe haul hay, while Augusta Schwall's father was over at Wademan's house pumping water and while the brother Joe Schwall went over there to hitch up Wademan's horse and feed the hogs. * * * The Court: Of course, if they can state the date it should be stated, but in the absence or inability to state the date then it could only be stated by circumstances, as I understand it. Mr. McMillan (defendant's attorney): Do we understand that he can state that he relies upon a circumstance occurring in the month of May—as broad as that? Mr. McDonald (district attorney): I have confined it to the noon hour upon the day that they were hauling hay and described that so the defendant could not be prosecuted and convicted of the same crime. I can't state the precise day. Mr. McMillan: It is alleged in the information that this act was committed on or about the 20th day of May. Mr. McDonald: It was some time in that neighborhood, but I could not say that was the day. Mr. McMillan: How close? Mr. McDonald: I don't know."

Defendant's attorney suggested that he might be desirous of proving an alibi in the case. "Such a situation confronting us, we would be entitled to have before us the exact day, the exact hour of this circumstance that the prosecution relies upon." The district attorney stated that at the preliminary hearing the prosecuting witness connected the act in point of time with reference to a picnic which was shown to have been held at Nicholas on May 27th, and that her recollection was that the second act was about three days before that, and the first act about three days before the second. "She could not swear to the precise day at the preliminary, and she has never been able to state it since, and I have described the act as near as I could, so he knows the occasion and I don't see what more could be asked. * * * The Court: Of course, with what there is before the court, the court can do nothing but deny the motion. It might be that the court could cure the situation subsequently if evidence would show to the court that this matter could be more clearly defined, and if it can be I will again insist upon the district attorney more clearly defining it. As the matter stands now, I have nothing before me upon which I could act." Defendant renewed the motion at the close of the testimony in chief of the prosecuting witness. "Mr. McDonald: I think the testimony shows conclusively that I cannot name the date. I have described the date to the best of my ability. The Court: Yes, I think the evidence has not revealed to the court any more than the court had at the outset as to the date, and the statement made by the counsel is that it is as near as he can tie to the date. The motion is denied."

[1] The evidence established with certainty the date of the picnic referred to as May 27th. The prosecuting witness fixed the date as the 24th or 25th of April when she was last "unwell" prior to her alleged sexual intercourse with defendant; the particular circumstances and events immediately surrounding the act, the hour, defendant's presence at the Schwall home on the occasion, were described; defendant's admission that he was there at the particular time when the act was alleged to have been committed under the circumstances as described by the district attorney; all this appeared, and that on no other occasion did the same or similar conditions surround the parties. It might seem strange that neither her father nor her brother could remember or fix the date of these happenings more definitely than they did—that is, prior to the picnic a few days and while defendant was working for them in haying time—but they testified that they could not designate the exact day of the month. Their pay roll, if they had one, would show that defendant worked for them certain days; but would not necessarily

make note of any fact connecting the particular circumstances testified to with any particular date. That the prosecutrix failed to remember the date is not surprising. The evidence showed that she offered no resistance and yielded without reluctance; that she did not mention the affair until her pregnancy made concealment of her condition impossible. Considering all the circumstances, and that defendant admitted being alone with her in the house, under the circumstances described, which at no other time is it pretended again occurred, we find ourselves compelled to hold that the time and place were fixed with sufficient certainty, or to hold that this particular character of crime cannot be made out unless the day and hour are selected and definitely shown by direct evidence. We cannot subject the trial courts to so rigid and inflexible a rule as is contended for by defendant. Furthermore, inasmuch as he admitted being present on the only occasion when all these circumstances concurred, an alibi, obviously, could not avail him. His situation would have been no more favorable to him and no different had the day been fixed and he had admitted being there on that day. We must hold that the motion was properly denied.

2. And this brings us to the only ground for reversal open to him, aside from certain further alleged errors of law later to be noticed, namely: That the evidence was insufficient to justify the verdict. This contention is based upon the alleged inherent improbability of the testimony of the prosecuting witness. Her testimony was: That she was at the time doing the housework of her home. Her mother was dead, and her sister, a year younger than herself, was away. Her father was at defendant's place, about half a mile distant. Her brother Joe was working in the hayfield with defendant helping him. One of the young children was at school, and the other was with its father. At noon her brother, Joe, and defendant came to the house. Joe had occasion to go back to the field, which he did on his bicycle. That the witness was on the back porch near an opening to the cellar, and defendant attempted to have sexual intercourse with her there, but for reasons he explained and because Joe was liable to return any moment, which in fact he did in a few minutes, defendant desisted. That while at dinner defendant complained of having a headache and spoke of some chores to be done at his home and that he had promised to go over and hitch his horse to a buggy for his wife. That Joe told him to lie down on the couch and he would take his wheel and run over and do his chores and hitch up the horses. That defendant lay down on the couch, and Joe went to defendant's house, and witness took a story book, went into the room where defendant was lying, and commenced reading. She testified that defendant said:

" 'Is there a bed in the next room?' and I said, 'No,' and he looked and there was, and he said, 'Won't you go in and lie down on the bed?' and I said, 'No, I have to finish reading this book.' He says, 'You have got time to finish that some other time.' So we lied down on the bed, and he opened his trousers and lifted up my dress, and he asked me if I liked to do this, and I says I didn't know, and he says: 'Well, you ought to know; you might as well say yes.' "

The witness then stated that defendant had sexual intercourse with her. She testified to acts of improper familiarity with her before this time and afterwards, and that two or three days later he had sexual intercourse with her again on the sleeping porch of the house under circumstances described by her and while her little brother aged eight and little sister aged four were playing in the dooryard. She testified that on this occasion defendant came to the house unexpectedly and found her alone; that he accomplished his object and "tiptoed across the porch" and quietly slipped away without the children seeing him.

As to the circumstances surrounding the first act there was corroboration, but as to defendant's connection with the act itself there was no corroboration. The witness was delivered of a child on January 27, 1918, which established the fact that some person had sexual intercourse with the prosecutrix, but did not tend to prove that defendant was the father of the child. It is now urged that the story told by the prosecuting witness is inherently improbable; that she first explained her condition by stating that two hunters came along and one of them forced her to submit to his embraces, but it appeared that at the time she made this statement she finally under some pressure said that defendant was the cause of her situation; and, particularly, it is urged that the child appeared to be a full nine months' child as testified by Dr. Fairchild, the physician who officiated at the accouchment, and hence defendant could not be the father, since the testimony did not fix the first act at an earlier date than about May 20th, or 252 days before the birth of the child, whereas the birth of a normal child usually occurs after from 270 to 280 days from the date of conception, and that the evidence was that this child was normal in all respects. The defendant did not testify in his own behalf.

[2] It is well settled by the decisions of the Supreme and appellate courts of this state that a conviction may be had upon the uncorroborated testimony of the prosecuting witness, although she may have made contradictory statements as to the person who had committed the criminal act and had otherwise made contradictory statements. Where there are no corroborating circumstances, in cases of this kind, the reviewing court should scrutinize with discriminating care the testimony given by the prosecuting witness. The defendant may be so placed as to be at the mercy of the prosecutrix and

may have no means of disproving her testimony except by convincing the jury that she has committed downright perjury—a last resort not easy of accomplishment. Our Supreme Court, in some of the earlier cases, cited by appellant, has ordered reversals on the ground that the testimony of the prosecuting witness on its face convinced the court that the jury in believing it must have been governed by passion and prejudice. We are unable to discover in the testimony given in the present case by this young girl improbabilities inherent or otherwise. Viewing carefully all the facts and circumstances as narrated by her, as we have done, we can find no motive for falsely accusing defendant; the two families were close neighbors and frequently interchanged visits and were on the most friendly terms; this girl was not shown to have had intimate or dubious relations with any young men. So far as appears, she was a simple, unsophisticated girl of 14 years (the court spoke of her as "of tender years and not overly bright") who apparently did not comprehend the consequences or full meaning of the act to which she seems willingly to have consented. The friendly relations existing between these families should have restrained defendant from bringing this shame and disgrace upon this young girl. So far from the story related by Augusta Schwall being inherently false, it presents to our minds an instance, quite too common, of the power by which some men's sexual passions obtain complete mastery of their conscience and in seeking their gratification no heed is given to the consequences accruing to their victims.

[3] The expert testimony as to the normal period of gestation was not such as conclusively showed that the birth date of the prosecutrix's child was wholly inconsistent with the fact that conception may have taken place at the time fixed by the child's mother as the time when she had sexual intercourse with defendant. The testimony was sufficient to leave with the jury the determination of the fact involved in the point made by defendant. We think the verdict had sufficient support.

[4] 3. Error is claimed in permitting evidence to be introduced of familiarity "not actually amounting to acts of sexual intercourse," defendant contending that any acts short of this are inadmissible. Defendant relies upon People v. Castro, 133 Cal. 12, 65 Pac. 13, citing People v. Soto, 11 Cal. App. 431, 105 Pac. 420, to the effect that no case has extended the rule in the Castro Case. The district attorney cited People v. Koller, 142 Cal. 623, 76 Pac. 500. The view of the question taken by the learned trial judge was that, it being conceded that prior and subsequent acts of sexual intercourse were admissible as showing an adulterous disposition, any lascivious or other acts of familiarity tending to awaken or promote sexual desires were alike admissible. Logically, this seems to be sound reasoning.

[5, 6] 4. It is claimed that the court erred in making statements as to the age of the prosecutrix and in declaring that it would make no difference if half a dozen men had had illicit intercourse with her. During the course of a colloquy in which the court, the district attorney, and defendant's attorney took part, the court incidentally referred to the prosecutrix as of tender years; and in connection with the evidence relating to fixing the date of the act of sexual intercourse the court remarked that "the witness is not overly bright." The undisputed fact was that the prosecutrix was 14 years of age. That the court referred to her as of "tender years" could not have prejudiced defendant's case. The remark that "the witness is not overly bright" was made in connection with a ruling as to relaxing the rule somewhat which forbids leading questions. In the connection used, we do not think the remark was prejudicial. Furthermore, the court immediately directed the jury to pay no attention to the remarks and, in its charge, instructed the jury that they were "not to consider in any manner any remark made by either counsel or by the court, concerning the admissibility of testimony or the striking out of testimony improperly admitted."

[7] The objection made by the defendant to the questions put to the prosecutrix, "Did you ever have an act of sexual intercourse with any one else than Fred Wademan?" and, "Who is the father of that child?" was sustained by the court. Defendant seems to assume that this ruling precluded him from making proof that some other person was the father. He made no such offer during the trial. The ruling was not so intended and had no such effect. The court held that it was not a part of plaintiff's case and was not at that point admissible. Whether right or wrong in the ruling, defendant was not prejudiced by it.

[8] 5. A reversal is demanded because of error in giving people's instruction No. 8, as follows:

"You are instructed that while the crime is alleged, in the information, to have occurred on or about the 20th day of May, 1917, it is not necessary that the prosecution prove that the crime was actually committed by the defendant precisely on the 20th day of May, 1917. It is sufficient to sustain the charge if you be convinced beyond a reasonable doubt, from the evidence in the case, that the crime alleged was committed at any time within three years immediately preceding the filing of the information, which filing was had and done on the 27th day of December, 1917."

It is contended that in every substantial part of this instruction it is similar to the one considered as error in People v. Elgar, 171 Pac. 697, and which was held not to be cured by a subsequent instruction. In the Elgar Case there were two acts of rape committed, one about May 6, and the other about May 14, 1917. The district attorney selected

the first act as the one relied on for a conviction. After giving the instruction substantially as in the present case, that it is sufficient to show that the crime was committed at any time within three years immediately preceding the filing of the information, the court gave an instruction to the jury that—

"If you believe * * * that the said Jim Elgar, on or about the 6th day of May, 1917, * * * did willfully * * * have and accomplish an act of sexual intercourse with and upon the person of one Clementina Elgar, you should find him guilty as charged in the information."

The court held on appeal that this latter instruction did not obviate the injury done by the other instruction.

It is very plain that, if the rule requiring the people to select the day has any virtue or force, this instruction No. 8, standing alone, would seem to be in conflict with and is in violation of this rule.

[9] The Attorney General does not defend the instruction. His claim is that instruction No. 9 must be read with No. 8, and when so read "it is apparent that the instruction No. 8 is not improper in the case, but only has the effect of showing that the offense of rape stands alive and subject to prosecution for a period of three years after the date of the alleged act."

Instruction No. 9 is as follows:

"You are instructed that in the charge of rape, other acts of sexual intercourse between the accused and the female whom he is accused of having raped occurring both before and after the principal act charged may be introduced in evidence as tending to sustain the act of sexual intercourse charged; that is, the particular act upon which the defendant is being tried. In other words, acts of sexual intercourse between the parties may be shown by the prosecution to prove that the parties are lewdly inclined and that the barriers of modesty have been broken down with reference to each other but not primarily to prove habitual or continuous criminality or other offenses.

"But where several acts of sexual intercourse are claimed, by the prosecution, to have occurred between the defendant and a particular girl under the age of consent, the prosecution is required, at the commencement of the trial, to select some one particular act of sexual intercourse upon which it relies to make good the allegation of the information.

"In the case before us the prosecution has selected one particular act of sexual intercourse which it claims occurred between the defendant and Augusta Schwall. This one particular act is designated and described by the prosecution to be the first act of sexual intercourse which it is alleged was actually accomplished by the defendant with Augusta Schwall. It is further described by the prosecution to be the act which it is alleged was committed during the noon hour at the home of Augusta Schwall, at the time her father was alleged to have been at the home of the defendant for the purpose of pumping water with a gasoline engine and while her brother Joe Schwall went to the home of the defendant during said noon hour for the purpose of hitching up the defendant's horse and attending to his hogs.

"Such being the case, before you can find the defendant guilty you must find that he accomplished an act of sexual intercourse with Augusta Schwall on the particular occasion which the prosecution has selected. If you find that other acts of sexual intercourse or other lewd acts were committed by the defendant with Augusta Schwall, you may consider them for the purpose of determining whether or not he committed the particular act of sexual intercourse with Augusta Schwall which the prosecution has selected. But you can consider such acts for no other purpose."

The Attorney General says:

"A consideration of the last 20 lines of said instruction No. 9 will show that a verdict of guilty could only be had by the jury by reference to the offense charged (made specific by election stated) 'on the particular occasion which the prosecution has selected.'"

There was no evidence of sexual intercourse except upon the two occasions in May, the acts being within five days of each other. The jury were very clearly told that the act relied on must be and was selected by the prosecution, and that the act thus selected must be established to their satisfaction beyond a reasonable doubt or they must acquit the defendant, and that evidence of other acts was admissible only for the specific purpose explained by the court. When considered together, as they should be and doubtless were by the jury, no person of ordinary intelligence could fail to understand that conviction must rest entirely, if at all, upon evidence directed to the particular act selected by the prosecution. We cannot doubt that the jury so understood the instructions.

6. Error of the court is assigned for refusing to give an instruction to the jury not to be influenced by the presence of the child, citing People v. Stanley, 33 Cal. App. 624, 629, 166 Pac. 596; and in declining to instruct the jury to disregard the question asked of the prosecutrix by the district attorney, "Who is the father of that child?" citing People v. Soto, 11 Cal. App. 436, 105 Pac. 420.

[10] It appeared that while the prosecutrix was on the witness stand her baby was brought into court from an adjoining room. She testified that it was her child and was born on January 27, 1918. In the course of the examination the district attorney put to her the question, "Who is that father of that child?" Defendant objected to the question and also asked the court to instruct the jury to disregard the question as misconduct of the district attorney in asking it. The court seems to have regarded the matter as rebuttal and not open to the prosecution, unless evidence was introduced tending to show that some man or men other than defendant had had sexual relations with the prosecutrix; that, should the evidence make it admissible for the prosecution to put the question, it would be allowed. The request made by defendant for an instruction to the jury at that time included a request that the jury be instructed "not to be influenced or their sympathies captivated" by the presence of the child; that the child could be exhibited for the sole purpose of proving the corpus delicti, and not to prove that the defendant was its father. The court refused the request, stating that some of the matters he was willing to instruct upon as requested, but that others

of them would be error. There was no circumstance connected with the presence of the child having any tendency to show that defendant was its father and that the child was there for any purpose other than to show that it was the child of the prosecutrix. There was no evidence in the case offered by defendant that had any tendency to show that some person other than defendant might have been or was the child's father. We do not think its presence in court alone made it necessary for the court to instruct the jury as to the limit to which inferences might be indulged from such presence.

[11] 7. Error is assigned in giving for the plaintiff instruction No. 11 reading as follows:

"You are instructed that if you find from the evidence in this case beyond a reasonable doubt that the defendant, Fred Wademan, committed the act of sexual intercourse with the said Augusta Schwall, on the occasion selected by the prosecution at the beginning of the trial, and you further find that said act of sexual intercourse was committed within three years prior to the filing of the information, and that the said Augusta Schwall was a female person under the age of 18 years at the time the act was committed, and you further find that the said Augusta Schwall was not the wife of the said Fred Wademan at the time the act was committed, then you must find the defendant guilty of the crime of rape as charged in the information."

The first error pointed out is that the instruction omits a definite statement of the venue of the crime, and that when the court undertakes to recite the facts contained in the information it must include every element necessary to sustain a conviction. The uncontroverted testimony was that the act was committed in Yolo county, and, while it may be true that the jury were at liberty to find this testimony to be untrue, we think the instruction by its reference to the act as selected by the prosecution sufficiently pointed to the place where the offense was committed.

[12] The point most seriously urged is that the court instructed the jury in effect "that, if they should find that the girl was under the age of 18 years, they must find that she was of the age stated in the information, to wit, 14 years," whereas, under section 261 of the Penal Code, as amended in 1913, "juries are now required not only to find whether or not the prosecutrix was under the age of 18 years, but necessarily they must find whether or not 'the female is over the age of 16 years'"; that, whenever the offense is charged under subdivision 1 of section 261 of the Penal Code, there must be a finding, which the jury alone can make, as to whether or not "the female is over the age of 16 years, and under the age of 18 years."

The Legislature by the amendment of section 264, lodged a discretion with the jury to determine whether the defendant is guilty of a felony or a misdemeanor where, in case of rape, the female is over the age of 16 years and under the age of 18 years. Such, however, being the case, "to take the question of age away from the jury," continues the brief, "certainly works a very substantial injury to a defendant, for it deprives him of an independent finding of the jury which might subject him only to a misdemeanor punishment."

The uncontradicted testimony of John Schwall, father of the prosecutrix, Augusta, and her testimony also, was that she was born March 27, 1903, and her age therefore was 14 years and 2 months at the time the offense was committed. The verdict of the jury was:

"We, the jury impaneled to try the above-entitled cause, find the defendant guilty of rape as charged in the information."

If the information had charged that the rape was committed upon a female under the age of 18, not giving her age, or if it had charged that she was over the age of 16 years and under the age of 18 years, it might be said that the information was laid under this section and that it was thus made applicable. But where the information distinctly charges that the female was under the age of 16 and the uncontroverted evidence so established the fact to be and the jury by their verdict found the defendant guilty as charged in the information, the amended section 264 has no application. If in such a case the question of age was controverted and the evidence conflicting, there would seem to be some force in the contention that the defendant would be entitled to a finding by the jury as to the fact in order that he might enjoy the right to have the jury determine whether he must suffer as being guilty of a misdemeanor or the greater penalty attached to a felony. As we understand section 264, it is only where "the female is over the age of 16 years and under the age of 18 years" that the jury is called upon to "determine by their verdict whether the punishment shall be imprisonment in the county jail or in the state prison." We think the verdict was sufficient without being supported by a separate or other finding as to the age of the prosecutrix.

[13] 8. Error is claimed in refusing defendant's instructions Nos. 21, 28, 29, 32, and 33. These instructions are not set out in appellant's brief and the only comment made upon them respectively is: No. 21 "should have been given," citing a case; "No. 28 should have been given under the rule laid down in" a case cited; "No. 29 was a proper instruction to be given as laid down in" a case cited; "No. 32 should have been given," citing cases; "No. 33 was directly within the rule laid down in" case cited. We do not think we are called upon to test the sufficiency of appellant's assignments of error thus made. We are entitled to know why he believes a particular instruction is violative of some rule or principle of law found in a decided case. Assuming, as we may in the absence of comment by appellant, that the purport of these instructions is correctly

stated by the Attorney General, there would appear to be no error in refusing to give them.

[14] 9. Misconduct of the district attorney in his closing argument to the jury is assigned as error. One of the instances relied on is the reference made by the district attorney to the generally well-known Slaughter Case. Stating who Slaughter was and that he was found guilty of rape, the district attorney said: "Is there any reason to believe this man is a better man than the Rev. Madison Slaughter?" The record shows the objection, but appellant made no motion to strike out or request that the remarks be disregarded.

[15] The only other alleged error under this head called to our attention is contained in the following remarks of the district attorney:

"Now, gentlemen of the jury, I had faith when I took you on the jury, I still have faith in you, and I think there is only one thing you can do to do justice in this case, and that is to render a verdict of guilty. Gentlemen of the jury, I believe I am conscientious in saying it. I am not saying it because I want to win this case, because I would not be guilty of sending an innocent man to prison, but as sure as there is a God in heaven, that man is guilty. The officers in this case have done all we can do. The rest remains with you. If you want to do justice in the case, do justice by that girl, do justice by that child that is brought into the world by the defendant, do justice by that girl's family, and do justice to society in general, there is only one thing for you to do, and that is to render a verdict of guilty in this case, notwithstanding that man's position in the community. I would not ask you to do something I would not do myself; but, after I have heard the evidence in the case, there is only one conclusion I have arrived at. If you won't find this man guilty, don't ever sit in a rape case, because that is all the testimony you may get in a case of this kind. You will never find the crime committed with people standing about. You have got to believe the story of the girl in a rape case or you will never render a conviction. The girl's testimony is undisputed. If her story was contradicted, you might be in doubt; but the defense has left the story stand where it is unimpeached and undisputed, and, when you go into the jury room to consider whether the girl was telling the truth, ask yourself this question, 'Is her testimony contradicted by a single witness in this case?' and I say no. Under those circumstances, gentlemen of the jury, you have got to believe that girl; you cannot do anything else. Her story is true, it rings true, and she is telling the truth. I am not going to argue the case further. I am going to submit it to you for your judgment. Gentlemen of the jury, I have all confidence in you that you will do justice in this case and render a verdict of guilty."

The point emphasized is that the district attorney violated the provisions of section 1323 of the Penal Code "by indirection," citing People v. Morris, 3 Cal. App. 1, 84 Pac. 463; People v. Tyler, 36 Cal. 522; People v. McGungill, 41 Cal. 429; People v. Sanders, 114 Cal. 216, 46 Pac. 153. Referring to the district attorney's remarks, appellant says:

"The fact that he cunningly conveyed this thought to the jury, without making a direct reference to the defendant's omission to testify, should not shield him from the rule that has been so frequently laid down."

We do not think appellant's attorney quite justified in referring to the district attorney's remarks as cunningly intended to remind the jury that the defendant had not testified. But it is with the probable effect on the jury the reference to the matter was likely to have which we are to consider. The defendant is not required to testify in a criminal case, and the statute is intended to prevent the prosecuting officer from taking advantage of the defendant by reason of his failure or refusal to testify. The reviewing courts have very properly held it to be prejudicial error for the district attorney to call the attention of the jury to the fact that the defendant has not testified in his own behalf and to comment on the fact as warranting the inference that his silence is evidence of guilt. The district attorney should not be permitted by indirection to accomplish what the law frowns upon when done directly. And where his address to the jury shows on its face that the district attorney intended to invite attention to the failure of the defendant to take the witness stand and deny the charge and had the apparent effect to emphasize such fact and suggest an inference of guilt, such conduct should receive quick condemnation. We do not think, however, it can fairly be claimed that the district attorney intended to invite attention to the fact of defendant's not having testified or to suggest any inference deducible from the fact. In speaking of the testimony of the prosecutrix in the way he did, he had a right to claim that it was uncontradicted and that no witness had been called to impeach her testimony. The only reference to the matter came from the following instruction given at defendant's request:

"The court instructs the jury that, while the statute of this state provides that a person charged with crime may testify in his own behalf, he is under no obligation to do so, and the statute expressly declares that his neglect to testify shall not create any presumption against him. The jury should decide the case with reference alone to testimony actually introduced before them, and without reference to what might, or might not, have been proved, if other persons had testified."

It is impossible to withhold from the jury the fact itself. The most that can be done for the defendant's protection is to instruct the jury as was done and to restrain the district attorney from using the fact to defendant's prejudice. We cannot say that the remarks of the district attorney were so far prejudicial as to justify a reversal.

[16] 10. Appellant urges that the court committed error in denying the motion for new trial, it appearing at the hearing of the motion that one of the jurors, a woman, "examined the prosecutrix's child during a recess of the court," thereby receiving evidence out of court. It appeared from affidavits in support of the motion that a member of the

jury, Albertina Graves, entered the witness room during the trial and while the court was at recess, where affiant and other witnesses were congregated; that in the room was Mrs. Metzger, who at the time was holding the prosecutrix's baby; that the juror stopped near Mrs. Metzger and looked at the baby's face for a short time and passed on to make an unimportant inquiry from another person in the room and then left the room. Albertina Graves made affidavit that she went to this room to make inquiry from a Miss Ogden, a waiting witness, as to the address of a person she wanted to see; that she knew Mrs. Metzger, but did not know Miss Ogden, and she asked Mrs. Metzger to point out Miss Ogden; "that at that time the said Mrs. Metzger had the baby referred to in the aforesaid affidavits in her lap; that affiant is informed and believes that said baby was the baby of Augusta Schwall; that said baby was wrapped up in a blanket; that the face of said baby was exposed; that affiant did not throw back the blanket covering the said baby's face; that affiant did not examine the face of said baby, but only looked at it casually, remarking to the said Mrs. Metzger at the time, 'What a nice big baby!' or words to that effect; that to the best of affiant's memory the eyes of said baby were closed; that the hair of said baby and the top of its head were covered; that affiant did not look at said baby for a few minutes, but only looked at it casually for about a half a minute; that in looking at said baby affiant did not do so with any purpose of ascertaining or endeavoring to see whether said baby resembled the defendant in the above-entitled action or for any other purpose concerned in said action; * * * that affiant made no remark of any kind to the said Mrs. Metzger or to the said Miss Hazel Ogden about the features or appearance of said baby, nor to any of the jurors in the case, nor did affiant make any remark to any of the jurors in said case about said baby prior to the verdict; the affiant only looked at said baby casually and not with the purpose of using it as evidence; that affiant rendered her verdict in said case purely and simply upon the evidence introduced into court and before the aforesaid court and jury in said action."

Several jurymen deposed that no mention of having seen the baby was made by the jurywoman Graves in the jury room. We do not think it can be said that she "received evidence out of court" in the sense which the law deems such conduct prejudicial.

[17] 11. When the hour for sentencing the defendant arrived, the court inquired whether he had anything to say why sentence should not be passed. His attorney stated that he desired to move for a new trial and thereupon served and filed his motion stating the grounds. The minutes show that the proceedings thenceforward consisted of argument as to the time when the motion would be heard and other matters pertaining to the motion. Subsequently, on March 6, 1918, the motion came up and was denied. "The Court: There is nothing further to do but to pronounce the ordinary sentence. You may stand up, please, Mr. Wademan. It is the judgment of the court and the sentence of the law that you be taken to state's prison at San Quentin, there to be confined, or to be confined in such prison as the prison directors shall decide, and that you shall there remain for not less than 1 nor more than 50 years, which time is to be fixed by the prison board according to law." On the same day the judgment was entered and read as follows:

"The district attorney, with the defendant and his counsel, Theodore A. Bell, Charles W. Thomas, and R. B. McMillan, came into court. The defendant was duly informed by the court of the information filed against him for the crime of rape on the 27th day of December, 1917, of his arraignment and plea of not guilty to the charge in the information, of his trial by a jury and the verdict of the jury of guilty as charged in the information, of his motion for new trial and the order denying said motion.

"The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him. To which he replied that he had none. And no sufficient cause being shown or appearing to the court thereupon, the court renders its judgment: That whereas the said Fred Wademan has been duly convicted in this court of the crime of rape, it is therefore ordered, adjudged, and decreed, that the said Fred Wademan be punished by confinement in the state prison of the state of California, and that the said Fred Wademan be taken to the warden of the state prison at San Quentin. The defendant was then remanded to the custody of the sheriff of the county of Yolo, to be by him delivered into the custody of the warden of said state prison at San Quentin, state of California, to be confined for a period of from one (1) to fifty (50) years."

For the first time in the proceedings the point is made in defendant's brief on appeal that before sentence was pronounced he was not informed of the nature of the charge against him, etc., as required by section 1200 of the Penal Code. In People v. Walker, 132 Cal. 137, 64 Pac. 133, it was held that the provisions of this section are mandatory. In that case the defendant made a motion after judgment that the minutes be corrected and the judgment vacated. The bill of exceptions which the lower court certified to be correct showed that the requirements of this section were not complied with. The motion was denied, and on appeal the Supreme Court reversed the order and directed that the cause be remanded "with directions to the superior court to arraign the defendant for judgment and to proceed thereupon as it may be advised." In the present case no such motion was made; the recitals in the judgment show that the requirements of the section were complied with. In the absence of any showing to the contrary, other than the mere silence of the minutes, we must presume that the judgment speaks the

truth. People v. Perez, 87 Cal. 122, 25 Pac. 262; People v. Johnson, 88 Cal. 171, 25 Pac. 1116. Furthermore, every fact mentioned in the section was known to the defendant. He was personally present when sentence was pronounced and made no objection when called upon except to move for a new trial. We think section 4½ of article 6 of the Constitution covers the case. If the cause were remanded, there is but one sentence under the indeterminate sentence statute which the court could enter. Upon the record we cannot say there has been a miscarriage of justice. When the Walker Case was decided, section 4½ of article 6 was not in existence. See People v. Tomsky, 20 Cal. App. 672, 130 Pac. 184.

[18] It is finally contended that the sentence is void, under the Indeterminate Sentence Law (St. 1917, p. 665), "as there is no minimum punishment fixed or prescribed for rape." We had this question before us in the case of People v. Rossi, 174 Pac. 916, and, upon the authority of that case, the portion of the judgment in this case which directs that the defendant be imprisoned for a period of from 1 to 50 years is stricken from said judgment, and, as so modified, the judgment and order appealed from are affirmed.

We concur: BURNETT, J.; HART, J.

38 Cal. App. 203

## COWAN v. UNION TRUST CO. OF SAN FRANCISCO et al. (Civ. 2444.)

(District Court of Appeal, First District, California. Sept. 14, 1918.)

1. TRUSTS ⊂⊃365(4)—SUIT TO ESTABLISH — LACHES—WHAT CONSTITUTES.
Where plaintiff, after having, with full knowledge of all facts, disclaimed any intention of asserting title to a fund, did not attempt to assert any title for over three years, his right to maintain an action to charge defendants as trustees, under Civ. Code, § 2224, as to involuntary trust resulting from gaining a thing by accident, mistake, etc., is barred by laches; there being no excuse for delay.

2. EQUITY ⊂⊃71(2)—LACHES—LAPSE OF TIME.
What length of time will constitute a defense on the ground of laches must be determined by the circumstances of each case, and is addressed to the sound discretion of the chancellor.

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

Action by W. F. Cowan, as trustee of the estate of Jean Pyatt, bankrupt, against the Union Trust Company of San Francisco and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Fred S. Howell, of Petaluma, for appellant. A. H. Crook, H. F. Peart, and Byrne & Lamson, all of San Francisco, for respondents.

STURTEVANT, Judge pro tem. The plaintiff claims this action to be one brought to charge the defendants, as trustees, as provided in section 2224 of the Civil Code, and in this behalf he seeks to recover a money judgment for $2,674. The defendants appeared and answered and a trial was had on the facts. Judgment was ordered for the defendants. The appeal is from the judgment, and is supported by a bill of exceptions.

[1, 2] The answers alleged, and the trial court found, that the plaintiff's claim was barred by the plaintiff's laches. In support of the defense of laches much evidence was introduced. It is not conflicting. It shows that an ever decreasing fund existed from 1896 down to the date of trial; that each defendant, at one time or another, had the handling of some of the moneys; that no defendant profited any sum whatever out of it; that every cent was paid over to Jean Pyatt, the beneficiary; that as early as May 2, 1911, the plaintiff could have legally asserted a claim to the residue; that, with full knowledge of all of the facts, the plaintiff at first disclaimed any intention of asserting title, and did not, till 3 years 4 months and 19 days thereafter, attempt to assert any title. The record does not contain any excuse for this great delay. We think the facts found by the trial court constitute a complete defense. Cahill v. Court, 145 Cal. 42, 44, 78 Pac. 467; Marsh v. Lott, 156 Cal. 643, 105 Pac. 968. The question as to what length of time will constitute a defense on the ground of laches must necessarily be determined by the circumstances of each case, and is addressed to the sound discretion of the chancellor. In the light of the above-mentioned facts, the discretion of the chancellor certainly was not abused.

The judgment is affirmed.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

38 Cal. App. 212

## OREE et al. v. GAGE et al. (Civ. 2445.)

(District Court of Appeal, First District, California. Sept. 17, 1918.)

1. TRUSTS ⊂⊃81(4)—RESULTING TRUST—PAYMENT BY CHILDREN FOR CONVEYANCE TO PARENT.
Mother, who took deed to property, the entire purchase price of which was paid out of the earnings of her daughters, held the property in trust for the daughters.

2. HOMESTEAD ⊂⊃81 — PROPERTY HELD IN TRUST.
Mother could not legally declare property held by her in trust for her daughters a homestead.

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by Mary L. Oree and others against Vincent Gage and others. Judgment for plaintiffs, and defendant named appeals. Affirmed.

John C. Fleming, of Fresno, Paul Nourse, of Los Angeles, and B. W. Gearhart, of Fresno, for appellant. W. D. Crichton and C. K. Bonestell, both of Fresno, for respondents.

STURTEVANT, Judge pro tem. This is an action to quiet title. The plaintiff had judgment in the trial court, and the defendant Gage has appealed, under section 953a of the Code of Civil Procedure.

On June 14, 1895, J. Downing deeded to Clara Gage. On December 21, 1895, Clara Gage deeded to these plaintiffs. The judgment of the trial court was correct, if the property was not community property, and was not affected by a purported declaration of homestead.

[1, 2] The plaintiffs introduced evidence that they were the daughters of Clara Gage by a former marriage; that their mother took and held the property in trust for them; that the purchase price was paid out of the earnings of the daughters; and that the defendant stepfather did not contribute anything to the payments, but during the major portion of the period during which the purchase price was being paid he was living separate and apart from the mother. The trial court evidently believed this testimony, and properly held that Clara Gage merely held the property in trust for her daughters. On trust property she could not legally declare a homestead. Osborne v. Strachan, 32 Kan. 52, 3 Pac. 767; Rice v. Rice, 108 Ill. 199; Gordon v. English, 3 Lea (Tenn.) 640; Shepherd v. White, 11 Tex. 346; Bier v. Leisle, 172 Cal. 432, 435, 156 Pac. 870.

It follows that the judgment should be affirmed; and it is so ordered.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

---

38 Cal. App. 199

## ROBERT v. SUPERIOR COURT OF LOS ANGELES COUNTY et al. (Civ. 2749.)

(District Court of Appeal, Second District, California. Sept. 13, 1918.)

1. JUSTICES OF THE PEACE ⊂=159(13)—APPEAL—UNDERTAKING—WAIVER.

The giving of an undertaking on appeal from justice court to superior court, as required by Code Civ. Proc. § 978, may be waived by respondent, in view of Civ. Code, § 3513, providing that any one may waive the advantage of a law intended solely for his benefit.

2. APPEAL AND ERROR ⊂=228—REVIEW — WAIVER.

Where respondent, on appeal from justice court to superior court, waived the giving of the undertaking required by Code Civ. Proc. § 978, and interposed no objection to trial without such undertaking, he could not, on appeal to the District Court of Appeal, in view of Civ. Code, § 3517, question superior court's jurisdiction on ground that undertaking was not filed.

Petition for certiorari by J. H. Robert against the Superior Court of Los Angeles County and Charles Monroe, Judge thereof, to review a proceeding wherein petitioner was plaintiff and the Los Angeles Railway Company was defendant. Affirmed.

Fay R. Robertson, of Los Angeles, for petitioner. Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for respondents.

SHAW, J. Certiorari. Upon trial had in the justices' court, petitioner, as plaintiff, obtained a judgment against the Los Angeles Railway Company, from which it appealed to the superior court. Within five days after the time of serving and filing the notice of appeal, the parties filed with the justice a written document, duly signed, which, after reciting the service and filing by the Railway Company of its notice of appeal, and its desire to have the undertaking for costs and that for a stay of execution waived, stated:

"Now, therefore, it is hereby stipulated that each and both of said undertakings are hereby expressly waived. It is further stipulated that said appeal shall be deemed perfected for all purposes without the filing of said undertakings."

Thereafter, within due time, a transcript of the record was transmitted to the superior court, where, without any objection at any time interposed by the plaintiff in said action, the case was tried, as a result of which a judgment was rendered in favor of defendant. Notwithstanding the express waiver of the undertaking for costs, petitioner now asks this court, in reviewing the proceeding, to annul the judgment so entered by the superior court, the ground therefor asserted being that upon the facts shown the court had no jurisdiction of the appeal. This contention is based upon section 978, Code of Civil Procedure, which provides:

"An appeal from a justice's or police court is not effectual for any purpose, unless an undertaking be filed with two or more sureties in the sum of one hundred dollars for the payment of the costs on the appeal."

[1] In construing a similar statute the Supreme Court of South Dakota, in Brown v. Chicago, etc., Ry. Co., 10 S. D. 633, 75 N. W. 198, 66 Am. St. Rep. 730, held that an undertaking on appeal is required, not only for the benefit of the adverse party, but on grounds of public policy, and, since it constitutes one of the essential steps in perfecting an appeal, a waiver thereof was insufficient to confer jurisdiction. A like ruling was made in Santom v. Ballard, 133 Mass. 464. Petitioner, in support of this view, also cites several cases in this jurisdiction, among them Thomas v. Hawkins, 12 Cal. App. 327, 107 Pac. 578, and Stimpson v. Superior Court, 12 Cal. App. 536, 107 Pac. 1013, to the effect that the undertaking for the payment of costs on appeal is an essential and indispensable prerequisite to the conferring of jurisdiction of appeals from justices' courts. The California cases, however, do not involve the

question of a waiver, and while the South Dakota and Massachusetts cases are in point they are clearly based upon the asserted fact that the undertaking for costs is required upon grounds of public policy and for public reasons, and hence could not be waived. We do not assent to this. The bond runs to the obligee and is clearly for the benefit of the respondent in such action. We are unable to perceive any grounds of public policy upon which it could be based, and since, under the provisions of section 3513 of the Civil Code, "any one may waive the advantage of a law intended solely for his benefit," we are constrained to hold that, since the undertaking was clearly for petitioner's benefit, he, under the provision quoted, had the right to waive the giving of the same.

Moreover, the history of the legislation clearly indicates that such was the intent of the Legislature. The Practice Act of 1860 (St. 1860, p. 298) contained the identical provision here under consideration. In Blair v. Hamilton, 32 Cal. 50, the court had under consideration a case wherein the sureties upon such undertaking were excepted to and upon the hearing the justice, saying that he knew the sureties were good, refused to swear them, to which action the defendant for whom such undertaking was given assented. In the superior court it was insisted that the sureties not having justified, the situation was as though no undertaking had been filed and hence the district court was without jurisdiction. The Supreme Court, in deciding adversely to the contention, said:

"A party may waive the performance of an act intended for his benefit and security. He [petitioner] might have waived a bond altogether, an act which is frequently done, much more a justification of the sureties."

While it may be and is contended that the statement by the court as to the power of one to waive the giving of such undertaking without affecting the jurisdiction of the court was unnecessary to the decision, nevertheless it was germane to the question involved and an interpretation of the statute as it then existed. In the case of In re Li Po Tai, 108 Cal. 484, 41 Pac. 486, the court, in construing the effect of a re-enacted statute which had theretofore been interpreted, said:

The decision so construing the provision "was made many years ago, and has never been overruled or questioned. Meantime, the Legislature has revised the statute, and re-enacted this particular section in its old form, and we are bound to suppose with the intention that it should be construed now as it was construed before the revision."

To the same effect is Dalton v. Lelande, 22 Cal. App. 481, 135 Pac. 54, and State Commission in Lunacy v. Welch, 154 Cal. 775, 99 Pac. 181. So here, after what was said in Blair v. Hamilton, supra, the Legislature re-enacted the provision under consideration, and we must assume that in so doing it had in mind the construction placed upon it by the Supreme Court and as so construed, re-adopted it as a part of the law.

[2] We are further of the opinion that, as provided in section 3517, Civil Code, "no one can take advantage of his own wrong," and that petitioner having waived the undertaking and, without interposing any objection, gone into the trial and taken the chances of obtaining a judgment in his favor, his objection now made comes too late and he should not be heard to question the jurisdiction of the court. The case of Matthews v. Superior Court, 70 Cal. 527, 11 Pac. 665, was one wherein the notice of appeal was not served upon the attorney representing the plaintiff, but, through error and inadvertence, upon another attorney; notwithstanding which the proper attorney of record appeared at the trial and, without questioning the sufficiency of the service of the notice of appeal, proceeded with the trial, after which it was claimed that the court had no jurisdiction by reason of want of service of the notice. In its decision the court said:

"Such being the case, the party will not be heard to say that the court had no jurisdiction."

To the same effect are Montgomery v. Superior Court, 68 Cal. 407, 9 Pac. 720, Elder v. Crabtree, 59 Ark. 177, 26 S. W. 817, and Moyle v. Landers, 78 Cal. 99, 20 Pac. 241, 12 Am. St. Rep. 22.

The proceedings, the regularity of which is attacked for want of jurisdiction, are affirmed.

We concur: CONREY, P. J.; JAMES, J.

---

38 Cal. App. 209

PEZZONI v. PEZZONI. (Civ. 2447.)

(District Court of Appeal, First District, California. Sept. 16, 1918. Rehearing Denied by Supreme Court Nov. 14, 1918.)

HUSBAND AND WIFE ⊂⊃279(6)—SEPARATION AGREEMENTS—"DEPART"—"APPROACH."

Where a separation agreement between a husband and wife provided that the husband was "to depart from California for Switzerland" and never to "approach" the wife against her will, it was a breach for husband, after having received monthly payments stipulated, to return from Switzerland; the word "depart" meaning to go away, and having reference to permanent visits, and the word "approach" meaning to come nearer in space.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Depart.]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Victor Pezzoni against Pia Pezzoni. From a judgment in favor of plaintiff for less than amount claimed, he appeals. Affirmed.

Harry F. Sullivan, of San Francisco, for appellant. S. G. Tompkins, of San Jose, for respondent.

STURTEVANT, Judge pro tem. This is an action on a written contract for the pay-

ment of money. The plaintiff had judgment in the lower court for $475; but, contending that his recovery should have been for $625, the full amount claimed in the prayer of his complaint, he has appealed on the judgment roll.

If the defendant is right in her interpretation of the written contract, the judgment should be affirmed. The contract sued on is set forth in the findings, and is as follows:

"This stipulation, entered into by Victor Pezzoni, of Osoflaco, San Luis Obispo county, California, and Pia Pezzoni, his wife, stipulates that, inasmuch as there is an unsurmountable incompatibility of temper and character between the husband and wife, they have herein agreed to a peaceable separation on the following terms and conditions:

"First, that said Victor Pezzoni will leave his wife's abode in Osoflaco and depart for Switzerland, and at no time hereafter will ever molest her or approach her against her will, and that their daughter Ernestina is left in the sole charge and care of the mother.

"Second, that in consideration of Victor keeping to the above agreement, Mrs. Pia Pezzoni agrees to pay immediately and hereafter the following sums as hereinafter stipulated: One hundred dollars for clothing and necessaries; one hundred and seventy-five dollars for first-class passage from Guadalupe to Switzerland; seventy-five dollars for pocket money for incidentals on the trip; a draft of one hundred dollars collectible on his arrival in Switzerland; and to send him thereafter a monthly remittance of twenty-five dollars each month.

"Each of the contracting parties agrees to comply faithfully to his or her agreement in the above stipulation.

"Done in duplicate this twelfth day of January, 1911, that each party may have a copy.

"Victor Pezzoni. [Seal.]
"Pia Pezzoni. [Seal.]

"Witness: S. Campodonio.
"W. F. Lucas."

It was found by the lower court that:

"After the execution of the agreement, and pursuant thereto, and solely by reason thereof, said Victor Pezzoni left his wife's abode and departed for Switzerland. Thereafter said Victor Pezzoni returned to California, and ever since his return he has continued to reside and now resides within the state of California."

The defendant claims that the finding last quoted shows that the plaintiff has breached his contract and may not recover. We think this claim is sound. Under his contract the plaintiff was "to depart for Switzerland." The word "depart" means to go away, and is synonymous with abandon, die, and escape. Standard Dict. Such was its old legal meaning. Burrill's Law Dict. It does not imply temporary visits, but has reference to permanent visits. Blodgett v. Utley, 4 Neb. 29; Venuci v. Cademartori, 59 Mo. 352; Webster v. Bank, 2 Neb. (Unof.) 353, 96 N. W. 118, 119; Lee v. McKoy, 118 N. C. 518, 24 S. E. 210; In re Jack Sen (C. C.) 36 Fed. 441. We think this meaning of the word "depart" is reinforced by the clause that the plaintiff will never "approach her against her will." One of the ordinary meanings of the word "approach" is "to come nearer in space." Stand. Dict. Again, his departure was a sine qua non so far as payments by the defendant were concerned. The plaintiff was to be paid his expenses of going to Switzerland, not the expenses of a round trip; his monthly allowance was not to be paid until "his arrival in Switzerland"; the subsequent payments defendant was "to send him" after plaintiff reached Switzerland.

The judgment should be affirmed; and it is so ordered.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

---

38 Cal. App. 213

## PEOPLE v. WONG BOW. (Cr. 448.)

(District Court of Appeal, Third District, California. Sept. 17, 1918.)

CRIMINAL LAW ⊂⊃1130(4)—FAILURE TO FILE BRIEFS—REVIEW OF TRANSCRIPT.

Where one appealing from a conviction and sentence files no briefs, and his time to do so has not been extended by stipulation or order of District Court of Appeal, that court was not called upon to review the transcript.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Wong Bow was convicted of arson in the second degree, sentence was suspended, and he was ordered committed to a school of industry. From the judgment, and an order denying his motion for a new trial, he appeals. Judgment and order affirmed.

W. F. Geary and W. N. Vallandigham, both of Santa Rosa, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM. Defendant, a Chinese boy 19 years of age, was informed against by the district attorney of Sonoma county, Cal., on the charge of arson. Upon trial the jury found said defendant guilty of arson in the second degree, with recommendation for leniency. The court, being of the opinion that said defendant, Wong Bow, was a fit subject for commitment to the Preston School of Industry, at Ione, Cal., suspended judgment (sentence) and ordered said defendant committed to said Preston School of Industry until he reaches the age of 21 years or until legally discharged.

This appeal is from said judgment, and order denying his motion for a new trial. Appellant has filed no briefs herein, nor has his time so to do been extended, either by stipulation or order of this court. Under such circumstances, while we are not called upon to review the transcript, we have carefully perused the same, and are satisfied that the defendant had a full and impartial trial, and was justly convicted of arson. Indeed, the evidence against him is overwhelmingly convincing, and we have perceived no sufficiently prejudicial error in the instructions of the trial court, nor ruling upon the admission or rejection of evidence, to warrant any

interference by this court with said judgment or order.

The judgment and order are therefore affirmed.

38 Cal. App. 181

PEOPLE v. POWER. (Civ. 2641.)

(District Court of Appeal, Second District, California. Sept. 10, 1918.)

1. HIGHWAYS ⟸158—OBSTRUCTION—ABATEMENT—DISTRICT ATTORNEY.
In view of Pol. Code, § 4156, and Civ. Code, §§ 3479 and 3480, relating to abatement of public nuisances, the district attorney may prosecute an action to abate the construction and maintenance of an earthen embankment on a public highway.

2. HIGHWAYS ⟸158—OBSTRUCTION—ABATEMENT—PLEADING.
A complaint in an action to abate a nuisance by maintaining an earthen embankment on a public highway sufficiently specified the size, height, width, and location of the embankment.

3. HIGHWAYS ⟸1—CREATION—NECESSITY OF FORMAL DEDICATION.
Notwithstanding St. 1855, p. 192, Pol. Code, § 2619, and its amendment (St. 1883, p. 6), and sections 2621 and 2618, relating to opening and dedication of highways, a formal declaration by the board of supervisors is not, under all circumstances, essential to the creation of a public highway; but the public right may arise by prescription or implied dedication.

4. HIGHWAYS ⟸68—OBSTRUCTION—ABATEMENT—EVIDENCE.
In an action to abate a nuisance by maintaining an earthen embankment along a public highway, evidence *held* to support a finding that the highway existed to a width of 60 feet.

5. HIGHWAYS ⟸158—OBSTRUCTION—ABATEMENT—EVIDENCE.
In a suit to abate a nuisance by maintaining an embankment on a public highway, ranch patents were admissible to show the lines of adjoining ranchos often referred to during the taking of testimony.

6. PUBLIC LANDS ⟸116—PATENTS—CONCLUSIVENESS.
In a suit to abate a nuisance by maintaining an embankment on a public highway, a patent issued to defendant's predecessor in title, referring to the road as a highway was admissible as against the defendant.

7. EVIDENCE ⟸229—ADMISSIONS.
In a suit to abate a nuisance by maintaining an embankment on a public highway, a protest by defendant's predecessor in title, admitting the existence of the road, was admissible to disprove the claim that the highway was not a public one.

Appeal from Superior Court, Ventura County; Milton T. Farmer, Judge.

Action by the People against George C. Power. From a judgment for plaintiff, and a denial of a new trial, defendant appeals. Affirmed.

W. H. Barnes, of Ventura, and Edward M. Selby, of Los Angeles, for appellant. Don. G. Bowker, Dist. Atty., Robert M. Sheridan, and H. F. Orr, all of Ventura, for respondent.

CONREY, P. J. Action to abate a nuisance, alleged to have been caused by the construction and maintenance of an earthen embankment on a public highway. The defendant appeals from the judgment and from an order denying his motion for a new trial.

The amended complaint contains allegations to the effect that the parcel of land therein described is now, and for more than 46 years prior to the commencement of this action has been, used by the public for the purposes of travel thereon as and for a part of a certain public highway known as the "Old Conejo Road"; that such use was continuous, notorious, and adverse to the claim or right of possession of the defendant and his predecessors in interest, and with their knowledge; that in the month of April, 1908, the defendant without any right whatever erected and constructed, and continues to maintain, a certain earthen embankment upon and along and within the exterior boundaries of said parcel of land for a total length of 3,145 feet, more or less; that by reason of said embankment the free passage and use in the customary manner of said parcel of land has been and is obstructed, and said embankment interferes materially with the right of the public to travel over and along said parcel of land in the usual and customary manner. The defendant's answer raised issues of fact as to the existence of the highway and separately as to the width thereof. Defendant did not deny that he constructed and maintained a certain earthen embankment upon, along, and within said parcel of land, but he denied that he did so without any right whatsoever, or without full legal right.

In the fifth paragraph of his answer the defendant alleged that he is the owner of all portions of said strip of land which lie southwest of the center line thereof and of a large tract of land adjoining said strip on the southwest; that on the land so owned by him he has a lemon orchard and other valuable improvements; that in order to conduct water to his trees for irrigation he has constructed a ditch upon his land about parallel with the center line of said parcel of land described in the amended complaint, and at all points distant more than 30 feet from said center line; that the northeast side or bank of said ditch extends upon the southwesterly portion of said parcel of land, but is at all points more than 20 feet distant from the center line thereof.

In its findings the court declared that the defendant constructed and maintained said earthen embankment within the limits of the parcel of land described, which land is a part of the highway as alleged by plaintiff, and that said embankment is located on the south or southerly portion thereof. As to the other statements above mentioned, as found in the fifth paragraph of the answer, there are no specific findings, but the evidence shows without conflict that they are true, and we shall assume that they are

true; this assumption being in harmony with the assumptions made by counsel in their briefs.

We are unable to find any error in the court's finding that the action is not barred by the provisions of certain sections of the Code of Civil Procedure pleaded in the defendant's answer. The amended complaint was filed April 30, 1914, but we do not know when the original complaint was filed. The record on appeal does not show the time when the action was commenced.

[1] The district attorney was authorized to prosecute this action. Pol. Code, § 4156; Civ. Code, §§ 3479 and 3480.

[2] Appellant claims that the court erred in overruling his demurrer to the amended complaint. The points urged are that the complaint is uncertain because it does not specify the size, the height, the width, or the particular location of the alleged earthen embankment, and is further uncertain because it did not show in what manner the free passage and use in the customary manner of said parcel of land was obstructed by reason of the said embankment. We think that the complaint was sufficiently clear and certain as to these matters. The answer of the defendant and the evidence as produced at the trial further show that this part of the controversy was fully presented to the court and that the defendant suffered no prejudice by reason of the claimed uncertainty in the complaint.

Appellant claims that the roadway in question in this action has never become a public highway because it has never been declared such by order of the board of supervisors. In support of this the following statutory provisions are relied upon: Section 1 of "An act concerning roads and highways," found in the Statutes of 1855 at page 192, reads as follows:

"All roads shall be considered as public highways which are now used as such, and have been declared such by order of the court of sessions or board of supervisors, or which may be hereafter so declared by the board of supervisors within their respective counties."

Section 2619 of the Political Code, which became effective on January 1, 1873, as originally enacted, read:

"Roads laid out and recorded as highways, by order of the board of supervisors, and all roads used as such for a period of five years, are highways."

In 1874 section 2619 was amended by striking out the clause, "and all roads used as such for a period of five years." Section 2621 of the Political Code, as enacted in 1883 (St. 1883, p. 6), contained the provision that—

"No route of travel used by one or more persons over another's land, shall hereafter become a public road or byway by use, or until so declared by the board of supervisors or by dedication by the owner of the land affected."

In addition to the foregoing statutory provisions quoted by appellant, we should also take into account section 2618 of the Political Code which, as enacted in 1872, read as follows:

"Highways are roads, streets, or alleys and bridges, laid out and erected by the public, or if laid out or erected by others, dedicated or abandoned to the public."

And as re-enacted in 1883, and still in force, reads as follows:

"In all counties of this state public highways are roads, streets, alleys, lanes, courts, places, trails, and bridges, laid out or erected as such by the public, or if laid out or erected by others, dedicated or abandoned to the public, or made such in actions for the partition of real property."

[3] Notwithstanding the statutory provisions above noted, it does not appear that a formal declaration by the board of supervisors has ever been held to be under all circumstances essential to the creation of a public highway. On the contrary, the Supreme Court, in Hartley v. Vermillion, 141 Cal. 339, 348, 74 Pac. 987, 991, stated the law as follows:

"It is a matter of common knowledge that many roads and highways in this state—starting, perhaps, first as mere trails—became public highways without any formal or express dedication, but by long uninterrupted use and general acquiescence. When, as in this case, the public, or such portion of the public as had occasion to use the road, traveled over the same, with full knowledge of the landowners interested, without asking or receiving any permission and without objection from any one, for a period of time beyond that required by law to bar a right of action, a right in the public to the use of the road arises by prescription or implied dedication. Schwerdtle v. County of Placer, 108 Cal. 589 [41 Pac. 448]. In the opinion in that case a large number of authorities are cited to the effect that a dedication is presumed from long and continued adverse use as a road or highway."

Appellant next contends that the evidence does not justify the finding that the southerly 10 feet of the 60-foot strip is now or ever has been used by the public in general for the purposes of travel thereupon. Appellant's position is stated by his counsel as follows:

"He does not admit the existence of a public highway at all, but he does claim that, if any public highway exists by reason of people having traveled along the strip of land, the width of such highway does not exceed 40 feet, or 20 feet on each side of the center line. If so, the alleged embankment is not in the highway. * * * We are not, therefore, particularly concerned at this time as to the correctness of the findings of the court so far as they relate to the central 40 feet of the strip, but are essentially interested in determining the character of the southerly 10 feet of the 60-foot strip. The findings of the court above referred to relate to the entire width of the 60-foot strip, and the inclusion of the southerly 10 feet is essential to the support of the judgment."

[4] Our examination of the record of the testimony received at the trial satisfies us that there was evidence sufficient to support the court's findings, not only as to the existence of the highway, but also as to the full width of said 60 feet thereof. This may be shown by reference to a very few items of the evidence. The witness Flint, who has resided in Ventura county since May, 1863,

stated that the property of the defendant is located on the south side of the Old Conejo road—what used to be the Conejo road, "and it is the same old road now." It must be admitted that there was some uncertainty in the testimony of this witness as to the location of the road. For instance, he says:

"The present road is farther north than the Conejo road was—than the old road. I think about to where his house is, is the same, and from there I think it is a little further south."

He further said that it was just about the same old track all the time until they began to fence it up, and was about 50 or 60 feet wide, or possibly 80 feet.

The witness Frank B. Dennis stated that he had been acquainted with the land now owned by defendant since 1860 or 1861, when the ranch was bought by Dixie Thompson; that in 1868 the Conejo road, from the Telegraph road to the Santa Clara river, ran about the same place it does at the present date; that it ran along the grant line between the San Miguel and the Santa Paula y Saticoy ranches. It may be noted at this point in explanation of the testimony that records were introduced in evidence which showed that defendant's property is in the Rancho San Miguel and in that part thereof adjoining the Rancho Santa Paula y Saticoy. The same witness said:

That "at that time it was all open country; you might say, I guess, it was just simply a main traveled road. It was probably 80 or 100 feet in width at those times, and it might have been less than that; it varied in width." That a fence was placed along that road by Dixie Thompson in 1878 or 1879.

D. D. De Nure testified:

That he became acquainted with the locality in question in 1869. That at that time they traveled on the same road that is there now. "It was just a common country highway. It never had been worked very much; just an ordinary road as you would find anywhere in a new country. I believe they call it the Conejo road." "I have no clear idea now of where Mr. Power's east line is, unless it is along that road. I have seen a lemon orchard there, but I did not notice whether it came up to the road or not." "After this county was set off from Santa Barbara, then that road was worked just about as it is now. I think it was about 1874 that they commenced working, after they got the new county; then we had the road worked, and the road along that fence, along that Montalvo road, to my recollection, was worked up about as wide as it is now, about 50 or 60 feet wide. That was considerably wider than it had been before that time; that is, it was wider after they commenced to work it."

The witness J. L. Crane knew this locality as early as 1862, and knew the Old Conejo road at that time.

"I could not locate absolutely where that road run then, but practically it never seemed to me that there was any change there from then until now; there was only this change, of course, the road was never fenced or laid off on lines, went weaving, as it were curved." "In 1862, and down to 1867, the road was varied in different widths; in some places it was 100 feet wide; in some places maybe it would not be over 60."

He further stated that he is satisfied that the old road from 1868 to 1874, the general location of it, is surely the same as at the present time.

The witness Barnes said:

"I am perfectly familiar with the road now traveled along the property of Mr. Power, known as Old Conejo road; that road has been used and traveled as it is at present from 1881 up to the present time. It never could have been changed, because, as I say, Mr. Mills' land was all fenced, and the Thompson land was all fenced; it could not have been changed. There has been considerable travel along that road during these years. It is probably the most extensively traveled road in the county. Road work has been done off and on during that period of time."

In this connection it should be remembered that Thompson was formerly the owner of property including the property of defendant.

[5, 6] Appellant further insists that certain of his objections to testimony offered by the plaintiff should have been sustained. We have examined that testimony and the objections offered, and are of the opinion that the court's rulings do not contain any errors of sufficient importance to warrant us in setting aside the judgment. The ranch patents were valuable and admissible for the purpose of showing the lines of adjoining ranchos, which lines were often referred to as the testimony was received; and the references to the Old Conejo road in the patent of Rancho San Miguel were admissible as against the defendant, since the patent was issued to a predecessor in title, and under whom the defendant's title came into existence. The objections to certain questions on the ground that they were leading may be disposed of by observing that the answers show that the witnesses did not "lead."

Assuming that the court erred in admitting in evidence certain field notes and plat of a survey made by the witness, John A. Barry, we think that the defendant was not prejudiced seriously thereby, if at all. While the plat shows a width of 60 feet for the road, this witness testified that the portion occupied by travel did not exceed 40 feet. The diagram simply showed a road, and while the field notes indicated that the witness made the measurements as for a 60-foot road, his admissions in testimony show that this was an arbitrary assumption. The documents should have been rejected, but they constitute a very insignificant portion of the evidence upon which the court made its findings as to the existence and width of the road.

[7] The court did not err in overruling the defendant's objections to certain proceedings in the matter of a petition for a road by Stevens and others. This referred to a proposed re-establishment of an important roadway intended to run partly by the route of the Old Conejo road. Defendant's predecessor, Thompson, filed a protest wherein he set forth reasons why the proposed road ought not to be established as a county road. This protest was sustained, and the proceedings were abandoned. The protest as made by Thompson was dated December 16, 1870,

and contained numerous references to "the old road." One of these statements was that—

"The old road was many years ago established by competent persons as the county road, and money expended upon it by the state and county, making it a good, easy, safe, and practicable road."

This was an admission of fact concerning the existence of the road, and was admissible in evidence as against the defendant.

The case as a whole was very fully presented and fairly tried, and the court's findings are sufficiently sustained by the evidence.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

---

38 Cal. App. 194

STEERE v. FORMILLI. (Civ. 2443.)

(District Court of Appeal, First District, California. Sept. 13, 1918. Rehearing Denied by Supreme Court Nov. 11, 1918.)

1. CONTRACTS ⊜171(3) — CONSTRUCTION OF BUILDING CONTRACT—ENTIRE CONTRACT.
Owner's agreement to pay contractor, during construction of building, 75 per cent. of value of labor performed and material furnished at end of three-week periods, did not make contract separable, or settlements so made accounts stated.

2. DAMAGES ⊜68—INTEREST—UNLIQUIDATED CLAIM.
In contractor's action against owner for breach of building contract providing for payment by owner, at intervals of three weeks, of 75 per cent. of the value of labor performed and material furnished, interest should not be allowed on such claim prior to date of judgment; the claim being unliquidated.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by J. E. Steere against Cesare Formilli. Judgment for plaintiff, and defendant appeals. Affirmed.

Thomas H. Breeze, of San Francisco, for appellant. Walter H. Linforth, of San Francisco, for respondent.

STURTEVANT, Judge pro tem. This is an action to recover damages for a breach by the owner of a building contract. A trial on questions of fact was had in the lower court, judgment was entered in favor of the plaintiff, and the defendant has appealed on the judgment roll. The lower court found: That the contract as pleaded contained a provision to the effect that the defendant would make payments "as follows, seventy-five (75) per cent. of the value of the labor performed and materials incorporated on the premises and in the said buildings and structures, as estimated by the defendant, less previous payments made, every three weeks commencing with the third week after the date of commencement of the plaster work"; that the plaintiff commenced the work on October 23, 1914, and continued to perform till March 2, 1915, when the defendant notified the plaintiff that the said contract was terminated; that the reasonable value of the work and materials was $18,333.50; that the proportion of the value of the work and materials furnished to the value of the work and materials to be done and furnished was $18,333.50. In framing its judgment the lower court allowed interest on the balance found due from the date of discharge, March 2, 1915.

[1] The principal point made by the appellant is that the work done and materials furnished during each three weeks constituted, under the terms of the contract, a separate contract, and the settlements made at the end of the three-week periods became accounts stated. This same point is presented in several ways, but the effect is the same. The point is not new. It has been expressly held that the contract provision in question does not operate to make the contract separable, but is a means provided by the contracting parties for estimating the amounts of the progress payments. American-Hawaiian v. Butler, 17 Cal. App. 764, 770, 121 Pac. 709; Keeling v. Schastey & Vollmer, 18 Cal. App. 764, 768, 124 Pac. 445; Adams v. Burbank, 103 Cal. 646, 650, 37 Pac. 640.

[2] The claim sued on was unliquidated. Until a trial was had the amount was but the pleader's estimate. In such a case, interest should not be allowed prior to the date of the judgment. Edwards v. Arp, 173 Cal. 472, 473, 160 Pac. 551; American-Hawaiian v. Butler, supra. The lower court allowed interest from the date of the breach of the contract. We think the judgment should be modified by deducting therefrom the amount of the interest which was computed as accruing between March 2, 1915 (the date of the breach), and July 17, 1916 (the date of the judgment), and as thus modified, it should be affirmed.

It is so ordered.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

---

38 Cal. App. 214

GEE CHONG PONG et al. v. HARRIS. (Civ. 1862.)

(District Court of Appeal, Third District, California. Sept. 18, 1918.)

1. COURTS ⊜125—SUPERIOR COURT—JURISDICTION—AMOUNT.
The superior court would have no jurisdiction of suit against administratrix, where amount of claim sued upon was less than $300, unless the action could be treated as one in equity, on the ground that an equitable lien arose out of an agreement upon which major part of claim was founded.

2. AFFIDAVITS ⊜9—SUFFICIENCY.
The test of the sufficiency of an affidavit is whether it is so clear and certain that an indictment for perjury may be sustained on it, if false.

3. AFFIDAVITS ⟸2—SUFFICIENCY.
Affidavit to claim of partnership against estate of deceased *held* insufficient, under Code Civ. Proc. § 1494, where it appeared to be made by the partnership (incompetent to make it), and it did not appear that it was sworn to by the partner who signed it.

4. EXECUTORS AND ADMINISTRATORS ⟸227(3) —CLAIM AGAINST ESTATE — AFFIDAVIT TO SUPPORT—SUFFICIENCY.
Where affiant and claimant are the same, it is sufficient if affidavit to claim against estate of deceased person states that there are no offsets to the knowledge of "claimant," though Code Civ. Proc. § 1494, uses the word "affiant."

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action by Gee Chong Pong and others against Margaret Harris, as administratrix of the estate of Aaron Harris, deceased. Judgment for defendant, and plaintiffs appeal. Affirmed.

L. N. Peter and James A. Nutting, both of Quincy, for appellants. A. R. Tabor and W. T. Phipps, both of Sacramento, for respondent.

CHIPMAN, P. J. The second amended complaint sets forth an action in two counts. The first is based upon the sale of two certain gold nuggets, one of the value of $135, and the other of the value of $75, "upon an understanding and agreement between plaintiffs and said Aaron Harris (defendant's intestate) that plaintiffs should have a lien upon said personal property as security for the return thereof to plaintiffs or the payment to plaintiffs of the value thereof." It is alleged "that said Aaron Harris never returned the said personal property, or paid plaintiffs the value thereof, and ever since the said 2d day of September, 1914, said personal property has been held and possessed by said Aaron Harris and his estate," and that at the time of his death said Aaron Harris was indebted to plaintiffs in the sum of $210 for said gold nuggets "and the estate of said deceased is still indebted to plaintiffs therefor."

For a second cause of action it is alleged that, on September 2, 1914, "plaintiffs purchased of said Aaron Harris certain goods, wares, and merchandise, to wit, certain hams, and then and there paid said Aaron Harris cash in the sum of $15 therefor," to be thereafter delivered, but "that said Aaron Harris never delivered the said hams to plaintiffs, and plaintiffs have never received the same"; that at his death the said Harris was indebted to plaintiffs in the sum of $15, no part of which has ever been paid, and said estate is indebted therefor.

The prayer is for judgment for $225; "that $210 thereof be adjudged a lien on the said personal property; that said personal property be decreed to be sold in satisfaction of said lien; that the said claim be allowed and approved, and adjudged to be a valid claim against the said estate; and that said administratrix be directed to pay the same in due course of administration."

The affidavit to the claim, which latter is the basis of the action, reads as follows:

"State of California, County of Plumas—ss. Fook Hing Lung Company, whose foregoing claim is herewith presented to the administratrix of said deceased, being duly sworn, says that the amount thereof, to wit, the sum of two hundred and twenty-five ($225.00) dollars, is justly due to the said claimant; that no payments have been made thereon which are not credited; that there are no offsets to the same to the knowledge of said claimant. Fook Hing Lung Co., by Gee Chong Pong, Member and Clerk of Said Co.

"Subscribed and sworn to before me this 20th day of September, A. D. 1915. Elizabeth Caya, [Seal] Notary Public in and for Plumas County, State of California. My commission expires Apr. 2, 1916."

Indorsement:

"The within claim rejected this 15th day of October, A. D. 1915. Margaret Harris, Admx. of Estate of Aaron Harris."

Defendant demurred to the complaint on the following grounds:

(1) That the court has not jurisdiction "by reason of the fact that no lien is shown by said complaint and that the amount of the claim sued upon is less than three hundred dollars."

(2) That two causes of action, one for the foreclosure of a lien for a balance due on account of said nuggets and one for cash advanced for certain hams, are improperly united.

(3) That said complaint does not state facts sufficient to constitute a cause of action.

The court sustained the demurrer "without leave to amend," and judgment passed for defendant. Plaintiffs appeal from the judgment.

[1] Clearly the court was without jurisdiction, unless the action relating to the alleged sale of said nuggets can be treated as an action in equity, on the ground that an equitable lien arose out of the alleged agreement. We do not deem it necessary to pass upon this question.

It was necessary to the maintenance of the action that the claim should first be properly presented to the administratrix, as required by section 1494 of the Code of Civil Procedure, and—

"must be supported by the affidavit of the claimant, or some one in his behalf, that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the affiant. * * * When the affidavit is made by a person other than the claimant, he must set forth in the affidavit the reason why it is not made by the claimant."

It will be observed that the affidavit states that the claim was presented by Fook Hing Lung Company and that "Fook Hing Lung Company, * * * being duly sworn, says," etc., and "that there are no offsets to the same to the knowledge of said claimant." The affidavit is signed: "Fook Hing Lung Co., by Gee Chong Pong, Member and Clerk of Said Co."

[2] A test of the sufficiency of an affidavit

is whether it is so clear and certain that an indictment for perjury may be sustained on it if false. 2 C. J. 348. It has been held that an affidavit cannot be made by a partnership firm in the firm name, since it would be impossible to convict the individual partners of perjury upon the evidence of such affidavit. 2 C. J. 325.

"An affidavit on behalf of a partnership, therefore, should be sworn to by one of the partners, and where it appears in the body of the affidavit that it was sworn to by one of the partners it is sufficient, although signed with the firm name." Id.

[3] The affidavit states that the partnership was sworn, and it nowhere appears that the affidavit was sworn to by one of the partners. As signed, it imports that Chee Chong Pong signed the name of the firm, but does not import that he was sworn. Nor does it appear from the jurat by whom the affidavit was sworn to. The implication, if any, would be that it was sworn to as stated in the body of the affidavit, to wit, by the partnership. If the affidavit had been properly made by one of the partners, the statement that there are no offsets to the knowledge of "claimant," instead of "affiant," would be immaterial. Warren v. McGill, 103 Cal. 155, 37 Pac. 144. As the affidavit reads, there is no statement that there are no offsets, for the reason that the affidavit purports to be made by one incompetent to make it, to wit, the partnership. That such statement is essential, see Perkins v. Onyett, 86 Cal. 348, 24 Pac. 1024.

In Maier Packing Co. v. Frey, 5 Cal. App. 80, 89 Pac. 875, the affidavit read:

"Maier Packing Co., by Simon Maier, Pres., whose foregoing claim is herewith presented to the administrator of the estate of said deceased, being duly sworn, says," etc. [Signed] Maier Packing Co., Simon Maier, Pres.

"Subscribed and sworn to before me, this 15th day of June, 1904."

It was held "impossible to reconcile the provisions of this affidavit with the requirements of the statute"—citing Perkins v. Onyett, supra.

[4] It is claimed that the Maier Packing Co. Case is not to be followed, citing Scott Stamp & Coin Co., Limited, a Corporation, v. Leake, Adm'r, etc., 9 Cal. App. 513, 99 Pac. 731, and Western States Ins. Co. v. Lockwood, 166 Cal. 185, 135 Pac. 496. In both of these cases the affidavits appeared to have been made by one of the officers of the corporation, and it was held in such case that the requirement of the statute that, where the affidavit is made by a person other than the claimant, the reason therefor must be set forth, does not apply; and also, where the affiant and the claimant are the same, it is sufficient if the affidavit states that there are no offsets to the knowledge of "claimant," though the statute uses the word "affiant." In the present case the affidavit does not show that it was sworn to by any person competent to make it.

We do not think the statute has been sufficiently complied with. The judgment is therefore affirmed.

We concur: HART, J.; BURNETT, J.

---

38 Cal. App. 196

## CHRISTMAN v. SOUTHERN PAC. CO.

(Civ. 2575.)

(District Court of Appeal, Second District, California. Sept. 13, 1918.)

1. RAILROADS ⟸328(5) — INJURIES TO PERSONS — CONTRIBUTORY NEGLIGENCE — CROSSING ACCIDENTS.

Where truck driver was injured when his radiator was struck by gasoline motorcar on railroad he was guilty of contributory negligence, without which the accident would not have occurred, when with full knowledge of the situation, and the time of trains, he approached a crossing the view of which was obstructed at such speed that he could not stop before getting on rails.

2. RAILROADS ⟸335(1) — INJURIES TO PERSONS—CONTRIBUTORY NEGLIGENCE—EFFECT.

Where truck driver approached railroad crossing the view of trains from which was obstructed at such speed that he could not stop before reaching the rails the fact that the railroad company was also negligent did not aid the plaintiff's case.

3. RAILROADS ⟸324(1)—CARE REQUIRED OF TRAVELERS — CROSSING ACCIDENTS — GASOLINE MOTORCARS.

The care required of persons approaching railroad tracks along which gasoline motorcars are operated is the same as that required when the cars are operated by electric power along interurban lines.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Frank D. Christman against the Southern Pacific Company. Judgment of nonsuit, and plaintiff appeals. Affirmed.

J. W. Hocker, E. E. Morris, and Robert E. Austin, all of Los Angeles, for appellant. Henry T. Gage, W. I. Foley, and W. I. Gilbert, all of Los Angeles, for respondent.

CONREY, P. J. Action to recover damages for personal injuries which the plaintiff received by reason of a collision between a motor truck operated by the plaintiff and a gasoline motorcar operated by the defendant. At the close of the plaintiff's evidence defendant moved for a nonsuit, on the ground that the testimony showed that the plaintiff was guilty of contributory negligence, which was the proximate cause of the accident. This motion was granted, and the plaintiff appeals from the judgment.

Stating the facts as favorably to the plaintiff as they can be under the evidence, they are as follows: On the 7th day of February, 1914, the defendant was a common carrier of passengers and freight for hire, and operating a line of steam railroad carrying passen-

gers and freight, and running from the city of Los Angeles, through and east of Norwalk, in Los Angeles county. At the town of Norwalk the railroad track runs east and west across a certain public highway running north and south. At about noon of that day the plaintiff was driving an auto truck along the highway, and was moving toward the railroad track, in a southerly direction. At the same time the motorcar of the defendant was approaching the highway crossing from the west. Plaintiff approached the railroad track while traveling at a rate of 8 or 10 miles an hour, and the motorcar was traveling at the rate of 45 or 50 miles an hour. There was a blacksmith shop on the west side of the highway, located about 35 feet from the railroad right of way. When the plaintiff passed the blacksmith shop, he first looked east, and then looked toward the west. Looking toward the west, he saw the gasoline motorcar, which was a passenger car of the defendant, approaching the crossing. When he first saw the motorcar, he was about 30 feet from the crossing. Immediately he put on his brakes, with the result that the auto truck stopped so that its radiator was just over the nearest rail of the railroad track. At that point it was struck by the motorcar. Prior to the day in question the plaintiff had driven over this crossing 8 or 10 times, and knew that the railroad track was there. It was a fact, and the plaintiff knew it to be a fact, that when driving his motor truck at the speed at which he then was driving he could not stop within less than 35 or 40 feet. The plaintiff was aware of the fact, not only that there was a railroad track there, but knew also that trains were being operated over it.

[1, 2] Upon the facts thus shown, all of which were admitted by the plaintiff, it is clearly established that the plaintiff was guilty of contributory negligence, without which the accident could not have occurred. With complete knowledge that he was approaching a railroad crossing which he knew to be regularly in use, he drove his auto truck at a rate of speed so great that, as he himself knew, his machine was bound to go upon the track, at all times after the moment of his first opportunity to look for the train. Having thus neglected the most obvious precautions for taking care of his own safety at a time and place where he had ample opportunity to use those precautions, the plaintiff is not entitled to recover damages for the injuries received. The fact that there was concurrent negligence on the part of the defendant does not, under these circumstances, aid the plaintiff's case.

[3] Counsel for appellant contend that the defendant was unlawfully operating a gasoline motorcar on a steam railroad line, and that under the circumstances here shown the plaintiff was not under obligations to look and listen for a gasoline motorcar. There is in the record no evidence tending to show that the defendant was operating said gasoline motorcar without legal right so to do. We perceive no reason why the requirements of care on the part of a person approaching the tracks on which gasoline motorcars are operated should be held to be any different than the standard established for those seeking to cross the tracks of an electric railway. We are referring, of course, to interurban railroads, and not to city street railways. Loftus v. Pacific Electric Ry. Co., 166 Cal. 464, 467, 137 Pac. 34, and cases there cited.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

---

38 Cal. App. 204

## COSBY v. DANZIGER. (Civ. 2578.)

(District Court of Appeal, Second District, California. Sept. 16, 1918.)

1. PUBLIC LANDS ⊂⊃7—ESTATE GRANTED—AUTHORITY OF GOVERNMENT.
The government of the United States, in adopting the laws under which it will transfer public lands to private persons, has power to grant such lands in fee, or less than in fee, or on lease for limited terms and limited uses.

2. VENDOR AND PURCHASER ⊂⊃135(1)—UNINCUMBERED TITLE—GOVERNMENT EASEMENTS.
A contract to pass an ordinary clear and unincumbered title is not complied with by offering a title based on a patent from the United States which excepts a right of way for ditches to be constructed by its authority.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by Walter Cosby against J. M. Danziger. From a judgment for plaintiff, and a denial of a new trial, defendant appeals. Reversed.

W. N. Goodwin, Hunsaker & Britt, and Goodwin & Morgrage, all of Los Angeles, for appellant. H. T. Morrow and Dave F. Smith, both of Los Angeles, for respondent.

CONREY, P. J. The defendant appeals from a judgment awarding to the plaintiff a sum representing the unpaid balance of the purchase price found to be due under a contract for the sale by plaintiff to defendant of a tract of land in the county of Kern. There is also an appeal from an order denying the defendant's motion for a new trial.

The contract was executed on the 28th day of November, 1908. Part of the consideration was paid at that time and the remainder was due six months from the same date. The contract provided that—

"Upon the payment of the balance of the purchase price said seller agrees to deliver to said buyer a good and sufficient deed of grant, bargain and sale, conveying said premises to said buyer free and clear of all incumbrances, and also to deliver to said buyer an abstract of title to said land, showing the title of said seller to said land to be free and clear of all

incumbrances. Said buyer hereby agrees to assume and pay the taxes on said property for the fiscal year 1908–09, and shall be entitled to immediate possession of said premises and to remove therefrom any mineral, oil, water, or other property."

The court found that on the 13th day of December, 1911, the plaintiff tendered to defendant, and offered to deliver to defendant, a deed of grant, bargain, and sale, in the form provided in the contract, conveying the real property described in the contract, free and clear of all incumbrances, and at the same time tendered to defendant and offered to deliver to defendant an abstract of title, which abstract of title showed the title of plaintiff in and to said real property free and clear of all incumbrances; that defendant at said time did not specify any objection to the deed, or to the abstract of title, or to the title of said real property; that the plaintiff duly made renewal of the same offer in open court at the time of the trial, upon condition that defendant would pay plaintiff the balance due and unpaid to plaintiff under said contract.

Appellant contends that the evidence does not support the findings of the court to the effect that the plaintiff tendered to defendant a deed accompanied by an abstract showing title to the premises in question vested in the plaintiff free and clear of any and all incumbrances. The abstract of title which was tendered by the plaintiff to the defendants shows that the instrument under which the plaintiff claims that legal title to the premises described in the contract became vested in him is a patent issued by the United States of America to Walter Cosby, dated June 7, 1905. A copy of this patent, exemplified under certificate of the recorder of the General Land Office at Washington, was recorded in the recorder's office of Kern county, Cal., on the 16th day of November, 1910. Besides describing the property as the N. E. ¼ of section 24, etc., (being the same description as in the contract between plaintiff and defendant), the patent designated the property as being "that certain placer mining claim and premises known as the Black Goose placer mining claim." The patent grants "said mining premises," etc., subject, nevertheless, to certain conditions and stipulations, one of which is as follows:

"4. * * * And there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by authority of the United States."

The certificates attached by the Kern County Abstract Company to the several sections of the abstract as made by it declare that the same is—

"a full, true, and complete abstract of title to the land hereinafter described, as shown by the records in the county offices of the county of Kern, state of California, except the records and proceedings of the board of supervisors of said Kern county, as also all matters, instruments, and proceedings on file or of record relating to water, water rights, ditches, and canals."

This was not a complete abstract. For all that appears therefrom, there may have been liens or easements of record, covered by said exception, and there may have been actions pending, or judgments existing, in the federal courts of the district in which the land is situated, affecting the plaintiff's title. It may be, however that the defendant's failure to specify any objection to the incomplete condition of the abstract deprives him of the right to insist upon such objections. As to this matter we express no opinion, since upon other grounds we shall hold that the plaintiff is not entitled to prevail in the action.

The right of way reservation contained in the patent to which we have referred was made pursuant to an act of Congress of August 30, 1890, which provided:

"That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by authority of the United States." 26 Stat. 391, c. 837; 8 Fed. Stat. Ann. (2d Ed.) p. 802.

The object of this legislation was to save to the government the right to thereafter enter upon land for which patents might be issued, and construct and maintain thereon such canals and ditches as might be deemed necessary in furtherance of the government's policy for the reclamation of arid lands. Green v. Willhite (C. C.) 160 Fed. 755; United States v. Van Horn (D. C.) 197 Fed. 611.

We now have gone far enough to see that the plaintiff agreed to deliver to the defendant a deed conveying said premises to the buyer free and clear of all incumbrances and to deliver to defendant an abstract of title showing the title of the plaintiff to said land to be free and clear of all incumbrances; that the plaintiff claims the right to fulfill that contract by conveying the land to the defendant subject to the right of the United States government at any time to construct and maintain ditches and canals across the land through any part thereof which the government may select.

Counsel for respondent say that appellant had knowledge of the reservations in the title at the time the contract was entered into; that he contracted in the light of that knowledge, and by his conduct construed the contract in a manner inconsistent with his contention here. This claim is not borne out by the record. There is no evidence tending to show that at the time when the contract was made appellant had any knowledge or notice of the source of respondent's title. Even if it could be assumed that appellant must have known that the title rested upon a federal basis, yet there is no evidence that he knew or had notice that the plaintiff's patent was of later date than August 30, 1890, and that therefore it necessarily would contain the reservation to which we have referred.

Thus we are brought to a consideration of the question whether or not said right of way reservation constitutes an incumbrance on the land which the plaintiff agreed to convey. If the plaintiff's property were subject to a right of way granted to some private person to construct ditches thereon, we would not hesitate to hold that such right of way is an incumbrance against the property. It was so determined by this court in Hixson v. Hovey, 18 Cal. App. 230, 122 Pac. 1097. In that case the court also said:

"Under the contract of sale defendant Clara W. Hovey was entitled to receive the property free and clear of all incumbrance. When it was provided that the certificate should show 'title to be vested in seller,' that term necessarily meant a good title, or one which was free from incumbrance."

While agreeing that the deed tendered by respondent to appellant would convey the title subject to the right of way for canals or ditches, as specified in the patent, counsel for respondent insist that, for various reasons, this reservation was not an incumbrance. The gist of this contention seems to be that since the patent was issued in the form provided by law, and contained only a reservation established by public statute, that the reservation itself results from an exercise of sovereign governmental power, and not from an exercise of the proprietary power of the government as owner or the land; that under these circumstances the patentee has obtained the most complete and absolute dominion of the property which a private person can have under the law, and that the reservation therefore does not constitute an incumbrance or a defect of title, but is merely a part of the description of that title, and shows nothing more than that the land is subject to "a power in trust for the benefit of the land and the people."

On this last proposition we are referred to U. S. v. Minidoka R. R. Co. (C. C.) 176 Fed. 762. Adverting to the act of August 30, 1890, in connection with other statutes providing for the construction by the government of ditches and canals for irrigation uses, the court did say that "in a large sense the Secretary of the Interior in building and operating these canals acts as the trustee for the settlers, upon whom primarily rests the burden of their cost, and into whose hands their control will ultimately pass"; but the court did not say or intimate that a reservation like that here in question does not constitute an incumbrance upon the land affected thereby.

[1, 2] The government of the United States, in adopting the laws under which it will transfer public lands to private persons, has power to grant such lands in fee, or less than in fee, or on lease for limited terms and limited uses. So far as the questions presented in the present case are concerned, we think that it is not important that the government, in the enactment of such legislation, may be acting in a sovereign governmental capacity rather than as proprietor of any definite area of land. On any theory, it remains true that in a given case the grant provided for may be a grant of less than an unlimited title in fee. Such is the case at bar. We cannot escape the facts that respondent agreed to pass to appellant an ordinary clear and unincumbered title, and that appellant had no information charging him with notice that he was buying land subject to a right of way for ditches or canals, to be constructed by the government of the United States. Comparing the deed and the evidence of title tendered by respondent with the terms of his contract, the fact glaringly stands forth that he has not complied and apparently cannot comply, with those terms. This being so, he is not entitled to compel performance by the purchaser.

The judgment and order are reversed.

We concur: JAMES, J.; SHAW, J.

179 Cal. 192

## In re PRESCOTT'S ESTATE.

### Appeal of FREDRICKS.

(S. F. 8615.)

(Supreme Court of California. Oct. 31, 1918.)

1. TRUSTS ⟸329—COMPENSATION OF TRUSTEE—AMOUNT—REVIEW.

Allowance of $200 to trustee for 14 months' service in management and control of $200,000 bequest, there being little to do beyond collecting and remitting income, *held* not so inadequate as to justify interference by appellate court, in view of Code Civ. Proc. § 1700, confiding allowance of compensation to discretion of trial court.

2. TRUSTS ⟸315(2)—COMPENSATION OF TRUSTEE—STATUTE APPLICABLE.

Civ. Code, § 2274, measuring trustee's compensation by that of an executor or administrator, is inapplicable, where trust estate has not been fully administered.

Department 1. Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

In the matter of the estate of Nellie S. Prescott, deceased, and the trust created by her last will and testament. From part of a decree fixing his compensation George Fredricks, trustee, etc., appeals; Jessie Gray Booth, one of the beneficiaries of the trust, being respondent. Affirmed.

Percy E. Towne, of San Francisco, for appellant.

Augustin C. Keane, of San Francisco, for respondent.

SLOSS, J. The will of Nellie S. Prescott bequeathed $200,000 to George Fredricks in trust, to manage and invest the same and to pay the income in equal shares to Elizabeth H. Booth and her three daughters during their respective lives. The will was admitted to probate, and thereafter Fredricks, as trustee, applied for and obtained a decree of partial distribution, distributing to him a number of bonds, together with a sum in cash sufficient to make up the full amount of the bequest. His first account, covering a period of 14 months following the partial distribution, was filed, together with a report, and a prayer for compensation to him and his attorney. The account showed that the entire income, less some minor and necessary expenses, had been remitted to the four beneficiaries, each of whom had received $2,090.24. There was no opposition to the account, and the court duly settled it, allowing the sum of $200 each to the trustee and his attorney, incorporating in its decree a finding that these sums constitute a reasonable compensation. The trustee appeals from that part of the decree fixing his compensation.

[1, 2] The only question is whether an allowance of $200 for 14 months' service in the management and control of this trust estate is so inadequate as to justify the interference of an appellate court. The compensation of the trustee is confided to the discretion of the trial court. Code Civ. Proc. § 1700. The provision of section 2274 of the Civil Code for measuring the trustee's compensation by that of an executor is not applicable here. The statutory commissions of an executor or administrator are to be allowed only when the estate has been fully administered. In re Rose, 80 Cal. 166, 180, 22 Pac. 86; Bemmerly v. Woodard, 136 Cal. 326, 331, 68 Pac. 1017. They cannot, therefore, afford the basis for fixing the compensation of a trustee at any earlier stage of the execution of the trust.

The allowance here made was undoubtedly small—probably smaller than we might have thought proper, had the question of compensation come before us for original determination. There is, however, no inflexible rule for measuring the allowance; the question of what is a reasonable compensation depending "largely upon the circumstances of each particular case." 39 Cyc. 492. In the present instance it appears that the trust fund was invested in sound bonds, and, except for the sale of a few of these and the substitution of others, the trustee had little to do beyond collecting and remitting the income. He does not claim that he was put to any personal

expense in his trusteeship. Of course, the responsibility of holding and safeguarding a trust fund is an element to be regarded in fixing compensation. But we may fairly assume that the court felt that this feature might more properly be left for consideration upon the final winding up of the trust, or at least at some later stage of its administration. Viewing the record as a whole, we do not feel warranted in saying that the action of the trial court in fixing the amount to be retained by the trustee manifests an abuse of discretion.

The portion of the decree appealed from is affirmed.

We concur: ANGELLOTTI, C. J.; RICHARDS, Judge pro tem.

---

179 Cal. 189

## In re ESPINOSA'S ESTATE AND GUARDIANSHIP. (S. F. 8737.)

(Supreme Court of California. Oct. 31, 1918.)

1. TIME ⟸9(4)—EXCLUDING FIRST OR LAST DAY—"NOT LESS THAN FIVE DAYS BEFORE."
Service of citation upon alleged incompetent on the 23d gave the court the right to hear the matter on the 28th of the same month, under Code Civ. Proc. § 1763, providing that notice must be given "not less than five days before" the appointed time.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Not Less Than.]

2. INSANE PERSONS ⟸13 — PROCEEDING AGAINST INCOMPETENT — CITATION—SUFFICIENCY.
Citation designating a time and place for alleged incompetent person to appear and show cause why a guardian should not be appointed according to "petition on file" sufficiently complied with Code Civ. Proc. § 1707, providing that citations shall contain "a brief statement of the nature of the proceeding."

3. APPEAL AND ERROR ⟸909(1) — PRESUMPTIONS—RECITALS IN ORDER.
Where order appointing guardian of incompetent person recites that matter came on regularly to be heard, the court on appeal is bound, in the absence of a contrary showing, to hold that sufficient notice of hearing was given and that court acquired jurisdiction for all purposes.

4. INSANE PERSONS ⟸33(1)—GUARDIANSHIP PROCEEDING—STATUTES APPLICABLE.
In proceeding for appointment of guardian of an incompetent person, Code Civ. Proc. § 1763 et seq. governs, and jurisdiction of court does not depend upon compliance with section 1747, relating to guardians of minors.

5. INSANE PERSONS ⟸22 — FINDINGS—SUFFICIENCY.
Recital, in order appointing guardian, that he "is an incompetent person as alleged in the petition and that the allegations of the petition are true," is a sufficient finding of the ultimate fact.

6. APPEAL AND ERROR ⟸907(2) — APPOINTMENT OF GUARDIAN—REGULARITY OF PROCEEDING—PRESUMPTION.
That trial court abused its discretion in appointing another than petitioner guardian of appellant, an alleged incompetent person, could not be established in the absence of a transcript of testimony and proceedings before trial court because all intendments and presumptions are in favor of the regularity and propriety of order appointing guardian.

Department 2. Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

In the matter of the estate and guardianship of Salvador Espinosa, an incompetent person. From an order and decree adjudging him incompetent, Espinosa appeals. Affirmed.

J. W. Hocker and Z. B. Stuart, both of Los Angeles, for appellant. R. C. McComish, of San Jose, and C. F. Lacey, of Salinas, for respondent.

MELVIN, J. Upon petition of his brother Salvador Espinosa was adjudged incompetent, and George S. Gould, Jr., was appointed guardian of his person and estate. From the order and decree adjudging him incompetent, Espinosa appeals.

There is neither a reporter's transcript nor a bill of exceptions on file, the record consisting of the clerk's transcript alone. In appellant's brief appears a purported "Statement of the Case," which we must ignore except where it finds support in the clerk's transcript. Appellant makes three contentions in his brief. These are as follows: (1) The court failed to acquire jurisdiction of the matter. (2) There was no formal adjudication of incompetency. (3) The court abused its discretion in appointing Mr. Gould.

[1] Under the first head, appellant contends that service of the citation on February 23, 1918, did not give the court the right to hear the matter on the 28th of the same month. Section 1763 of the Code of Civil Procedure provides that the alleged incompetent person must be given notice of the time and place of the hearing "not less than five days before" the appointed time. Appellant's counsel assert the rule to be that, where a statute requires an act to be done a given number of days before an event, the time must be reckoned by excluding the day of the act and the day of the event. Whatever may be the law in other jurisdictions, it is settled in California adversely to appellant's contention. Cosgriff v. Board of Election Commissioners, 151 Cal. 407, 91 Pac. 98.

[2] Appellant also denies the court's jurisdiction because of the alleged insufficiency of the citation to inform him of the contents of the petition. The citation designated a time and place for appellant to appear before the court "then and there to show cause" why Manuel Espinosa or some other fit and proper person should not be appointed guardian of his person and estate, according to the "petition on file." This was a sufficient compliance with section 1707, Code of Civil Procedure, which provides that the citation shall contain "a brief statement of the nature of the proceeding."

[3] But even if a more formal notice were

required under our law, we would be bound to hold that it had been given and that jurisdiction had been obtained for all purposes, in the absence of a showing to the contrary, because in the order appointing a guardian there is a recital that the matter "came on regularly to be heard." Estate of Schulmeyer, 171 Cal. 340, 153 Pac. 233.

[4] There is no merit in the contention that the jurisdiction of the court depends upon compliance with the requirements of section 1747 of the Code of Civil Procedure. That section relates to guardians of minors. The law on the subject of guardians of incompetent persons is set forth in sections 1763 et seq. of the Code of Civil Procedure. Matter of Coburn, 165 Cal. 202, 131 Pac. 352; Estate of Schulmeyer, supra.

[5] Appellant's theory that error was committed by the court in omitting to make formal findings is not correct. There is sufficient finding of the ultimate fact in the recital contained in the order appointing the guardian that "said Salvador Espinosa is an incompetent person as alleged in the petition and that the allegations of the petition are true." Authority last cited above is conclusive upon this point.

[6] There is absolutely no support for the appellant's final assertion that the court abused discretion in the appointment of Mr. Gould instead of the petitioner, who was appellant's brother. In the absence of a transcript of the testimony and proceedings before the court, of course, there could be no successful attempt to establish abuse of discretion, because all intendments and presumptions are in favor of the regularity and propriety of the order.

The judgment and the order appointing a guardian are affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.

---

179 Cal. 119

## BUMILLER v. BUMILLER. (L. A. 4566.)

(Supreme Court of California. Oct. 4, 1918. On Rehearing, Oct. 31, 1918.)

1. CORPORATIONS ⊂⊃123(7) — PLEDGE OF STOCK—TITLE—CLAIMS OF THIRD PERSONS.
A pledgee of corporation stock cannot assert ownership thereof in any other person than his pledgor, in the absence of any claim of ownership by such third person, or of a demand on his part for delivery of the pledged property to him.

2. CORPORATIONS ⊂⊃123(7) — PLEDGE OF STOCK—OWNERSHIP—PRESUMPTIONS.
A pledgor of corporation stock, shown to have been in possession thereof and exercising acts of ownership over it, will be presumed to have been the owner of the stock, in view of Code Civ. Proc. § 1963, subds. 11, 12.

3. CORPORATIONS ⊂⊃123(23) — PLEDGE OF STOCK—REDEMPTION—SUBROGATION.
A plaintiff, who has acquired an interest in corporation stock pledged, may redeem it from the lien under Civ. Code, § 2903, by an offer of performance of the obligation of which the stock was security in accordance with section 2904, and title 4, c. 2, and under section 2903 is subrogated to all the benefits of the lien as against all owners of other interests.

4. PLEDGES ⊂⊃48 — RIGHTS OF PLEDGOR — CONVERSION.
One who has acquired an interest in pledged property, and tenders performance of the obligation for which the pledge has been made, may maintain an action against the pledgee for conversion upon his refusal to deliver the pledged property on demand.

On Rehearing.

5. CORPORATIONS ⊂⊃123(16) — PLEDGE OF STOCK—INTEREST OF THIRD PERSONS—JUDGMENT.
Where plaintiff had acquired an interest in three-fifths of corporation stock pledged, it was not error, in a suit for the possession of such stock, to give an alternative judgment that, if defendant failed to deliver his stock and note which it secured, plaintiff was entitled to damages equivalent to three-fifths of the value of the stock.

Department 1. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Eckley B. Bumiller against Arthur W. Bumiller. Judgment for plaintiff, and defendant appeals. Reversed and remanded for retrial on single issue.

Overton, Lyman & Plumb, of Los Angeles, for appellant. Edwin A. Meserve and Shirley E. Meserve, both of Los Angeles (J. D. Taggart, of Los Angeles, of counsel), for respondent.

RICHARDS, Judge pro tem. This is an action in which the plaintiff seeks to recover from the defendant the possession of 25 shares of stock of the Western Union Oil Company or its value, with damages for its detention. The plaintiff alleges in her amended complaint that, being the wife of one Joseph F. Bumiller, she commenced on March 14, 1914, an action against him in the county of Los Angeles for divorce and for a division of certain community property, of which the stock in question was alleged to be a portion; that in said action an interlocutory decree was duly entered on June 18, 1914, wherein it was adjudged and decreed that said stock, which was then standing on the books of the corporation in the name of one D. A. McGilvray, was the community property of the parties to that action; that the said stock had been pledged by said Joseph F. Bumiller to Arthur W. Bumiller, the defendant in this case, as security for the payment to him of the sum of $1,000, evidenced by a promissory note for that amount executed by Joseph F. Bumiller to said Arthur W. Bumiller; that a three-fifths interest in said 25 shares of stock was thereby awarded and set apart to said plaintiff as her separate property and estate, and that the said Joseph F. Bumiller be and he was thereby ordered and directed to transfer or cause to be transferred to said plaintiff said three-fifths inter-

est in said stock. The complaint proceeded to allege that the said Joseph F. Bumiller, not having complied with the said direction and order in said interlocutory decree, proceedings for contempt were instituted by said plaintiff against him, in which proceedings the court again ordered said defendant Joseph F. Bumiller to transfer her three-fifths interest in said stock to plaintiff, subject to the pledge of the whole thereof to said Arthur W. Bumiller as security for the said note which the defendant Joseph F. Bumiller was directed to pay; that upon being served with a copy of this latter order said Joseph F. Bumiller made, executed, and delivered to plaintiff an assignment of an undivided three-fifths of said stock; that thereupon and on December 21, 1914, the plaintiff herein made a written tender to said Arthur W. Bumiller of the amount of the principal and interest of the said promissory note as the security for the payment of which the whole of said stock was pledged; that said Arthur W. Bumiller, without objecting to the form or amount of said tender, refused to accept the same, whereupon the plaintiff deposited the amount thereof in the Citizens' National Bank of Los Angeles to the credit of the said defendant herein, Arthur W. Bumiller, and notified him of the fact of said deposit; that thereafter, and at various times prior to the institution of this action the plaintiff made other and similar written tenders of payment in full of said note to the defendant herein, copies of all of which tenders were attached to and made parts of the complaint; that the only objections which said defendant made to any of such tenders were the objection that such tenders did not provide for the protection of the defendant, Arthur W. Bumiller, against any claims which D. A. McGilvray may have to said stock arising out of the fact that it stood in his name upon the books of the corporation, and the further objection that Joseph F. Bumiller had instructed said Arthur W. Bumiller to turn over no property of his to said plaintiff without a written order from him. The plaintiff further avers that the said defendant still holds said stock in his possession and refuses to deliver any portion thereof to the plaintiff, and that the value of the stock is the sum of $3,000. Wherefore the plaintiff prays judgment that she is entitled to the possession of said note and of said stock, and that said defendant be required to deliver the same to her or pay the sum of $3,000, the value of said stock, and for such other and further relief as may be meet in the premises.

The answer of the defendant admitted the existence of the divorce action and the making and entry of the interlocutory judgment therein, as averred in the plaintiff's complaint, and admitted the execution of the assignment by Joseph F. Bumiller of three-fifths of his interest in the stock in question. It also admitted the execution to the defendant by Joseph F. Bumiller of the promissory note referred to in the complaint and the pledge to him by said Joseph F. Bumiller of the stock in question as security for said note. The defendant also substantially admitted that the several tenders alleged to have been made by the plaintiff were in fact made, but denied that the plaintiff had stated in her complaint all of the defendant's objections thereto, and in that regard he appended to his answer several other specified objections to the sufficiency of such tenders. The defendant denied that D. A. McGilvray had no interest in the stock in question, but nowhere in his answer undertook to aver that said McGilvray had in fact any interest therein, or had ever made any claim thereto. The defendant denied that the stock was of the value of $3,000, or of any greater value than $1,875. Finally the defendant averred that he was willing to turn over to the plaintiff three-fifths of said stock upon the payment by her to him of three-fifths of the amount due upon said promissory note, and upon the further production by plaintiff of a release from D. A. McGilvray of all interest in said three-fifths of said stock.

The case proceeded to trial upon the issues thus framed, and the trial court made its findings of fact and conclusions of law in plaintiff's favor, and by its judgment decreed that the plaintiff was entitled to recover from the defendant the possession of the promissory note of Joseph F. Bumiller and the 25 shares of stock held by the defendant as the security thereof, upon payment by the plaintiff to said defendant of the sum of $1,060.53, the principal and interest due on said note, and that the plaintiff be thereupon subrogated to the rights of the defendant in and to said note and said stock, and that in the event that said defendant failed to deliver the same to said plaintiff, as in said judgment directed, the said plaintiff have judgment against him for the sum of $1,800, being three-fifths of the value of said stock, in which event she should not be required to pay to the defendant the amount of said note. It is from this judgment that the defendant prosecutes the present appeal.

The defendant's first contention is that there was no evidence to sustain the finding of the trial court that the stock in question was the community property of the plaintiff and J. F. Bumiller prior to the making of said interlocutory decree; his point in support of said objection being that the only evidence of such community ownership of said stock was the interlocutory decree in an action to which this appellant was not a party, and by which, therefore, he was not bound. But this point, even if it had any value, cannot avail the appellant, since the plaintiff did not rest her right to said stock

upon the terms of said decree alone, but also upon an assignment of her husband's interest in said stock to her to the extent of an undivided three-fifths thereof, which assignment the defendant expressly admitted in his answer to have been made.

[1, 2] The next point urged by the appellant is that there was no evidence other than that contained in the said interlocutory decree that the certificates of stock were indorsed in blank by D. A. McGilvray, in whose name the stock stood upon the books of the corporation. The point has no merit. The defendant in his answer and throughout the entire case repeatedly asserted that he received and held the stock in question as a pledge from Joseph F. Bumiller to secure the promissory note made by the latter to him. As such pledgee of this stock he cannot be heard to assert ownership thereof in any other person than his pledgor, in the absence of any claim of ownership by such third person or of a demand on the part of the latter for the delivery of the pledged property to him. Palmtag v. Doutrick, 59 Cal. 154, 43 Am. Rep. 245; Wetherly v. Straus, 93 Cal. 283, 28 Pac. 1045. The record in this case shows not only that D. A. McGilvray never claimed or asserted any ownership or interest in the stock in question, but further shows as an undisputed fact in the case that Josseph F. Bumiller was, prior to and at the time of making said pledge, in the possession of the whole of said stock and was exercising acts of ownership over it. The presumption thus arises that he was the owner of the stock. Code Civ. Proc. § 1963, subds. 11 and 12. This being so, it is quite immaterial whether or not the name of D. A. McGilvray was indorsed in blank on said stock as found by the court; the important finding being that Joseph F. Bumiller was at the time of its pledge to the defendant and of his assignment of an undivided three-fifths thereof to the plaintiff the owner of the stock.

[3] The defendant made several objections to the tenders proffered by the plaintiff as a predicate to this action at the time of such proffer and at the trial of the case. As to the form of these several tenders, we find them to have been in conformity with chapter 2 of title 4 of the Civil Code, relating to the offer of performance of obligations. The plaintiff, having acquired an interest in the shares of stock which were subject to the defendant's lien as the pledgor thereof, was entitled to redeem it from such lien under section 2903 of the Civil Code, and was entitled to do so by an offer of performance of the obligation of which the stock was the security (Civ. Code, § 2904); and, having done this by the method provided by chapter 2 of title 4 of the Civil Code, was entitled to be subrogated to all of the benefits of the lien as against all owners of other interests in the property (Civ. Code, § 2903). The undisputed evidence shows that the plaintiff tendered to the defendant at the place where he was found, or to his duly authorized agent, the full amount due upon the promissory note for which the stock in question was pledged, and that she made such tender good by a deposit of such amount with a proper depository, giving the defendant due notice thereof. The record also shows that when the parties were in court at the trial of the cause the plaintiff renewed these offers to pay said obligation in full.

[4] These repeated tenders and offers of payment of the promissory note of Joseph F. Bumiller were sufficient to have entitled the plaintiff to a delivery of said note with its security to her, and the defendant's refusal to deliver the same upon demand amounted to a conversion of the property which entitled the plaintiff to bring and maintain this form of action. Loughborough v. McNevin, 74 Cal. 250, 14 Pac. 369, 15 Pac. 773, 5 Am. St. Rep. 435. The plaintiff being thus entitled to an undivided three-fifths interest in said stock and having thus offered to pay the entire obligation evidenced by said note, the defendant's offer in his pleadings and at the trial to turn over to her a portion of said stock upon payment of a part of the note did not measure up to her rights in the premises as defined by the foregoing sections of the Civil Code, and was therefore properly refused by her, and was also properly rejected by the trial court in its findings and judgment.

The appellant finally urges that the trial court was in error in that portion of its alternative judgment to the effect that, in the event of the defendant's failure or refusal to deliver the note and stock as directed, the plaintiff should be entitled to recover judgment in the sum of $1,800 for the conversion of the stock, being three-fifths of the value thereof. The appellant insists that, though the plaintiff alleged the stock to be of the value of $3,000, she offered no evidence to sustain such allegation. In this we think the appellant is correct; but in his answer the defendant, while denying that the stock was of the value of $3,000, expressly admitted that its value was the sum of $1,875, and he now contends that the trial court, acting upon such admission, could only have given its alternative judgment for three-fifths of said sum or the sum of $1,125. We think this contention must be sustained. It does not follow, however, that the judgment should be reversed on account of this error. The court having found the plaintiff to be entitled to an alternative judgment against the defendant for a sum equal to three-fifths of the value of the stock, in the event of the failure of the defendant to deliver the same to her, and the value of the stock as an admitted fact in the case being the sum of $1,875, the judgment may be modified, so as to require the defendant to pay to the plaintiff a sum equal to three-fifths of said last-

named value, or the sum of $1,125, in the event of his failure to deliver the stock to her as directed in the earlier part of the judgment.

The trial court is directed to make such modification of the judgment in accordance with the views above expressed. In all other respects the judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.

On Rehearing.

PER CURIAM. [5] We are of the opinion that the concluding portion of the department decision, reading as follows, namely:

"In this we think the appellant is correct; but in his answer the defendant, while denying that the stock was of the value of $3,000, expressly admitted that its value was the sum of $1,875, and he now contends that the trial court, acting upon such admission, could only have given its alternative judgment for three-fifths of said sum or the sum of $1,125. We think this contention must be sustained. It does not follow, however, that the judgment should be reversed on account of this error. The court having found the plaintiff to be entitled to an alternative judgment against the defendant for a sum equal to three-fifths of the value of the stock, in the event of the failure of the defendant to deliver the same to her, and the value of the stock as an admitted fact in the case being the sum of $1,875, the judgment may be modified, so as to require the defendant to pay to the plaintiff a sum equal to three-fifths of said last-named value, or the sum of $1,125, in the event of his failure to deliver the stock to her as directed in the earlier part of the judgment.

"The trial court is directed to make such modification of the judgment in accordance with the views above expressed. In all other respects the judgment is affirmed"

—should be modified, so as to read as follows:

"We think that the trial court was not in error in its conclusion that the plaintiff was entitled in the alternative portion of her judgment to a recovery of an amount of damages equal to three-fifths of the value of the 25 shares of stock in the event of the failure or refusal of the defendant to deliver the whole of the said stock to her in conformity with the terms of the judgment in her favor for the possession thereof; but we think that the appellant is correct in his contention that there was no evidence to support the finding of the trial court upon the issue as to the value of said stock, upon which the amount of its alternative judgment was predicated. It follows that the cause should be remanded for retrial upon this single issue; and it will be so ordered."

The judgment heretofore given is modified to read as follows:

"Judgment reversed, and cause remanded for retrial upon the single issue as to the value of the 25 shares of stock in question; and upon a determination of this issue the trial court is hereby directed to make its finding thereon, and to thereupon enter judgment in plaintiff's favor for the possession of the whole of said stock, or, in the event of the defendant's failure or refusal to deliver the same, an alternative judgment in damages against the defendant for a sum equal to three-fifths of the entire value of said stock, as found by the court upon the retrial of said issue."

38 Cal. App. 231

## COULTER DRY GOODS CO. v. MUNFORD et ux. (Civ. 2258.)

(District Court of Appeal, Second District, California. Sept. 19, 1918.)

1. HUSBAND AND WIFE ⟸19(7) — NECESSARIES—HUSBAND'S LIABILITY.

One who has sold clothing and other dry goods to a wife and charged to her account cannot collect therefor from the husband without proving that the husband had neglected to make adequate provision for the support of the wife, in view of Civ. Code, § 174.

2. EVIDENCE ⟸271(13)—CONVERSATIONS BETWEEN PLAINTIFF'S AGENTS.

In an action against husband and wife for goods furnished the wife, testimony relating to conversations between plaintiff's general manager and its creditman about the affairs and financial responsibility of defendants, not made in the presence of either defendant or with their knowledge, to prove the account was charged to both, was properly excluded.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by the Coulter Dry Goods Company against E. S. Munford and wife. Judgment in favor of E. S. Munford and against wife. From the judgment for named defendant, plaintiff appeals. Affirmed.

Ward Chapman and L. M. Chapman, both of Los Angeles, for appellant. George Beebe and J. M. Wright, both of Los Angeles, for respondents.

CONREY, P. J. This action was brought against the defendant E. S. Munford and his wife, Mrs. E. S. Munford, upon an account for goods alleged to have been sold to the defendants at their special instance and request. Judgment was entered in favor of E. S. Munford and against the other defendant. Plaintiff appeals from the judgment in favor of E. S. Munford.

[1] The items of account consisted of clothing and other dry goods furnished to Mrs. Munford while she was residing at Los Angeles. The husband at that time resided elsewhere, but their separation was temporary and the case does not involve any defense on the ground that the defendants were living separate and apart from each other. Mr. Munford testified that he did not know anything of the account until after the articles were furnished and that his wife never informed him of the fact that she had opened the account. He was receiving a salary of $416 per month and was sending to his wife for the support of herself and children the sum of $300 per month. She also had some separate income. Mr. Frank Coulter appears to have been an officer and one of the managers of the plaintiff. Mrs. Munford testified that for some time after she began trading with the plaintiff she paid cash for the articles purchased by her, until after she was urged by Mr. Coulter and by Mr. Baker, the general manager, to open a credit account.

This was done by Mr. Baker, and the account was made in the name of Mrs. Munford. She testified that Mr. Frank Coulter knew that her husband was providing her with $300 a month, and that that sum was sufficient for the support of herself and family. There is no evidence tending to show that the defendant E. S. Munford neglected to make adequate provision for the support of his wife or family.

"If the husband neglect to make adequate provision for the support of his wife, * * * any other person may, in good faith, supply her with articles necessary for her support, and recover the reasonable value thereof from the husband." Civ. Code, § 174.

It will be seen that the Civil Code limits the conditions of liability of a husband for merchandise sold to his wife. In Hoey v. Hechtman, 2 Cal. App. 120, 83 Pac. 85, the complaint alleged that the defendant A. J. Hechtman was indebted to plaintiff's assignor in certain sums for goods, wares, and merchandise sold to Carrie C. Hechtman, wife of the defendant, "and that said goods, wares, and merchandise were common necessaries of life and necessary for the support and maintenance of said Carrie C. Hechtman." In that case it was held by the First District Court of Appeal that defendant's demurrer to the complaint upon the ground that it did not state a cause of action, should have been sustained.

"The complaint does not allege a sale to defendant, and does not allege all the facts necessary under section 174 of the Civil Code, to fix liability upon a husband for a sale to the wife"—citing Simon, Jacobs & Co. v. Scott, 53 Cal. 76, and Nissen v. Bendixsen, 69 Cal. 521, 11 Pac. 29.

The court further said:

"In the complaint before us it is alleged that the goods were necessary for the support of the wife, but it is not alleged that the husband had neglected to make adequate provision for her support. Both are essential. The allegation that the goods were necessary for her support refers to the character of the goods as being suitable to her circumstances and condition in life, and such allegation does not import that the husband had neglected to make adequate provision for her support. Under the statute the articles must be necessary for her support and the husband must have neglected to make adequate provision for her support."

In St. Vincent's Institution, etc., v. Davis, 129 Cal. 17, 61 Pac. 476, the Supreme Court referred to section 174 of the Civil Code and stated that under the provisions of that section whoever supplies necessaries for the support of a wife must, in order to recover therefor against the husband, show that the husband had failed to make adequate provision for the support of his wife. There being no such proof, it was held that the plaintiff was not entitled to recover. The same rule is applicable to the case at bar, for we must presume that the court believed the testimony of the defendants, notwithstanding that it was inconsistent with some of the testimony presented on behalf of the plaintiff.

Counsel for appellant say in their brief that it is an uncontradicted fact that, when this account was first brought to the attention of Mr. Munford by means of a letter from the plaintiff, he wrote to Mr. Coulter a letter which contained an admission of his liability and a promise to pay the indebtedness when he got in better circumstances. That letter was lost, but one of the plaintiff's witnesses testified concerning its contents. But counsel are wrong in stating that the fact thus shown is uncontradicted, for their brief contains a quotation from the testimony of Mr. Munford in which he directly denies that in any such letter he said that he owed the account or that he would pay it.

[2] Appellant claims that the court erred in excluding testimony offered by the plaintiff for the purpose of proving that the account was opened on the credit of the husband, as well as the wife. This offered testimony related to conversations between the general manager of the plaintiff and its "creditman," and to statements made by the manager to the creditman about the affairs and financial responsibility of the defendants. These statements were not made in the presence of the defendants or either of them, or with their knowledge, and the objections were properly sustained.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

---

38 Cal. App. 222

## SANDER v. LOS ANGELES RY. CORPORATION. (Civ. 2570.)

(District Court of Appeal, Second District, California. Sept. 19, 1918. Rehearing Denied by Supreme Court Nov. 18, 1918.)

1. CARRIERS ⟸316(7) — NEGLIGENCE — PRESUMPTION FROM INJURY.
Where plaintiff showed that she was injured when alighting from defendant's street car through the catching of her skirt upon a knob, an appliance which served as a bumper to intercept sliding iron gate of car, she was entitled under the doctrine of res ipsa loquitur to presumption of negligence until defendant had excused itself.

2. TRIAL ⟸419 — MOTION FOR NONSUIT — WAIVER OF ERROR.
Error in denying nonsuit at close of plaintiff's evidence is waived by defendant supplementing plaintiff's proof by showing more fully the attendant conditions.

3. APPEAL AND ERROR ⟸991 — REVIEW — QUESTIONS OF FACT.
Whether negligence or want of it has been shown in a particular case is generally a question of fact to be determined by the trial court or jury.

4. CARRIERS ⟸318(3)—INJURY TO PASSENGER —NEGLIGENCE—EVIDENCE.
In action for injuries sustained by plaintiff, whose skirt, when she was alighting from defendant's street car, caught upon a knob which served as a bumper to intercept street car gate,

evidence *held* to support trial court's finding of negligence.

5. CARRIERS ⟸292(2)—INJURY TO PASSENGER —DEFENSE.

That defendant street railway company's claim agent had received no report of prior accident due to skirt of passenger catching on knob which served as a bumper to intercept street car gate would not be a complete defense to charge of negligence.

6. APPEAL AND ERROR ⟸996 — DETERMINATION BASED ON FACTS.

That different judges sitting at the trial might draw different conclusions upon the facts, as might also different juries, does not authorize interference by appellate court.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Elizabeth Sander against the Los Angeles Railway Corporation. From a judgment for plaintiff, and from an order denying motion for new trial, defendant appeals. Affirmed.

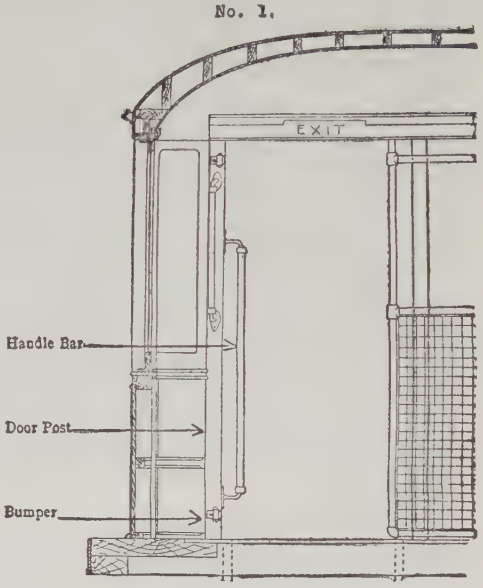
Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for appellant.

Park & Park and Wheaton A. Gray, all of Los Angeles, for respondent.

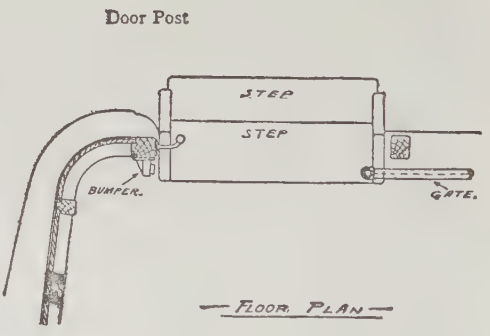
JAMES, J. Defendant appeals from a judgment entered in favor of plaintiff and from an order denying its motion for a new trial.

The action was to recover damages alleged to have been suffered by the plaintiff through the negligence of the defendant. Defendant was a common carrier of passengers, and plaintiff was a passenger on one of its electric cars in the city of Los Angeles when she suffered her alleged injuries. The car upon which plaintiff was riding was at a standstill, having stopped to permit the discharge of passengers. Plaintiff was preceded from the car by her husband. As she reached the exit space opposite the steps (there being two of the latter), she had a package in her right hand and took hold of the handguard with her left. As she stepped downward upon the steps, her skirt was caught on a protruding knob affixed near the floor at the left hand of the exit, and she was thrown to the street, where she struck upon her back. In her complaint the negligence charged against the defendant was that the knob was negligently placed in its position by the defendant and so placed as to constitute a dangerous contrivance. The case was tried before the court sitting without a jury, and by the decision of the trial judge the sum of $2,500 was awarded to the plaintiff. On this appeal the defendant makes no contention against the amount of damages awarded or the extent of plaintiff's injuries. The sole contention is that no negligence whatsoever was shown by reason of which the defendant was chargeable for any amount of damages. The knob upon which plaintiff's skirt caught was a small contrivance which served as a bumper to intercept the sliding iron gate which closed the exit of the car. There were two of these bumpers the one about which complaint is made being located four inches from the floor of the car, and the other near the top of the door, about six feet from the floor. There being no dispute in the evidence as to the location of the bumper or the manner of construction of the car at the place of exit, we may use for purposes of illustration two drawings attached to appellant's brief which it is agreed are correct:

No. 1.




No. 2.




Drawing No. 1 is a view from the interior of the front platform showing the exit door open; also the bumper near the floor, attached to the doorpost. No. 2 gives a view of the steps of the car looking downward immediately over the same. A duplicate of the contrivance, which is termed a "bumper," was submitted under stipulation in this court by the parties, and we have it before us for examination. This bumper consists of an iron plate about 2¾ inches long by 1½ inches wide, with an ell piece which is

made to fit on the inside of the doorpost. According to the testimony, this ell piece was set into the doorpost so that the piece was flush with the post on that side. A round iron projection extends above the plate to a height of about an inch and a half, and into this is set a solid rubber piece, cylindrical in shape, designed to receive the jar of the door when closed. This projection above the plate answers in general description to a section of 1½-inch pipe closed on one side and holding the rubber on the other, except that on the opposite side to that holding the rubber, and extending halfway up on the projection, is an iron brace, all a part of the casting. The casting is rough in kind and painted. The testimony introduced on behalf of the plaintiff to show the circumstances of the accident went only to the extent of describing the facts as we have first stated them, not presenting any description of the bumper itself or the way it was applied. Defendant at the conclusion of this testimony moved for a judgment of nonsuit, which motion was denied. Thereupon defendant introduced as a witness its master mechanic. He testified that it was his business to design all attachments for the cars of his employer, and that he had done this for about 12 years. He explained the method of construction of the car platform and bumper, and said:

"I consider that one of the most practical buffers that I could possibly adopt for that. I designed that car, and in studying that out, I had to have something to bump against, and the idea of putting it in that position as that was, throwing it out, in order that when they went to get past between the post and the buffer, the buffer was to keep it back far enough, so that you couldn't get your fingers between the sliding gate and the post, and is the reason why the buffer was placed back beyond the face of the post, so as to get room enough, so if anybody getting out of the car, or were getting in the car while the door was in action it couldn't pinch their fingers, and that is the reason why it is constructed in that manner. A further reason for placing the buffer out of the passageway, making the exit from there, was that we couldn't put one at the top and one at the bottom on account of throwing the gates out of square. It was necessary to put it in that position in order to have sufficient strength to support it. This buffer comes up even with the left-hand post as you get out of the car. I have been engaged in the railway business for about 35 years. I spent about a year and a half designing these cars before they were actually put in operation. We tried other buffers as experiments, but this buffer proved to be the most satisfactory that we have ever gotten out. This buffer is a modification of the original buffer that was put on."

On cross-examination the witness was asked various questions tending to elicit information as to whether the buffer casting could not have been extended all the way back to the front wall of the car (a distance of from twelve to fourteen inches), and he gave his view that it would not be practicable to do so. On further examination he stated that it could be so constructed, although he did not think it would be any better that way, saying:

"I don't think it would be impossible for a woman's garment to catch upon it if it were extended back to the end of the car. Her dress is as liable to be caught in underneath because we can't cover the whole distance from the floor of the car to the bumper."

Asked whether any shields had ever been placed over the bumpers, he replied, "No, sir."

The general claim agent of defendant company testified as follows:

"My duty regarding claims and injuries is to investigate all reports received, and to investigate all injuries, and as to how they occur. That has been my position with the defendant for 23 years. As claim agent of the railroad, I have a report of the number of passengers carried by the cars of the company."

He then stated that, during the year 1913 (it being alleged that the accident in question occurred on the 4th day of September, 1913), there had been carried on cars having the bumper attachments 88,236,273 passengers. He stated that as claim agent of the defendant he did not during the year 1913 receive any report or claim for injury other than the claim of the plaintiff arising out of an accident caused by the bumper, and further stated:

"The claim department watches all equipment on cars. If there is any complaint of anything dangerous, we notify the operating department; and, during that time all these millions of people carried, there has never been a question come up about any question on the cars. We have never received any report of any accident other than the one the plaintiff here received from this bumper or buffer."

Another witness, the assistant superintendent of the defendant, testified that he regarded the bumper as a safe appliance; but the appellant in its brief suggests that possibly this witness was not sufficiently qualified to give that opinion.

[1] Appellant first argues that the judgment of nonsuit should have been granted because there was no proof made by the plaintiff tending to show that the defendant had in any way been negligent. Appellant, under the facts adduced by the plaintiff, denies the application of the doctrine of res ipsa loquitur. It is true enough that negligence will not be implied from the mere fact of injury, and it is also true that the plaintiff, at the time she rested her case, had furnished the trial court with no information as to the construction of the bumper, its character, or location upon the car. She did, however, show that she was injured through the catching of her skirt upon an appliance affixed to the car by the defendant, and we are inclined to the view that enough was supplied, under the rule adverted to as affecting carriers of passengers, to entitle her to the presumption of negligence until the defendant had excused itself by evidence. In Steele v. Pacific Electric Ry. Co., 168 Cal. 375, 143 Pac. 718, the court states that, before negligence will be implied, "it must first be shown

that the injury came from the movement of the car by those in charge of it, or from something connected therewith, or in control of the defendant." She did show that her skirt caught upon the bumper and that the bumper was an appliance connected with the car. The rule adverted to is further defined in Fink v. Slade, 66 App. Div. 105, 72 N. Y. Supp. 824, as follows:

The doctrine "relates simply to the probative force of evidence. It does not dispense with the necessity of evidence of the defendant's negligence in any case, but, on the contrary, expressly requires it. * * * Attendant circumstances * * * must be such as will warrant an inference, not of negligence only, but of the defendant's negligence. * * * It is not that, in any case, negligence can be assumed from the mere fact of an accident and injury; but in these cases the surrounding circumstances, which are necessarily brought into view by showing how the accident occurred, contain, without further proof, sufficient evidence of the defendant's duty and of his neglect to perform it."

[2] We think, however, that it becomes immaterial for consideration here as to whether the trial judge erred in denying the motion for judgment of nonsuit. The defendant was not content to rest upon the plaintiff's testimony and its motion for such a judgment, but introduced independent evidence showing fully the description of the bumper, the method of attachment thereof and the general construction of the car in the part concerned in the accident; in other words, the defendant supplemented the proof made by the plaintiff by showing more fully the attendant conditions. It therefore becomes a question as to whether upon the whole evidence the court was justified in concluding that defendant had failed to use that degree of care toward its passenger which the law requires of it. Counsel for appellant, upon this general question, contend that, where the evidence fails to show that an appliance is improperly placed or attached and it has been used for a long period of time without causing an accident, any suggestion of negligence is repelled and it must be concluded that the carrier has done its full duty.

In support of this contention, Morris v. Southern Pacific Co., 168 Cal. 490, 143 Pac. 708, is cited. This case is cited particularly because it quotes approvingly from Holt v. Southwest Missouri Electric Ry. Co., 84 Mo. App. 443, this declaration:

"A carrier of passengers is not obliged to proceed to provide against casualties which have not been known to occur before and which may not reasonably be anticipated. * * * That which never happened before, and which in its character is such as not naturally to occur to prudent men to guard against its happening at all, cannot, when, in the course of years, it does happen, furnish good grounds for charge of negligence in not foreseeing its happening and guarding against that remote contingency."

Morris v. Southern Pacific Co., supra, was a case entirely different in its facts from this and referred to an accident occurring by the undermining of the roadbed of defendant by "unprecedented" high water. The Missouri case was one where the passenger boarding a car was struck by the revolving handle of the brake, which had been set loose by the dislodging of a dog set in a ratchet. The brake handle was caused to revolve through the accidental releasing of the dog, either by the foot of the passenger boarding the car or the jarring of the brake by the passenger, or a jar caused by some other person, the platform being crowded at the time. The Missouri court held that as a matter of law no negligence was shown against the defendant, although it announced in its decision that the conclusion was not reached "without difficulty." There is an Illinois case in which the court, under very similar facts, held that it was a question for the jury to decide as to whether negligence had been shown. Cleveland, etc., Ry. Co. v. McHenry, 47 Ill. App. 301.

[3] The question as to whether negligence or the want of it has been shown in a particular case is generally a matter of fact to be determined by the trial court or jury. In Seller v. Market Street Ry. Co., 139 Cal. 268, 72 Pac. 1006, the court said:

"It has often been said by this court that it is very rare that a set of circumstances is presented which enables a court to say, as a matter of law, that negligence has been shown. As a general rule, it is a question of fact for the jury, an inference to be deduced from the circumstances of each particular case, and it is only where the deduction to be drawn is inevitably that of negligence that the court is authorized to withdraw the question from the jury. This is true, even where there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn therefrom. If the conceded facts are such that reasonable minds might differ upon the question as to whether or not one was negligent, the question is one of fact for the jury. These rules are so well settled as to render it unnecessary to here do more than state them."

[4, 5] In reviewing the evidence in this case, we are of opinion that to declare as a matter of law that no negligence was shown would be to trespass upon the province of the trial judge and substitute our judgment for his as to the matter of fact upon which there might be different conclusions. So far as the evidence shows, the appliance complained of had only been used during the year 1913. It might be well concluded, from the position in which it was placed and the character of its construction, that a woman's skirt, if it chanced to fall against it as the passenger lowered herself to reach the steps, would catch and hold upon the corners of it. It would be reasonable to conclude, also, that by some very inexpensive means the sharp corners of the bumper could be shielded so that clothing could not catch upon them. If these deductions are allowable, then it must very clearly appear that the high degree of care required of passenger carriers had not been observed and that negligence was therefore shown. Hence the judgment could not here be set aside unless it may be said that the showing made by defendant as to the nonhappening of accidents while many millions

of passengers had been carried was a complete answer to the charge. The particular evidence introduced to this point was general and showed only that the claim agent had received no report of accidents due to that cause or claims for damages. This showing does not negative the possibility that a great many skirts of women passengers may have caught upon the bumpers and no complaint made because of the fact. There was no showing that all such occurrences were required to be reported by the operatives of the cars, and we cannot assume that such was the rule. But, aside from all of this, and assuming for the moment that the evidence was complete upon that point, we do not think that under the particular facts here shown the answer of the defendant would be as complete as the case made out by the plaintiff. If such were true, then that defense would be a perfect one, however dangerous the appliance causing an injury to a passenger might appear to be, as shown by the independent facts.

[6] Different judges sitting at the trial might conclude differently upon those facts, as might also different juries; but, having once made a determination, the appellate courts are without power to declare a different judgment.

For the reasons given, the judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

---

38 Cal. App. 277

## WRIGHT et ux. v. YOSEMITE TRANSP. CO.

(Civ. 2516.)

(District Court of Appeal, First District, California. Sept. 25, 1918. Rehearing Denied Oct. 25, 1918; Denied by Supreme Court, Nov. 21, 1918.)

1. CARRIERS ⊂⊃280(2)—PASSENGERS—PERSONAL INJURY—CARE REQUIRED—STATUTE.
A transportation company running stage routes, being a carrier of persons for reward, "must use the utmost care and diligence for their safe carriage," as provided in Civ. Code, § 2100.

2. CARRIERS ⊂⊃316(1) — PERSONAL INJURY — ACTIONS—NEGLIGENCE—BURDEN OF PROOF.
After plaintiffs had introduced evidence showing the circumstances surrounding the personal injury of one of them while a passenger on defendant's stage, which went off a grade, the burden of proving itself free from negligence rested on defendant.

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Action by W. H. Wright and wife against the Yosemite Transportation Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

See, also, 28 Cal. App. 279, 152 Pac. 54.

Myrick & Deering and Jas. Walter Scott, all of San Francisco, and F. P. Tuttle, of Merced, for appellant. R. C. Gortner, of Los Angeles, and John A. Wall, of Mariposa, for respondents.

BEASLY, Judge pro tem. This was an action in which the plaintiffs, who are husband and wife, obtained a judgment against the defendant, Yosemite Transportation Company, for $3,500 for injury to the wife suffered in an accident by which one of the defendant's stages went off the grade between Camp Curry and El Portal in the Merced Canyon in Yosemite Valley on the 10th day of July, 1910. As will be indicated by the length of time since the acccident, the case has a history. This and a companion case by Wright against the company for the injuries to his wife were tried originally before a jury in the superior court of Mariposa county, Judge Trabucco presiding, and resulted in a judgment in favor of the company in the case we are now discussing. The plaintiffs moved for a new trial on various grounds, and the trial judge granted the motions, whereupon an appeal was taken from the order, and the matter was decided in the District Court of Appeal for the Third District in the case entitled as above, and reported in 28 Cal. App. 279, 152 Pac. 54. It was contended on that appeal by the Wrights that the trial court was warranted in granting the new trial upon the ground that from the evidence the jury should have found a verdict in their favor. Necessarily, this involved passing upon the question of whether the evidence was sufficient to warrant such a verdict; and in that case Mr. Justice Hart, in an elaborate opinion, held that the trial court was justified in granting the new trial upon that ground, and therefore sustained the order appealed from. The case was returned to the superior court of Mariposa county for a second trial, and was tried before Judge Trabucco sitting without a jury, and the judgment from which this appeal is taken was in due course given by him.

[1, 2] We have examined the evidence upon the second trial with care. While stated in different language from that of the opinion of Mr. Justice Hart, above referred to, the evidence at the second trial does not in effect differ from the evidence as recited by him, and we are not disposed to quarrel with the conclusion which he reached. The only point insisted upon here is that the findings of negligence on the part of the stage company are not supported by the evidence. "A carrier of persons for reward must use the utmost care and diligence for their safe carriage." Civ. Code, § 2100. The burden of proving itself free from negligence rested upon the defendant in this case after plaintiffs had introduced their evidence showing the circumstances surrounding Mrs. Wright's injury; and, even if we were disposed to question the conclusion reached by the appellate court for the Third district on that

point, we are still not convinced that the defendant established its freedom from negligence by a preponderance of the evidence.

The judgment is affirmed.

We concur: LENNON, P. J.; STURTEVANT, Judge pro tem.

38 Cal. App. 782

## WRIGHT v. YOSEMITE TRANSP. CO.

(Civ. 2517.)

(District Court of Appeal, First District, California. Sept. 25, 1918. Rehearing Denied Oct. 25, 1918; Denied by Supreme Court, Nov. 21, 1918.)

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Action by W. H. Wright against the Yosemite Transportation Company. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 28 Cal. App. 279, 152 Pac. 54.

Myrick & Deering and James Walter Scott, all of San Francisco, and F. P. Tuttle, of Merced, for appellant. R. C. Gortner, of Los Angeles, and John A. Wall, of Mariposa, for respondent.

PER CURIAM. This case involves the same question as the case bearing the same title and numbered in this court No. 2516 (175 Pac. 905), this day decided.

For the reasons given in the opinion affirming the judgment in that case, the judgment in this case is also affirmed.

38 Cal. App. 268

## BRANDON v. SULLIVAN TRACTOR CO. et al.

(Civ. 2452.)

(District Court of Appeal, First District, California. Sept. 24, 1918.)

JUDGMENT ⊂=143(12)—OPENING DEFAULT—GROUNDS.

Where it appears that defendant's attorney labored under mistake of law as to the time necessary to file an answer after a general demurrer had been overruled, and the delay was only for two weeks, it was not error to open a judgment taken by default.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Zar A. Brandon against the Sullivan Tractor Company and others. From an order setting aside a default judgment, plaintiff appeals. Affirmed.

Ransey Probasco, of Oakland, and Sapiro & Ehrlich, of San Francisco, for appellant. De Lancey C. Smith, of Oakland, for respondents.

STURTEVANT, Judge pro tem. This is an appeal from an order of the superior court of Alameda county, setting aside a default judgment which had been entered against the respondents, and permitting them to file an answer.

The plaintiff filed a complaint against the defendants, and on August 17, 1916, the superior court overruled a general demurrer to this complaint, but in doing so granted the defendants permission to file a special demurrer within five days thereafter. On the 28th day of August, 1916, no special demurrer or answer having been filed, the default of the defendant Sullivan Tractor Company, a corporation, was entered by the clerk upon the request of the plaintiff. On the 8th day of September the clerk, upon plaintiff's request, entered the default of the remaining defendants, and on the same day the court ordered judgment as prayed against all of the defendants. Thereafter, and on the 11th day of September, 1916, the defendants gave notice that they would move to set aside their default, and the judgment entered pursuant thereto, under section 473 of the Code of Civil Procedure, and upon the ground that these proceedings were taken against them by reason of excusable neglect. They supported this notice, and a motion subsequently made and granted pursuant thereto, by certain affidavits.

One of these affidavits was by Hon. Milton T. Farmer, the judge who overruled the general demurrer, in which he stated that, had he been requested, at the time the demurrer was overruled, to grant the defendants time in which to answer he would have granted them at least ten days for such purpose. The other material affidavit is by Mr. De Lancey C. Smith. Mr. Smith deposes that his failure to ask for time in which to answer was due entirely to inadvertence and excusable neglect, by reason of the fact that at the time the general demurrer was overruled it was his intention to demur specially, as suggested by the court, and that, if he had done so, the necessity for filing an answer would not have arisen for some time thereafter; that this neglect of his arose from the fact that it is the common practice and usage in the superior court of Alameda county for the prevailing party at the hearing of the demurrer to serve upon the adverse party notice of the ruling of that court upon such demurrer, and the party served with such notice computes his time to appear next from the service of such notice, and in accordance with this practice he had a conversation with Ransey Probasco, one of the attorneys for the plaintiff, on or about the 26th day of August, during which he discussed with Probasco the fact that up to the time of that conversation plaintiff had not served the defendants with notice of the court's ruling at the hearing of the demurrer held on the 17th of August, and that Probasco during that conversation stated that he thought notice had been served, and, if it had not been, he would serve it immediately. In this affidavit, Mr. Smith admits that he was negligent in not asking the court for time in which to answer, if he should conclude not to file the special demurrer suggested, and states in addition to the foregoing facts that it was due to his excusable neglect in not so requesting the court for time for that purpose, and that he

overlooked the necessity of answering within ten days.

The lower court, after hearing the motion, granted it, and the plaintiff appeals from this order, on the ground that the neglect of Mr. Smith was inexcusable under the authorities. The appellant claims that the trial court erred in making its order vacating the default, and the appellant relies in this behalf on the rule as stated in Thornton v. Borland, 12 Cal. 439; Smith v. Yreka Co., 14 Cal. 201; Williamson v. Joyce, 140 Cal. 669, 74 Pac. 290; Barron v. Deleval, 58 Cal. 95; Wall v. Heald, 95 Cal. 365, 30 Pac. 551; Bell v. Thompson, 8 Cal. App. 483, 97 Pac. 158; Estate of Keating, 158 Cal. 109, 110 Pac. 109. Those cases were based on facts that are not closely in point. We think the facts in this case bring it within the rule as stated in O'Brien v. Leach, 139 Cal. 220, 72 Pac. 1004, 96 Am. St. Rep. 105; Berri v. Rogero, 168 Cal. 736, 145 Pac. 95; Hagenkamp v. Equitable, 29 Cal. App. 713, 156 Pac. 520.

The record shows that the defendant's attorney labored under a mistake of law, that his delay was for a period of only two weeks, and that he moved promptly when he discovered that a default had been entered.

The order is affirmed.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

---

38 Cal. App. 242

BROWN v. LEE et al. (Civ. 2449.)

(District Court of Appeal, First District, California. Sept. 21, 1918.)

1. GUARDIAN AND WARD ⊂=163—ACCOUNTING—CONCLUSIVENESS.
One who received allowance money for minors from their guardian and acted as a trustee was not bound by the account rendered by the guardian.

2. TRUSTS ⊂=321—COMPENSATION OF TRUSTEE—FAILURE TO ACCOUNT.
Minors who received their allowance through a trustee are entitled to be confronted with proper accounts, vouchers to support them, and to be paid any balance due them, preliminary to the payment of compensation to the trustee.

3. TRUSTS ⊂=315(2) — COMPENSATION OF TRUSTEE—AMOUNT.
A trustee of allowance money for minors, being entitled under Civ. Code, § 2274, and Code Civ. Proc. § 1618, to the same compensation as an executor, was entitled to compensation of about $1,000 for the handling of about $30,000.

4. TRUSTS ⊂=315(3) — COMPENSATION — ACTION TO RECOVER—ACCOUNTING.
The trustee of allowance money for minors should account for all moneys from the beginning of his trust until the bringing of an action for compensation, wherein the minors, by an affirmative defense tantamount to a cross-complaint, sought an accounting.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by D. C. Brown against James A. Lee and another. Judgment for plaintiff, and defendants appeal. Reversed.

N. E. Wretman, of San Jose, and Houghton & Houghton, of San Francisco, for appellants. E. S. Bell, of Napa, and Michael Brown, of San Mateo, for respondent.

STURTEVANT, Judge pro tem. This is an action brought by the plaintiff to recover for services rendered. The plaintiff had judgment in the lower court. The defendants appealed therefrom, and have brought up a bill of exceptions containing a part of the evidence. The defendants contend that the services rendered, if any, were the services of a trustee, and that no recovery should have been had till the plaintiff rendered to the defendants an account of his stewardship.

To ascertain the exact questions presented and how they arise, it is necessary to consider the following facts: On February 20, 1908, the Central Trust Company was appointed guardian of the estates of the defendants, who were at that time minor orphans. On May ——, 1910, P. J. Foote was appointed guardian of the persons of the defendants. September ——, 1910, the probate court made a monthly allowance of $75 per month in favor of each minor. Commencing on that date, the plaintiff received for the defendants the allowance money and continued to receive it during the life of the probate order. Both minors attained their majorities October 18, 1911. The Central Trust Company rendered its final account February 19, 1912. The plaintiff thereafter collected, not only the said allowances, but also the rents, profits, and sales moneys; and expended moneys necessary to cover the personal expenses of the defendants and paid the taxes, insurance, and repairs on the properties of the defendants. These relations continued till about April 1, 1914. On that date a disagreement arose between the parties, and this action followed.

The plaintiff framed his complaint into two counts: In the first one he claimed $4,789.38 as a balance upon a mutual, open, and current account for moneys expended between September 1, 1910, and April 1, 1914; and in the second count he claimed $6,000 for services rendered "as fiscal agent for the defendants," within two years prior to June 8, 1914. The defendants answered by interposing proper denials as to each count and by alleging among other things, that the defendants were minors prior to October 18, 1911; that a guardian of their persons was appointed April ——, 1910; that the Central Trust Company was appointed guardian of their estates on February 29, 1912; that before the commencement of this action the plaintiff received for the account of the defendants large sums of money totaling over $50,000; that during the same time the plaintiff had expended large sums in behalf of the defendants; that the defendants had asked an ac-

counting and none had been rendered. The defendants then prayed that the plaintiff be required to make a full and complete accounting of all of his transactions and for general relief. The trial court made findings: (1) Against the plaintiff on his first count; (2) in favor of the plaintiff on his second count; and (3) in favor of the plaintiff on the affirmative defense.

[1, 2] The trial court excluded proof of, and found against the plaintiff on his first count, because an account had been rendered and settled in the probate court on the application of the trust company. At first glance these rulings would seem to be in favor of the appellants. But, on close consideration, we think the rulings had a double effect. The plaintiff was not bound by the account rendered by the trust company. He was not chargeable with the allowance moneys until he received them. Having received moneys for the account of these defendants, the plaintiff should have been charged therewith; later he should have accounted therefor; and he was entitled to be compensated for all moneys for which he had so accounted. And, conversely, these defendants were bound to bear such burdens, but at the same time they were entitled to be confronted with proper accounts, vouchers to support the same, and to be paid any balance that might be ascertained to be due them.

As the record stands, the merits or demerits of plaintiff's first count have not been ascertained from the point of view of either the plaintiff or the defendant.

The second count was tried on the theory that it presented the whole controversy between the parties litigant. But it will be noted that the pleading by its express terms, was limited to the period described as "within two years prior to June 8, 1914." This allegation split the plaintiff's cause of action.

When, prior to October 18, 1911, such moneys were paid by the trust company, it is conceded by both litigants that this plaintiff received and disbursed the same, but that he has not since accounted for the same. Neither has he accounted for moneys received after the trust company rendered its account. He wrote out such a paper, but his counsel told him not to deliver it, and they did not even offer to bring it forward on the trial, although the defendants were constantly demanding the same.

[3] The trial court allowed the plaintiff $2,500 for his services. He was entitled to the same compensation as an executor. Civ. Code, § 2274; Code Civ. Proc. § 1618. He received and can probably account for about $30,000. Measured by the provisions of section 1618, Code of Civil Procedure, his compensation would have been about $1,000. It appears that he has already received $1,800 as compensation, and, as the record now stands, he has apparently been overpaid.

[4] The affirmative defense was tantamount to a cross-complaint for an accounting. 1 Ency. Plead. & Prac. 98, 99; 1 Corpus Juris, pp. 633–635. The accounting should have been had for the whole period from September —, 1910, till April 1, 1914. After the accounting had been had, the account would have shown on its face: (1) Whether the balance for the whole period was in favor of the plaintiff or in favor of the defendants; (2) the ultimate facts on which the trial court could have estimated the plaintiff's claim for services; and (3) the dimensions of the book account relied on by the plaintiff in his first count.

As the case must go back for a new trial, we think it advisable to suggest that each party be allowed to so amend his pleadings as he may be advised.

The judgment is reversed.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

---

38 Cal. App. 239

## KLIMM et al. v. HENRY COWELL LIME & CEMENT CO. (Civ. 2316.)

(District Court of Appeal, First District, California. Sept. 20, 1918.)

1. MECHANICS' LIENS ⟹132(4) — TIME FOR FILING CLAIMS.
Claims filed more than 30, but within 90, days after completion of structure were filed in time under Code Civ. Proc. § 1187, where no notice of completion was filed.

2. APPEAL AND ERROR ⟹1040(10)—ERRONEOUS RULING ON DEMURRER—HARMLESS ERROR.
Where defendant procured stipulation at trial that building was completed November 15, 1914, he was not prejudiced by overruling of demurrer to complaint, which alleged that work was completed on or about such date.

3. MECHANICS' LIENS ⟹161(4)—INTEREST.
Code Civ. Proc. § 1183, does not prohibit the allowance of interest in mechanics' lien cases.

4. APPEAL AND ERROR ⟹1154—ERRONEOUS JUDGMENT—MODIFICATION.
Where by oversight judgment is entered for $60 more than called for by the findings, direction will be given to trial court to modify judgment by reducing amount of recovery by that amount.

5. COSTS ⟹238(1)—APPEAL TAKEN FOR DELAY—SUCCESSFUL PARTY.
Where appeal appears to be taken for delay only, costs will be allowed a respondent whose judgment is reduced in amount, where appellant would have had relief in trial court, if he had asked therefor.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Consolidated action by Frank J. Klimm and others against the Henry Cowell Lime & Cement Company. Judgment for plaintiffs for the amount of their respective claims with interest, and defendant appeals. Judgment modified by reducing the amount awarded one plaintiff, and in all other respects affirmed.

Hatch & Hatch, of San Francisco, for appellant.

Daniel A. Ryan, Louis P. Dunkley, W. W. Allen, H. K. Eells, E. T. Cooper, Pillsbury, Madison & Sutro, Samuel B. Russell, G. R. Perkins, Adams & Adams, Nowlin, Fassett & Little, Lent & Humphrey, and Adolph Cohen, all of San Francisco, for respondents.

BEASLY, Judge pro tem. This is a consolidated action for the foreclosure of certain mechanics' liens against the property of defendant Henry Cowell Lime & Cement Company. It resulted in a judgment in favor of the lien claimants for the amounts of their respective claims, with interest at the legal rate from November 15, 1914, the date found by the court to be the date of completion, and for the foreclosure of the liens as prayed. The defendant appeals.

The liens were all perfected according to law and filed in time. Some outstanding facts of the case are of interest. The defendant Henry Cowell Lime & Cement Company entered into a contract with Day & Sons to erect and complete a building for $70,000. At the trial of this action it was agreed by all the parties that the building was completed on November 15, 1914, and the court found that the building was in fact completed on or about that date. Sufficient funds were due to the contractor from the defendant at the time of the trial to pay all these claims, with the interest allowed by the court. The contractor did not defend against the claims, but defaulted. It was proven at the trial that Day & Sons did not dispute the claims at all, and it does not appear that the Cement Company disputes any of the foregoing facts. It appeared at the trial, also, that Day & Sons gave a general order to the Cement Company to settle all of these claims. At the outset of the trial its attorney stated to the court that he had placed the matter before his client, and advised it that the trial was to he had on that day, and that his client had furnished him with no defense to the action.

[1] In face of this rather extraordinary record, it is now claimed by the Cement Company that the claims of lien were not filed in time, as they were filed more than 30 days after completion; but no notice of completion was filed, so the lien claimants had 90 days after actual completion within which to file their claims, and the claims were on file within this period. Code Civ. Proc. § 1187.

[2] Another ground urged for reversal is that it was averred in the complaints and found by the court that the building was completed on or about the 15th day of November, 1914; and it is contended that this averment is not sufficiently certain, but that the exact date of completion should have been alleged and found. The defendant raised this point by demurrer to the complaints, and cites Cohn v. Wright, 89 Cal. 86, 26 Pac. 643, in support of his position. But in view of the facts above stated, and especially of the stipulation of the defendant as to the time of completion, which stipulation was sought from two of the plaintiffs by defendant's counsel himself at the trial, the defendant cannot be said to have been prejudiced in any substantial right by the ruling on demurrer, nor by the form of the finding, and this case will not be reversed on that ground, although the case of Cohn v. Wright supports the contention of defendant's counsel.

[3] It is also contended by defendant that no interest can be allowed in mechanics' lien cases, and counsel cites section 1183, Code of Civil Procedure, in support of this contention; but the point is decided against him in Hubbard v. Jurian, 170 Pac. 1093. It will be noted that it is not contended that any of the several amounts of interest allowed was too large, but only that no interest whatever should have been allowed in the case.

[4] The other points made for reversal here are all equally technical with those to which we have called attention, except that in the case of the plaintiff Klimm judgment was entered for $60 more than called for in the findings. We have no doubt that this excess would have been conceded, had attention been called to it before this appeal was taken; but as it is an undeniable error, though evidently caused by oversight, the judgment must be modified, by reducing the amount awarded to Klimm by the sum of $60, and this the superior court is directed to do.

In all other respects the judgment is affirmed.

[5] We are almost persuaded, from a consideration of this entire record, that the appeal was taken for delay only, and therefore his costs on appeal will be allowed Klimm, as well as the other respondents.

We concur: LENNON, P. J.; STURTEVANT, Judge pro tem.

---

38 Cal. App. 245

## BOND v. WALTERS.

## MULLER v. SAME.

(Civ. 2535, 2536.)

(District Court of Appeal, First District, California. Sept. 23, 1918. Rehearing Denied by Supreme Court Nov. 21, 1918.)

1. PUBLIC LANDS ⇐128—PATENTED LANDS—ESTABLISHMENT OF TRUST.

Courts of equity will entertain proceedings to decree that persons who have received patents to land hold them in trust for the true owner.

2. PUBLIC LANDS ⇐128—SUIT TO ESTABLISH TRUST—NECESSARY ALLEGATIONS.

Plaintiff, seeking to enforce a trust as true owner of land held by another under patent, must show by his complaint that he is entitled to the relief sought, that he occupies a status entitling him to control legal title, and that officers who awarded land to defendant, to whom

patent was issued, were imposed upon by fraudulent practices of defendant.

3. PUBLIC LANDS ⊂=128—SUIT TO ESTABLISH TRUST—INSUFFICIENCY OF COMPLAINT.

In suits to enforce trusts as to land held by defendant under patent from United States, complaints *held* insufficient, as failing to allege that plaintiffs, in their contests with defendant before land department, introduced any evidence they had complied with regulations of Department of Interior entitling them to lands but for adverse claim of defendant, and as failing to claim defendant practiced any fraud on government.

4. PLEADING ⊂=8(11)—CONCLUSION—SUIT TO ENFORCE TRUST AS TO PATENTED LAND.

In suit to enforce trust as to lands held by defendant under patent from United States, plaintiff's allegation of conclusion that defendant was not entitled to receive land was not sufficient. He must go further, and show he occupied such a status, having complied with rules of Department of Interior, as entitled him to control title.

5. PUBLIC LANDS ⊂=106(1)—LANDS OF UNITED STATES—REVIEW BY COURTS—DEPARTMENTAL DECISIONS.

Decisions of land department on questions of fact, in absence of showing by plaintiff, seeking to enforce trust as to land patented to defendant, that he has complied with rules of Department of Interior, are not subject to review by courts.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Suits by Benjamin Bond and by Vera Muller against Augusta E. Walters. From judgments of dismissal, plaintiffs appeal. Affirmed.

Charles Kasch, of Ukiah, for appellants.

Preston & Preston, of Ukiah, for respondent.

LENNON, P. J. These suits were brought to have a trust declared in certain lands. The complaints are identical in every respect, except the names of the plaintiffs and the description of the real property involved; and from a stipulation contained in the transcript it appears that it is agreed that the decision in one case shall be determinative of the other.

Plaintiffs have appealed from the judgment of dismissal entered by the trial court after the entry of the default of the plaintiffs, which in each instance was for failure on their part to amend the complaint after the sustaining of general demurrers to the same.

In the complaint in the Bond Case plaintiff seeks to obtain a decree adjudging that the defendant, to whom a United States patent for the lands described in the complaint was issued, holds the title to such land in trust for the plaintiff, and prays for a decree directing the defendant to execute a proper conveyance to him of the land in question.

[1-4] While it is true that courts of equity will entertain proceedings to decree that persons who have received and hold patents to land hold the same in trust for the true owner, a plaintiff in such action must show by his complaint that he is entitled to the relief sought; that he occupies such a status as entitles him to control the legal title; that the officers who awarded the land to another, to whom the title was issued pursuant to the judgment, were imposed upon and deceived by the fraudulent practices of him in whose favor the judgment was given. Such facts must be distinctly alleged and proven. Kentfield v. Hayes, 57 Cal. 409; Aurrecoechea v. Sinclair, 60 Cal. 532. No such allegations are here presented. The complaint alleges, among other things, that in a contest for the lands between plaintiff and defendant filed before the land office, and at a hearing had before the land department, the register and receiver of the United States land office filed their decision, holding that the defendant herein had the legal title to the land in question; that after the entry of such opinion plaintiff appealed to the General Land Office, where the action of the register and receiver was affirmed; that thereafter the plaintiff appealed to the Secretary of the Interior, where such action was again affirmed, and the homestead entry of plaintiff was canceled as to the lands in question because of the prior right of defendant thereto and a patent issued to her. As pointed out by defendant, there is no allegation in the complaint that plaintiff in his contest before the land department introduced any evidence whatever showing that he had complied with the rules and regulations of the Department of the Interior entitling him to the lands in question, but for the adverse claim and contest instituted by the defendant. Nor does the plaintiff in his complaint claim that defendant practiced any fraud or misrepresentation on the government in her contest, nor in any of the proceedings had by her in obtaining the patent to the lands in question. The allegation that defendant was not entitled to receive the land does not suffice. Plaintiff must go further and show that he occupied such a status as entitled him to control the legal title. Jameson v. James, 155 Cal. 275, 100 Pac. 700. And mere conclusions on his part to this effect are insufficient for this purpose.

[5] The decisions of the land department, in the absence of such showing, upon questions of fact, are not subject to review by the courts. Powers v. Leith, 53 Cal. 711; Elliott v. Robbins, 33 Cal. App. 577, 165 Pac. 1042.

The judgment in each case is affirmed.

We concur: BEASLY, Judge pro tem.; STURTEVANT, Judge pro tem.

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

38 Cal. App. 253

## PEOPLE v. FONG SING. (Cr. 435.)

(District Court of Appeal, Third District, California. Sept. 24, 1918. On Petition for Rehearing, Oct. 24, 1918. Rehearing Denied by Supreme Court Nov. 21, 1918.)

1. CRIMINAL LAW ⟸363—EVIDENCE — RES GESTÆ.

Under res gestæ rule by Code Civ. Proc. § 1850, evidence is admissible of extrajudicial declarations tending to explain or show character, motive, purpose, or intent of transaction, itself a fact in dispute, which under ordinary circumstances would be excluded as hearsay or self-serving.

2. CRIMINAL LAW ⟸368(1)—EVIDENCE—RES GESTÆ.

In prosecution for murder, testimony that third person requested a codefendant to go to lumber yard and get lumber, of itself, or in absence of some statement by defendant in response indicating intention to accompany codefendant (in which case testimony would have been admissible), was inadmissible under res gestæ rule in support of defendant's alibi.

3. CRIMINAL LAW ⟸1186(4) — APPEAL — HARMLESS ERROR—EVIDENCE.

In prosecution for murder, court's action in excluding testimony admissible under res gestæ rule in support of defendant's alibi *held* not ground for reversal under Const. art. 6, § 4½, where testimony could have gone no further in support of alibi than that of another witness.

4. CRIMINAL LAW ⟸1043(2)—APPEAL—OBJECTIONS.

In prosecution of Chinese for murder, in view of character of objections to line of cross-examination, no specific objection being made, *held*, that defendant's complaint that questions were improper, as insinuating that defendant's witness was engaged in carrying on an illegal business, could not be reviewed.

5. CRIMINAL LAW ⟸1119(4)—APPEAL—RECORD—CONDUCT OF COUNSEL.

On appeal from conviction of murder, *held* that, in view of record, the appellate court cannot conclude that the special prosecutor went beyond the record when he pointed out a claimed inconsistency between the testimony of defendant and that of his witness.

6. JURY ⟸103(11) — DISQUALIFICATION — READING NEWSPAPER ARTICLE.

If juror in murder case, before being called, had read newspaper article that defendant intended to change his plea from not guilty to guilty, it would not per se disqualify him from sitting, unless his mind was so affected he could not give defendant a fair trial.

7. CRIMINAL LAW ⟸925½(4)—NEW TRIAL—RECEPTION OF EVIDENCE OUT OF COURT.

A new trial after conviction of murder was properly denied under Pen. Code, § 1181, subd. 2, on ground jury received evidence out of court, where it is only shown that newspaper, on withdrawal of defendant's original counsel from case, published article stating defendant intended to change plea of not guilty to guilty, a statement contradicted next day.

On Petition for Rehearing.

8. CRIMINAL LAW ⟸700—DUTY OF PUBLIC PROSECUTOR.

A public prosecutor should be as solicitous of the protection of the rights of a citizen, or other person on trial, as the judge who presides.

9. CRIMINAL LAW ⟸719(1)—TRIAL—ARGUMENT OF PUBLIC PROSECUTOR.

It is improper for public prosecutor to present to jury anything but strictly legal evidence in support of charge, and it is not within sphere of legitimate argument to prejudice defendant's standing by insinuating that some fact bearing strongly against defendant, but not proved by proper evidence, exists in reality.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Fong Sing was convicted of murder in the first degree, and from the judgment, and an order denying new trial, he appeals. Judgment and order affirmed.

Samuel M. Shortridge, of San Francisco, and Webster & Blewett, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant and two other Chinese, Charlie Suey and Sam Mie, were jointly charged by information filed in the superior court of San Joaquin county with the crime of murder in the alleged willful, deliberate, and malicious killing of a fellow countryman named Ching Sing. The defendant was given a separate trial, and the jury convicted him of murder of the first degree, fixing his punishment, however, at imprisonment for life. He has brought the case to this court on appeals from the judgment and the order denying him a new trial.

The homicide occurred in the city of Stockton, in the county above named, on the 5th day of March, 1917, between the hours of 1 and 2 o'clock p. m. There is no claim that the evidence is insufficient to support the verdict, but it is vigorously insisted that prejudicial error was committed by the trial court in certain of its rulings whereby certain evidence offered by the defendant was excluded from the record, that the district attorney and the attorney specially employed to assist in the prosecution of the accused were guilty of misconduct at the trial which so seriously prejudiced the rights of the defendant as to have prevented a fair and impartial trial of the question of his guilt or innocence, and that the court erred in denying the accused a new trial upon the ground, predicated upon an affidavit by the defendant, that the jury received out of court evidence the effect of which was greatly to prejudice the jury against the defendant.

The killing of the deceased, by whomsoever done, involved a deliberate and malignant murder. He was either standing on the sidewalk in front of a building situated on one of the streets of what is known as "Chinatown" in the city of Stockton, or had just stepped to the sidewalk from a building, when he was viciously attacked by several young Chinese (some of the witnesses said three and others thought there were four) and shot to death. The attacking Chinese fired upon the deceased simultaneously, thus disclosing a preconcerted arrangement to kill him, and after he fell to the sidewalk, probably lifeless, the murderers or some of them stepped up to where he lay and fired several shots into his

body. The physician who held the autopsy at the post mortem examination testified that he found in the body 23 wounds, of which 13 were entrance wounds.

After the shooting ceased, the Chinese committing the crime ran from the scene of the shooting, at least two of them throwing the weapons with which they shot the deceased to the sidewalk near where the homicide occurred and where they were a few minutes after the shooting found and picked up by an officer. The homicide was witnessed by several Chinese and partly seen by some white men. Several of the witnesses, both Chinese and white, positively identified Fong Sing, the defendant, as one of the Chinese who did the shooting.

A short time after the tragedy, Fong Sing and Charlie Suey were apprehended and placed under arrest several blocks from the place at which the deceased was killed. It appears that J. E. McFarland, a constable of Stockton, heard the shooting and thereupon hastened to the street from which direction the sound of the shooting seemed to him to come. On reaching the northeast corner of Washington and Center streets, he looked east or in the direction of the corner of Washington and El Dorado streets, and there observed a large number of people running in different directions. He saw three young Chinese running from the scene of the shooting on Washington street in a westerly direction, going as far as the corner of Washington and Center streets. One of the three Chinese, Sam Mie, disappeared or left the other two, Fong Sing and Charlie Suey, and went in a different direction. McFarland ran after Fong Sing and Charlie Suey, but the Chinese outsprinted the officer and soon got out of his sight. McFarland kept up the pursuit, inquiring of different people he met on the streets whether they had seen the fleeing Chinese, and finally he espied the defendant and Charlie Suey walking together at a point on Madison street near Lafayette and in near proximity to a lumber yard. The officer commanded the men to halt, but they started to separate and go in different directions, when McFarland drew his revolver and threatened to shoot unless they surrendered. The two men thereupon stepped up to the officer, who placed them under arrest. Just as the officer was about to start to jail with his prisoners, one Zuiver (who testified for the people) called out to McFarland and stated to the officer that he saw Fong Sing, just before he started toward the officer, throw some article, the exact character of which he did not then know, into a vacant lot, and at about the same time Zuiver went to the spot where the article was thrown, found a pistol, and delivered the same over to the possession of McFarland. Upon examination, the pistol was found to contain four empty and two loaded shells. McFarland testified that from the condition of the empty shells and the odor from the weapon he was of the opinion that the pistol had been discharged very shortly before it came into his possession.

The defendant claimed that he was not present at the scene of the homicide at the time of the commission thereof, but that when the shooting took place he and Charlie Suey were at the lumber yard of the Stockton Lumber Company, located on the corner of Sonora and Commerce streets, in the city of Stockton, several blocks from where the deceased was slain. Accordingly, the defendant set up and undertook to sustain an alibi, and it is the ruling of the court disallowing certain testimony offered by the defendant in support thereof which constitutes the point first urged in the briefs as a sufficient ground for a reversal, and it arose in this way: The defendant claimed and attempted to prove at the trial that, at about the noon hour on the day of the killing, he went to and was at the laundry of one Gong Sue, a Chinese laundryman, whose place of business was on the easterly side of Center street, between Washington and Lafayette streets; that, when he arrived at the laundry, Gong Sue and Charlie Suey, the defendant's codefendant, were there and then eating lunch; that, after lunch was finished, the three Chinese were engaged in and carried on a conversation for some time; that, very shortly after 1 o'clock, the defendant and Charlie Suey started to go to the lumber yard of the Stockton Lumber Company, which, as above stated, is situated several blocks from the place where the homicide occurred, for the purpose of procuring some lumber for Gong Sue; that they arrived at the lumber yard at about 1:20 or 1:30 p. m., and there met one Alfred Love, a building contractor of the city of Stockton, who spoke to Charlie Suey, with whom he was personally acquainted; that, while they were at the lumber yard, the sounds of shooting, apparently coming from the direction of Chinatown, were heard. The witness Love, above referred to, testified to having seen Charlie Suey and Fong Sing in the street, near the lumber yard, on the day and at about the hour above mentioned, and further testified that he at that time spoke to Charlie Suey. In further support of the alibi, the defendant sought to prove by Gong Sue that, on the day of the homicide, and shortly after 1 o'clock p. m. of that day, he sent Charlie Suey to the lumber yard to get some lumber, and that the defendant was then and had been for some minutes previously at the laundry and started with Charlie Suey to the lumber yard. An attempt was further made to have Gong Sue testify as to whether defendant himself at that time stated that he was going to accompany Charlie Suey to the lumber yard. To all that testimony the people's objections were sustained by the court on the ground that it was immaterial. The theory upon which it is con-

tended that the testimony thus sought to be brought before the jury was competent and proper is that it was a part of the res gestæ; that is to say, that it related to and tended to explain the transaction embracing the alibi of the defendant or the acts and movements on his part at the precise time of the homicide which were inconsistent with and contradictory to the claim that he was present at the place where the deceased was killed at the time he was shot to death and participated in the act of destroying the latter's life.

[1] The doctrine of res gestæ is so well understood that it is hardly necessary to remark that under that rule evidence is admissible of extrajudicial declarations tending to explain or show the character or motive or purpose or intent of a transaction, itself a fact in dispute, which would under other or ordinary circumstances be excluded as hearsay or self-serving. The rule, in other words, recognizes the competency of certain hearsay testimony, and is an exception to the general rule of exclusion as to that class of proof. Our Code of Civil Procedure, § 1850, thus states the rule:

"Where, also, the declaration, act, or omission forms part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act, or omission is evidence, as part of the transaction."

The propriety of such testimony, and, indeed, the theory upon which it is taken out of the general rule against hearsay testimony, proceeds from the supposition that the declarant without an opportunity deliberately to concoct a false statement or story concerning the transaction for the express purpose of exonerating himself from censure or culpability in connection therewith has spontaneously made some statement which tends to explain the nature, quality, motive, or intent of the transaction. In other words, it is a statement or declaration explanatory of the character of the transaction, its quality, purpose, or motive, given under such circumstances as to preclude the idea that it involved a falsehood deliberately meditated and conceived and given expression for the benefit or advantage of the declarant himself.

There are many cases which have sanctioned testimony of extrajudicial declarations, where a defendant in a criminal case or a party to a civil action has made some statement as to some matter arising in connection with a transaction constituting the principal fact in dispute. Declarations in such cases, however, have generally been admitted, not altogether under the rule of res gestæ, or because they were deemed as strictly a part of the principal transaction in dispute, but because they were regarded as indicative of the frame of mind of the declarant as to some act growing out of the principal transaction, and exhibited under such circumstances or conditions as to make it reasonably certain that it was not the result of a premeditated design to prepare, pro re nata, a statement of the fact; and it is generally upon this latter theory, rather than upon the theory that it is a part of the transaction in dispute, that the declaration of a person as to his destination on leaving his home or some other place is receivable as evidence of his intention or purpose where such declaration has a material bearing upon his connection or want of connection with the principal question in issue.

In his treatise on the Law of Evidence, section 108, Mr. Greenleaf thus states the rule:

"When a person * * * leaves his house, * * * his declarations, made at the time of the transaction, and expressive of its character, motive, or object, are regarded as verbal acts, indicating a present purpose and intention, and are therefore admitted in proof like other material facts."

The rule has been applied, under varying conditions, in many cases, both civil and criminal, and, without examining them in detail herein, we may cite the following cases in which the application of the principle involved in the rule is exemplified: State v. Mortenson, 26 Utah, 312, 73 Pac. 562, 569; State v. Power, 24 Wash. 34, 63 Pac. 1112, 63 L. R. A. 902; State v. Howard, 32 Vt. 380; State v. Dickinson, 41 Wis. 299; United States v. Craig, 25 Fed. Cas. 682; Territory v. Conk, 2 Dak. 188, 47 N. W. 395; Lakeshore & M. S. R. Co. v. Herrick, 49 Ohio St. 25, 29 N. E. 1052; State v. Jones, 64 Iowa, 349, 17 N. W. 911, 20 N. W. 470; D. & R. G. R. Co. v. Spencer, 25 Colo. 9, 52 Pac. 211; Grimes v. State, 68 Ind. 193.

[2] But, since the rule constitutes an exception to the general rule excluding the admission of hearsay testimony, it must, of course, be confined in its application strictly to the circumstances or conditions giving rise to the reason for the recognition of that class of testimony as a legal method of proving a fact, and hence we do not believe that the scope of the rule can reasonably be so far extended as to justify the admission in evidence of the declaration of a third party to the defendant in either a criminal or civil action involving a request by the former that the latter go to some particular place, unless such declaration is accompanied or followed by a declaration by the party himself that he intends to go to such place. Therefore, referring to the present case, the fact that Gong Sue might have requested Charlie Suey to go to the lumber yard and get some lumber, of itself, or in the absence of some statement by the defendant in response to such request indicating his intention to accompany Suey to the lumber yard, would not be admissible. The rule contemplates some utterance by the party to the action himself, and not that of a third party, for the very obvious reason that the declaration is admissible only because it is supposed to be expressive of what is in the declarant's

own mind with respect to the intention as to his destination, which, manifestly, could not be determined from what some other person might have said, unconnected with any declaration in that particular by the party himself. If, however, as is the claim here, the witness Gong Sue would have testified that the defendant, upon the request being made by Gong Sue of Charlie Suey that the latter go to the lumber yard for the purpose of getting lumber, declared that he intended to accompany Charlie Suey to the lumber yard, then we think the entire conversation might properly have been given in evidence under the rule above explained. The court below should therefore have admitted the testimony, but we cannot say that the ruling excluding it was prejudicial in view of considerations to which we will now refer.

[3] The witness Alfred Love, an American and a building contractor and a citizen of Stockton, presumably of reputable standing in that community, testified that he saw Charlie Suey and another Chinese in the street, about 40 feet from the lumber yard, on the day of the homicide, near the hour of 1 o'clock, p. m. The precise moment of time when the deceased was shot no witness pretended to state, but it was given as approximately at 1 o'clock; that is, at some point of time between 1 and 1:30 p. m. Nor did Love pretend to be able to fix or state the precise moment of time at which he saw the two Chinese near the lumber yard. His fixing of the time amounted, as must be so in a majority of such cases, to a mere approximation. There is nothing to show that there was any occasion for him to ascertain or fix the exact moment when he saw them.

There was testimony, as seen, that the Chinese committing the act, after doing so, ran from the scene thereof, and that two of them went in the direction of the lumber yard; that is, in that general direction. The defendant and Charlie Suey were arrested near the lumber yard, and in their conversations with the officers after their arrest made no claim that they had been at the lumber yard for the purpose of getting lumber. Thus, it is manifest, Love's statement that he saw Suey and the defendant at the lumber yard at about the hour of 1 o'clock p. m. might have been true, and it might have been also true that the two Chinese stopped where Love saw them in their flight from the scene of the shooting. Either such was the theory upon which the jury decided the question of alibi, or else they entirely repudiated the testimony of Love, which, he not being impeached, is not probable. But, in any event, we cannot see how the declaration of the defendant as to the point of his destination when he left the laundry or the testimony of Gong Sue as to such declaration could have gone any further in support of the alibi than was derived from the testimony of the witness, Love. Testimony of the declaration of the defendant himself, although admissible under the exception to the general rule, was in the fullest sense hearsay and self-serving, and if the jury did not believe Love, a white man, or concluded that he was mistaken as to the part of the day he saw Suey and the defendant near the lumber yard, or if, accepting Love's testimony as to the approximate time he saw the two Chinese near the lumber yard, the jury were persuaded that the circumstance so testified to was not inconsistent with the theory, which is by no means without support from the evidence, that Suey and the defendant were among the perpetrators of the homicide and immediately upon its commission fled to the place where they were seen by Love, then we may safely assume that the jury would have attached no probative value to the testimony of Gong Sue revealing a declaration by the defendant indicating his intention of going to the lumber yard. In other words, and in brief, we cannot perceive how the excluded testimony could have added any more support to the alibi theory than it derived from the testimony of an unimpeached white witness. We think, therefore, that section 4½ of article 6 of the Constitution applies here.

[4] It is next urged that error prejudicial to the defendant followed from asking Gong Sue, on cross-examination, if it was not a fact that he was engaged in the business of selling lottery tickets; he having on direct examination stated that he was conducting a laundry business. That question was not objected to, and the witness replied that lottery tickets were not sold at his place and that the only business carried on at his place was that of a laundry. He was then asked: "Don't anybody sell lottery tickets in there?" To that question objection was interposed by the defendant and sustained by the court. It is contended that the injury resulting to the defendant from the above questions to his witness by the district attorney was in the insinuation with which they were pregnant that said witness was engaged in carrying on a business prohibited and penalized by the law.

Generally, the purpose which an attorney has in view in asking his witnesses as to the business in which they are engaged is to bolster the reliability of their testimony, and we cannot conceive of any just reason why, in such a case, it is not proper for the party against whom or whose interests a witness testifies to show, on cross-examination, that, as a matter of fact, the witness is not conducting the business in which he has said he is engaged or, if he is, that in connection therewith he is also carrying on a traffic of a less reputable character. But, at any rate, no objection was made to the first of the several questions propounded on that line of cross-examination, and the objection to the last question was sustained, and therefore no review of the complaint in that respect is jus-

tified, not even upon the theory that the objection goes to the question of the misconduct of the district attorney, since the objection was solely upon the ground that it was not cross-examination and no specific objection or exception to the alleged misconduct of the prosecuting officer made. Moreover, the witness positively denied that he ever conducted a lottery business, and we are not to assume that the jury concluded that he lied in that particular; no other testimony having been received relating to that matter.

Much that is said in the foregoing applies with equal force to objections to a similar character of questions propounded on cross-examination to defendant's witness Yee Won.

[5] It is next urged that the district attorney was guilty of misconduct seriously militating against the substantial rights of the accused by referring in his argument to a matter which it is claimed was not brought out in the testimony and which tended to show a conflict between the testimony of the witness Love and that of the defendant upon a material fact in connection with the proof received in support of the alibi.

It appears that the stenographic reporter caused it to appear in his notes that Love shook hands with Charlie Suey when they met near the lumber yard, whereas Love testified that Charlie Suey was a distance of some 40 feet from him when he greeted the Chinese and did not say that he shook hands with Suey. Counsel for the defendant interrupted the district attorney when he was making the point arising from the alleged conflict upon that proposition, and called his attention to the alleged fact that, during the progress of the trial, when it developed that the reporter had made the defendant say that Love and Suey had shaken hands on the occasion mentioned, it was shown and agreed between counsel on both sides that, in point of fact, the defendant gave no such testimony, and that its appearance in the reporter's notes of the testimony was solely the result of error on the part of the reporter—that the latter, in other words, misunderstood the testimony of the defendant as it was translated by the interpreter and so made him say that Suey shook hands with Love, when he in fact made no such statement. But the district attorney, in effect, insisted that the defendant did testify that Suey shook hands with Love, and that the record disclosed that he so testified, and said nothing about an understanding or stipulation between counsel that the reporter had erred in so reporting the defendant, nor did he reply to the statement of defendant's counsel that any such an understanding was had or that any correction was made in the particular referred to of defendant's testimony. The court remarked, referring to this controversy between counsel, that "the jury must remember the testimony; they will have to determine what the testimony is."

The above is all that the record discloses relative to the matter under consideration; that is to say, with the exception of the above-explained colloquy between counsel, the record does not show, or at least our attention has not been directed to any part of the record where it is shown, that there was any correction made of the testimony of the defendant in the respect indicated above or agreed to by counsel on both sides, and, in the absence of a proper showing in that regard, this court cannot say upon the record that the special prosecutor was not justified in making the point to which objection is here made. In other words, admittedly the reporter's notes showed that the defendant did testify that Suey shook hands with Love, but the record does not show that the reporter made a mistake in so reporting the defendant's testimony or that it was stipulated at the trial that any such an error was made by the reporter, or that there was any correction of the defendant's testimony in that respect. Therefore, as stated, there is before us no record upon which we can base the conclusion that the special prosecutor went beyond the record when he pointed out the inconsistency between the testimony of Love and that of the defendant as to the manner in which the former met and greeted Charlie Suey.

[6, 7] The last point pressed upon us for a reversal is that the court erred in refusing to grant the defendant a new trial on the ground that the jury "received evidence out of court other than that resulting from a view of the premises." Pen. Code, § 1181, subd. 2. The motion for a new trial on said ground was, as above stated, supported by the affidavit of the defendant, setting forth the following facts: That, originally, attorneys Seymour and Eicke represented the defendant as attorneys in the case; that, for some reason, the specific nature of which is not disclosed by the record, Messrs. Seymour and Eicke, after the jury was impaneled and sworn, and before the taking of testimony was proceeded with, asked and were granted permission to withdraw from further participation in the case as representatives of the accused; that, thereafter, the Independent, a daily newspaper published in the city of Stockton, in reporting the withdrawal of Seymour and Eicke from the case, stated, among other things, that it was rumored that the defendant intended to change his plea of not guilty to that of guilty; that the "affiant is informed and believes that the jury so impaneled and sworn to try said cause heard and took cognizance of said common rumor that affiant intended to and was about to plead guilty and read the articles indicated above; and that in this regard the said jurors took evidence out of court in said cause or were biased and prejudiced against the defendant by reason thereof." Attached to said affidavit was the newspaper article re-

ferred to therein, and also attached thereto was an article published in the same newspaper the following day, stating that the defendant, through a friend, positively denied any intention of pleading guilty, and containing a statement from Mr. Seymour, one of the attorneys who withdrew from the defense of the defendant, that—

"The Chinese and their friends maintained their absolute innocence of the crime charged, and that, a difference of opinion having arisen in the conduct of the case, the attorneys for the defense had withdrawn in the best interests of their clients; a friendly interest still being maintained."

It will be observed that all that the affidavit contains as showing that the defendant was prejudiced by the publication referred to is the mere inference to be drawn from the statement therein made, on the information and belief of the affiant, that the jurors saw and read the said article. There is no positive showing that the jurors or any of them read the article, or that they were prejudiced against the defendant or influenced to find against him by reason thereof. Even if such a publication had been made before the jury were called to the jury box and it developed that any juror had read the article, it would not, per se, have disqualified him from sitting in the case. To have disqualified him, it would have been necessary further to show that his mind had been by the article so affected relative to the case as that he could not give the defendant a fair and impartial trial, according to law. Moreover, if it may be assumed that the jury read said article, it may with equal propriety be assumed that they also read the subsequent article correcting the statement of the first that the defendant contemplated entering a plea of guilty; and thus it may be assumed (assuming that both articles were read by the jurors) that the effect of the first article was overcome by the last. But, however that may be, without something more positive than is shown here that the jurors read and were affected or influenced against the accused by the first article, it must be assumed that, even if they perused the article, they were intelligent enough to know their sworn duty, and honest enough to have confined themselves in the determination of the very serious question of the guilt or innocence of the accused entirely to a consideration of the evidence as it was allowed to go before them under the rules of law submitted to them by the court for their enlightenment and guidance in the discharge of that all-important function.

We have discovered no legal reason for disturbing the verdict, and, for the reasons herein given, the judgment and the order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Petition for Rehearing.

HART, J. [8, 9] In a characteristically able argument, the senior counsel for the defendant urges a rehearing of this cause. There is nothing we can add to what has been said in the former opinion filed herein, except to express hearty concurrence in the general animadversion of the learned lawyer upon the practice too often resorted to in criminal cases by public prosecutors of lugging into their cases in argument matters having vital bearing upon the case which have not been brought in by evidence and which are calculated to deprive an accused of that fair and impartial trial which is guaranteed to him by the Constitution and the statute laws of the state. A public prosecutor should be equally as solicitous of the protection of the rights of a citizen or other person on trial for his life or his liberty as the judge who presides at the trial, and it is obviously an egregiously erroneous notion if that public officer conceives it to be his duty to convict every person against whom a crime has been charged, regardless of whether he is or is not guilty or of whether the proof he is able to produce against one so accused is or is not sufficient to justify his conviction. And it is equally a mistake for such an officer to suppose that it is proper for him to present to the jury anything but strictly legal evidence in support of the charge, or that it is within the sphere of legitimate argument to prejudice the standing of the accused in the minds of those who are to determine an issue so serious to him by insinuating in the course of his address that some fact bearing strongly against the accused which has not been proved by proper evidence in reality exists. This court has on a number of previous occasions in a number of cases, notably in People v. Hail, 25 Cal. App. 342, 143 Pac. 803, condemned such practice.

In the present case, however, as is stated in the former opinion, there is no such record as justifies us in reviewing the point that the special prosecutor was guilty of misconduct in referring to a matter in his argument which, it is claimed, was not brought into the case through the evidence. As explained in the former opinion, all that the record shows is that a controversy arose during the course of the prosecutor's argument as to whether it was conceded by counsel representing the people that the court reporter had made a mistake in reporting that the defendant had testified that he shook hands with the witness Love at the lumber yard, counsel for the defendant claiming that such concession had been made and that the mistake so made by the reporter had been corrected before the argument of the case was begun. Nowhere else in the record is it made to appear that a correction of the defendant's testimony in the particular referred to was

made, or that there was any suggestion by counsel that the reporter had made a mistake in any respect or particular in reporting his testimony. The prosecutor, when interrupted, did not admit that any such mistake had been conceded or that a correction of any such mistake had been made. He simply replied to the interruption, "If you didn't like the record, why didn't you correct it?" from which observation, and from the fact that he did not admit that a mistake in defendant's testimony had been conceded, or that any such mistake had been corrected, we felt justified in declaring, as we did declare in the former opinion, but which declaration counsel say we were not warranted by the record in making, that the special prosecutor "in effect insisted that the defendant did testify that Suey shook hands with Love, and that the record disclosed that he so testified," etc.

As above stated in the outset hereof, the learned attorney, as always he does, makes a forceful plea for a rehearing; but we do not thus feel persuaded that the conclusion we arrived at upon each of the points urged for a reversal, and from which conclusion necessarily followed the final result of the consideration of the record by this court, is erroneous.

The petition is denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

---

38 Cal. App. 243

PEOPLE v. LEE GOW et al. (Cr. 427.)

(District Court of Appeal, Third District, California. Sept. 24, 1918.)

1. HOMICIDE ⊂⊃234(1) — MURDER — IDENTITY.

In a prosecution for murder in the first degree, evidence *held* to identify defendants as the murderers.

2. CRIMINAL LAW ⊂⊃1035(5) — APPEAL — COMPETENCY OF JURORS—WAIVER.

In a murder trial, where a juror stated that he did not understand the instructions, defendants waived his incompetency by remaining silent, failing to request permission to question the juror or to ask that the jury be polled, and first seriously objecting thereto in the brief.

3. WITNESSES ⊂⊃290—REDIRECT EXAMINATION—REPETITION OF QUESTIONS.

In a prosecution for murder, it was not error to sustain the district attorney's objection to a question, on redirect examination, as to why witness fixed a certain date when such question had been asked and answered on cross-examination.

4. CRIMINAL LAW ⊂⊃304(1)—JUDICIAL NOTICE—DEATH OF COUNSEL.

The appellate court will not take judicial notice of the death of counsel for appellants, subsequent to the trial and before the hearing.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Lee Gow and Chow Soon were convicted of murder in the first degree, and, from the judgment and denial of a new trial, they appeal. Affirmed.

George E. Gardner, of Oroville, George J. McDonough, of Oakland, Danna P. Eicke, of Stockton, and Dion R. Holm, of San Francisco, for appellants. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. The defendants were convicted of murder in the first degree, and the jury fixed the punishment at imprisonment for life. The appeal is from the judgment and the order denying a motion for a new trial. That a foul murder was committed is not disputed. It was deliberate, premeditated, and malicious. It was one of a series of bloody episodes that attended what is known as a "tong war" between rival societies of Chinese.

[1] The principal contention in the case is in reference to the defense of "alibi," upon which appellants relied. It must be admitted that their claim in that regard was strongly supported. Not only Chinese witnesses, but several Caucasians, including prominent members of the police force of the city of Stockton, testified positively that the defendants were in said city on the very day and at the very hour when the offense was committed near Gridley in the county of Butte. Their testimony was entirely inconsistent with the theory of the guilt of the defendants, as the time of the murder was definitely fixed. But the jury, probably believing that some of the witnesses were mistaken and that others were falsifying, rejected their said statements, and based their verdict upon the evidence offered by the people. We can readily understand how the testimony in support of the "alibi" might have led the jury to acquit the defendants; but, after a careful reading of the entire record, we are compelled to say that there is abundant evidence of the identification of these men as the murderers of the deceased, and that under the familiar rule we are not permitted to hold that the verdict is unsupported. Many witnesses, including white men, testified unreservedly that the defendants were in the vicinity of the scene of the crime at or near the time it was committed, and one Chinese testified unequivocally that he was at the home of the deceased and witnessed the perpetration of the deed. His testimony, if fully credited, compels the conclusion that the crime was deliberate murder and that the defendants committed it. Nor can it be accepted for a moment that the testimony of these witnesses for the people is inherently improbable. Of course, the possibility of a mistake as to the identification of an individual under such circumstances is ever present, and innocent men may be unjustly convicted; but it is hardly necessary to add that the accuracy of the memory of the witnesses as to the identification of the parties, and the disposition of said witnesses

to tell the truth, were considerations entirely for the determination of the jury.

Of course, it is plain that, in a criminal case, the verdict must be unanimous; but there is no ground for holding that the requirement was violated herein. Such contention, however, is made in view of a certain colloquy that occurred between the judge and the jurors after the case had been submitted but before a verdict had been reached. A juror, Mr. Beck, asked this question:

"When these jurors swore to try this case by the law and the evidence, did it imply the unwritten law as well?"

The court answered:

"By consent of the defendants I state this: All of the law by which you will be governed in this case is contained in the instructions given you here by the court. The court will now read all the instructions again if you desire."

Mr. Beck then said:

"If I take it right, then, it implied the unwritten law because it did not state that it was only the written law. Is that right, your honor?"

The transcript proceeds:

"The Court (to reporter): 'Read the statement again.' (At this time the reporter reads the statement again.) Mr. Beck. We were asked if we would try the case by the law and the evidence. Why didn't they give us those instructions at the beginning of the case so we could know if the unwritten law was not implied."

The answer clearly implies that his delusion as to the unwritten law had been allayed by the repetition of the statement of the court, but he was disposed to criticize the procedure as to the time of giving the instructions. But, manifestly, his opinion as to that matter is of no moment here, and it does not constitute a cause of complaint by appellants. The court then asked each of the jurors if he desired the instructions to be read again. They all said no, some of them supplementing their answers with the explanation: "I understand them." Mr. Beck, however answered: "No, I don't understand them." Finally, as to this the record shows:

"The Court: 'Do you all understand that these were the instructions that I read to you at the close of the trial? This is the close of the case. You may retire to your room.' (At this time the jurors retire to their jury room.)"

[2] If appellants were dissatisfied with the situation, they should have manifested it in the proper manner. They should have requested permission to question the juror further to ascertain the extent of his misunderstanding of the instructions that he might be enlightened, but they were apparently content and made no objection to the further consideration of the case by said juror. Indeed, when the jury returned with a verdict of conviction, appellants were mute and did not even ask that the jurors be polled. Their conduct signified an acquiescence in the course pursued, and they waived all privilege thereafter to urge the incompetency of the said juror. It may be added that this consideration was not presented at all on the motion for a new trial, and seems not to have been regarded seriously by appellants until they filed their brief in this court.

Moreover, some of the instructions given were quite complicated and contained technical expressions that would not be easily understood by the lay mind. These were not essential to a proper determination of the cause by the jury, and we have a right to assume that such portion of the charge was what the juror had in mind in such statement. Besides, we must presume that the other jurors were able to explain the instructions to the satisfaction of Mr. Beck, and that during the four hours they were deliberating after returning again, they succeeded in removing any misapprehension, at least as to the material portions of law involved.

[3] It is claimed that the court erred in sustaining the district attorney's objection to the question asked on redirect examination of witness Lawrence Moore: "Is there any thing that fixes this particular date in your memory, Mr. Moore?" The witness had testified on direct examination that he saw the defendants on March 6th at about 10 minutes after 12 o'clock noon at 131 South Hunter street, Stockton. On cross-examination, the district attorney asked the witness questions as to his memory of different times and places, when and where he had seen the defendants, the object being, of course, to discredit his testimony as to this particular date, and to leave the impression on the minds of the jury that it was impossible for the witness to be certain that he saw the defendants on March 6th, as he claimed. Appellants indulge in an interesting discussion of the scope and purpose of redirect examination, quoting from section 871 of volume 5 of Jones' Commentaries on Evidence. We agree generally with what is stated by counsel as to the admissibility of such explanation. And it may be added that the court subsequently allowed similar questions addressed to the other witnesses. However, the ruling here was clearly without prejudice, since the witness had answered the question on cross-examination. The district attorney asked him, "How do you fix the time in your mind?" and he answered, "I hired a boat to him on that day." He went on to explain that he hired the boat to Chew Chung, and a memorandum was made of it, and the defendants were present, and "that is why I remember it." If there had been any other circumstance to aid his memory, he had ample opportunity to state it. The repetition of his answer to the question would have added nothing to the force and effect of his testimony.

One of the most singular points made by appellants is stated by them as follows:

"We now approach the third point upon which we claim reversal should be granted. George McDonough, Esq., leading counsel for the defense, was mentally unfit to conduct a trial

such as this, or, in fact, any other trial. It is regrettable, indeed, that we are forced to call the court's attention to the fact, but we feel justified in doing so because of the gravity of the offense with which Lee Gow and Chow Soon are charged. George J. McDonough, a man of wide experience in the legal profession, unfortunately met with reverses, and as an officer of this court it is believed your honors will take judicial notice of the fact that he committed suicide about one month after these appellants were convicted."

[4] It can hardly be seriously argued that we can take judicial notice of Mr. McDonough's death. But, aside from that, an insurmountable objection to our attaching any importance to this contention is found in the fact that there is no evidence whatever in the record that Mr. McDonough was incompetent. As far as we can determine from a reading of the transcript, he seemed quite capable of protecting the interest of his clients. We may add that two other attorneys were associated with him, and neither of them nor the judge of the court, apparently, discovered anything in the conduct of said attorney to create an impression that he was mentally unbalanced.

In the foregoing we have covered all the contentions made by appellants, and it must be plain that no sufficient reason has been advanced for an interference with the verdict of the jury.

The judgment and order are therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

---

38 Cal. App. 219

## WILHELM v. ROBERTSON et al.

(Civ. 2402.)

(District Court of Appeal, First District, California. Sept. 19, 1918.)

1. EVIDENCE ⟸353(14)—ADMISSIBILITY—AMBIGUOUS DEEDS.

In action to quiet title to lot numbered "18," where deeds referred to map containing a lot so numbered, the deeds were not inadmissible, as ambiguous, merely because some lots had been subdivided and contained the number "18," followed by a further designation of the original lot.

2. MORTGAGES ⟸354 — NOTICE — EFFECT OF DEATH OF TRUSTEE.

Where the trustees under trust deed gave due notice of sale on default, that one of them died before the sale, which was consummated on the day set, did not invalidate the deed under such sale for insufficient notice.

Appeal from Superior Court, Marin County; Edgar T. Zook, Judge.

Action by J. H. Wilhelm against May J. Robertson and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Keys & Harlan, of San Rafael, for appellant.

Thomas P. Boyd, of San Rafael, and O. F. Meldon, of Sausalito, for respondents.

LENNON, P. J. This is an action to quiet title to a certain parcel of land situated in the county of Marin.

The record discloses the following facts: On June 14, 1904, plaintiff purchased from the Tamalpais Land & Water Company a certain lot of land which is the subject of this controversy. On the 25th day of February, 1915, he executed a deed of trust, conveying the same to A. W. Foster, Jr., and M. T. Freitas, as security for the payment of a certain indebtedness referred to in the deed of trust. In this conveyance the plaintiff used precisely the same description as that contained in the deed under which he acquired the property. Having failed to pay his indebtedness, one of the trustees, under the power conferred in the trust deed, sold the property in question to defendant May J. Robertson. Thereafter the plaintiff brought this action to quiet title to the property. Judgment went for defendants, and plaintiff appeals.

As ground for reversal it is the claim of plaintiff that certain deeds offered in evidence to defeat his title were inadmissible for that purpose, for the reason that the description of the property therein recited was ambiguous and should not have been considered in establishing defendant's title. He further claims that the deed signed by one of the trustees which purported to convey this title to defendant, May J. Robertson, was void because of a lack of proper notice of sale.

Under the pleadings it was admitted that plaintiff was the owner and in possession of the property on the 8th day of June, 1915. For the purpose of identifying the property and establishing his case, plaintiff at the trial introduced in evidence a map of the Tamalpais Land & Water Company, from which it appears that the property described in the complaint is designated thereon by the figures "18." After the introduction of this map plaintiff testified that he had not conveyed the property, and rested his case. Thereupon the defendants, for the purpose of establishing their title, offered in evidence a deed of trust from plaintiff and his wife, as grantors, to A. W. Foster, Jr., and M. T. Freitas, given to secure a certain indebtedness. In this deed the property was described as lot 18 as delineated on the map referred to. For the purpose of explaining which lot 18 was meant by the description in the trust deed, the defendants offered in evidence the deed from the Tamalpais Land & Water Company to plaintiff, purporting to convey "lot number eighteen (18)" as laid down on the company's map. Defendants also called the plaintiff, who testified that the parcel of land identified was the only land he owned in that vicinity. Defendants further offered in evidence a deed from M. T. Freitas, as

surviving trustee under the trust deed, to defendant May J. Robertson, being the deed under which defendants claim title, wherein the property conveyed is described in the same manner as in the conveyance from the company to plaintiff. The introduction of these various deeds was objected to upon the ground that the description of the property contained therein was ambiguous, for the reason that the map referred to contained four different and distinct lots numbered 18, any one of which, it is claimed, fits the description in the several conveyances.

[1] We are of the opinion that the deeds were properly admitted. From the map of the company, referred to in the several deeds, it appears that a large tract of land had been divided into 33 blocks or parcels, numbered from 1 to 33, inclusive. Six of these parcels, viz. Nos. 1, 2, 3, 4, 5, and 6, were again subdivided into smaller parcels, containing 18 or more small subdivisions, which are designated upon the map by consecutive numbers. Four of these blocks as subdivided contain a lot numbered "18." The remaining blocks, up to and including block 18, are not so subdivided. It is under these conditions that plaintiff contends that the deeds mentioned were improperly introduced to defeat plaintiff's title, for the alleged reason that they all contain a description which is a perfect example of a patent ambiguity, and were, so plaintiff claims, wrongfully considered in establishing defendants' title to the property, and that the findings based thereon that the defendant is the owner are not supported by the evidence. It is conceded by respondents that, where a description in a deed equally applies to two or more parcels, there is a patent ambiguity; but it is insisted that the description here involved does not apply to any other lot shown on the map of the Tamalpais Land & Water Company, and we are of that opinion.

The map to which reference is made contains only one parcel of land designated as "18." The parcels which are subdivided into smaller lots or tracts, and which contain a lot or parcel designated by such number, bear the further and additional designation of the number of the larger parcels as subdivided. The tract in question is designated by the single number (18), and its description by such designation does not apply to any other lot upon the map. Aside from any other question, the description being sufficient to put plaintiff into possession, it ought to be sufficient to dispossess him.

[2] The further contention that the deed purporting to convey title to respondent May J. Robertson is void for lack of proper notice is without merit. When plaintiff failed to pay his indebtedness, a notice of sale was given by both trustees. It is conceded that the notice up to this time was a proper one. Subsequent to the giving of the notice, however, but before sale, one of the trustees died; but the sale was made on the day so fixed, by the surviving trustee, without further notice, and it is for this reason that the deed given thereunder is claimed to be void. The trust deed contained a specific covenant to the effect that in the event of default the trustees or the survivor of them might execute the trust and sell the property. The death of the cotrustee in no manner affected the notice, or prevented the survivor from executing the powers conferred upon him under the covenants of the deed.

For the reasons given the judgment is affirmed.

We concur: BEASLY, Judge pro tem.; STURTEVANT, Judge pro tem.

# CALIFORNIA REPORTER

176 PACIFIC REPORTER

179 Cal. 203

PATTERSON v. CHAPMAN et al. (two cases).
(S. F. 7900, 7901.)

(Supreme Court of California. Nov. 4, 1918.)

1. CONTRACTS ⊜334—PLEADING—COMPLAINT—UNSEALED INSTRUMENT—VALUABLE CONSIDERATION.

Since Civ. Code, § 1614, declares that "a written instrument is presumptive evidence of a consideration," testator's unsealed agreement evidencing an obligation to pay an amount in money or property after his death may be pleaded, without alleging a valuable consideration.

2. WILLS ⊜89—NOTE OR WILL.

Where an instrument, whether negotiable or not, and whether payable in money or property, acknowledges a present debt to another, it creates a present obligation, and is not a voluntary gift without consideration, and hence testamentary in character, though it contains a provision that it was not to be discharged until after death.

3. CONTRACTS ⊜4 — ACKNOWLEDGMENT OF DEBT—IMPLIED PROMISE TO PAY.

Where an instrument by which obligor acknowledged an indebtedness contains no express promise to pay, the law implies such promise.

Wilbur, J., dissenting.

In Bank.

Appeals from Superior Court, Alameda County; Wm. H. Waste, Judge.

Two actions by Etta I. Patterson against M. C. Chapman and others, executors of the estate of Wm. E. Dargie, deceased. Judgments in each case for the defendants, and plaintiff appeals. Judgments reversed.

McClanahan & Derby and Peter F. Dunne, all of San Francisco, for appellant.

Fitzgerald, Abbott & Beardsley and Eugene E. Trefethen, all of Oakland, and Stanley M. Moore, of San Francisco (Edgar D. Peixotto, of San Francisco, of counsel), for respondents.

PER CURIAM. In these two appeals from judgments entered in favor of the defendants the plaintiff attacks the rulings of the court sustaining general demurrers to the complaints without leave to amend.

The question involved in each case is the same.

It appears from the complaints that William E. Dargie made, executed and delivered to plaintiff an instrument in writing, a copy of which as set out therein is as follows:

"Oakland, Jan. 16—08.

"For value received I hereby instruct the administrator of my estate to pay to Miss Etta Patterson, formerly of Edgewood, Cal., the sum of fifty thousand dollars, within one year from the date of my death—or two years at the least. Interest at the rate of six per cent. per annum is to be paid on said sum, quarterly, till said amount is paid in full. Said fifty thousand dollars may be paid in real estate or stocks and bonds, which I may own at the time of my death, if cash cannot be paid without sacrificing my estate, but said stocks, bonds or real estate, must be the full value of cash at the date of delivery. I desire this request and order to be carried out promptly and without question of any kind. W. E. Dargie."

Dargie died testate on February 10, 1911, and thereafter plaintiff duly presented her claim based upon said instrument to the executors of his estate, by whom it was rejected.

[1] Some confusion of thought may arise if there is not kept constantly in mind the difference between the question of the sufficiency of the complaint as a pleading and the question of the sufficiency of the instrument as evidence of a valid contract or obligation for the payment of money. At common law a seal was necessary in order to create the presumption that an executory contract was founded upon a valuable consideration, and therefore, if it was not under seal, the rule of pleading was that the complaint or declaration must allege that the contract was executed for a valuable consideration. Our Civil Code declares that "a written instrument is presumptive evidence of a consideration." Section 1614. Hence it follows that in this state, in an action upon an unsealed written instrument as evidence of an obligation to pay money, the common-law rule applicable to sealed instruments prevails and it is not necessary to make the additional allegation that it was made for a valuable consideration. Henke v. Eureka Endowment Ass'n, 100 Cal. 429, 34 Pac. 1089; Williams v. Hall, 79 Cal. 606, 21 Pac. 965. Hence the complaints are not rendered bad because of the failure to make such allegation.

[2] The sole question presented for determination is whether or not the writing upon which plaintiff relies is in form and character testamentary as held by the trial court, or as claimed by appellant it is a contract by virtue of the execution and delivery of which Dargie in his lifetime created an obligation to be discharged after his death by his executors.

If the instrument created a debitum in præsenti, an obligation existing in the lifetime of the obligor, the fact that it was not to be discharged until after Dargie's death renders it none the less enforceable as a demand against his estate. 8 Cyc. 1007. "Where a testator has not, in a paper payable post mortem, recognized himself either by intendment, or language, as under legal indebtedness to the party in whose favor it is made, such instrument is without consideration, purely voluntary, and testamentary in its character." Kirkpatrick v. Pyle, 6 Houst. (Del.) 569. Any memorandum in writing, however, regardless of its form, and whether payable in money or specific property, whereby a debt is acknowledged by one as owing to another to whom the memorandum is delivered is sufficient to create such obligation. "Any words which prove a man to be a debtor will charge him with the payment of the money." Cover v. Stem, 67 Md. 449, 10 Atl. 231, 1 Am. St. Rep. 406. Hence, con-

ceding the document in question is not a negotiable instrument, draft, check, or bill of exchange, as claimed by respondent, the want of such character is immaterial if terms are employed therein which at the time of its execution created a debitum in præsenti. Banker v. Coons, 40 App. Div. 572, 58 N. Y. Supp. 47; Robbins v. Robbins' Estate, 175 Mo. App. 609, 158 S. W. 400; Kirkpatrick v. Pyle, supra.

[3] It is true the instrument contains no express promise to pay, but where the existence of an indebtedness based upon consideration is acknowledged the law implies a promise to pay it (Ward v. Bush, 59 N. J. Eq. 144, 45 Atl. 534), and the fact that payment is postponed until after the death of the party so acknowledging it is immaterial (Robbins v. Robbins' Estate, supra; Hegeman v. Moon, 131 N. Y. 462, 30 N. E. 487).

The instrument being signed by Dargie, every statement therein must be considered as his declaration and given effect accordingly. In the absence of any defense on the ground of fraud, mistake, or want of consideration, each declaration therein made, or necessarily implied from its language, must be given the full effect that the meaning carries. The instrument, therefore, contains a declaration by Dargie that in his lifetime, and before or at the time of its execution, he had received from the plaintiff something of value, a value which he considered equal to $50,000, and that for that consideration his executors are ordered and directed to pay to the plaintiff that sum in the manner and at the time specified. This precludes the idea of a gift to her. Its meaning is that he is ordering the payment to be made to her as a return for the value which he had received from her. This makes it a payment or recompense, not a gift. Furthermore, as it was an admission by him that in his lifetime he had received from her that value, not as a gift or as payment of any obligation to him, this fact alone, without any order to his executors to pay, would, in law, raise an implied promise by him to pay her for the benefit so received, and would be a sufficient foundation for a claim against the estate for such value. Cover v. Stem, supra. The only effect of the order, it having been accepted by her, is to merge the implied contract, and to modify it, so that she is thereby obliged to accept payment at the time and in the manner therein provided.

An examination of the authorities cited by respondent, chief among which is that of Cover v. Stem, supra, discloses that the instruments under consideration and constituting the subjects of the actions contained no promise and no words which by intendment or otherwise could be construed as acknowledging an indebtedness. Thus, in Cover v. Stem, supra, Moore v. Stephens, 97 Ind. 271, Pena v. New Orleans, 13 La. Ann. 86, 71 Am. Dec. 506, and other like cases, it was held that in the absence of a promise, and without recital or acknowledgment of consideration, an instrument containing a mere direction to the executors to pay the sum mentioned was testamentary in character. And to like effect are the cases in this state, namely, Wisler v. Tomb, 169 Cal. 382, 146 Pac. 876, and Tracy v. Alvord, 118 Cal. 655, 50 Pac. 757, both of which involved notes shown to have been given without consideration, and in the first of which such fact appeared from the complaint. On the other hand, in the cases of Banker v. Coons, supra, Robbins v. Robbins' Estate, supra, Kirkpatrick v. Pyle, supra, Hatch v. Gillette, 8 App. Div. 605, 40 N. Y. Supp. 1016, and Ward v. Bush, supra, where the instruments were executed under seal, but in addition to the fact presumed therefrom, as in the case at bar, contained the words, "For value received," or those of like import, it was held they created a debitum in præsenti, which obligation being established, the law implied a promise to pay it.

The judgments are reversed.

I dissent: WILBUR, J.

---

In re FORSTER. (Cr. 2208.)

(Supreme Court of California. Oct. 17, 1918.)

ATTORNEY AND CLIENT ⊂⊃36(1)—DISBARMENT—JURISDICTION OF SUPREME COURT.

An original application for disbarment of an attorney will not be entertained by the Supreme Court, unless instituted or supported by a bar association, or the misconduct is alleged to have direct connection with matters pending in the Supreme Court.

In Bank. Proceeding for the disbarment of Edwin L. Forster. Dismissed.

PER CURIAM. For the reasons stated in Re Delmas, 72 Pac. 402,[1] relative to the entertaining by this court of original applications for disbarment, this proceeding is dismissed.

179 Cal. 194

MACDONALD v. ROETH et al. (two cases). (S. F. 7758, 7777.)

(Supreme Court of California. Nov. 4, 1918.)

1. FRAUD ⊂⊃16—SALES OF STOCK—FALSE REPRESENTATIONS—SUMMARY OF REPORT.

Sellers of bank stock *held* to have practiced deceit in the sale by displaying summary of report to the comptroller, which failed to disclose a large amount of uncollectable debts disclosed by the full report.

2. FRAUD ⊂⊃59(3)—SALES OF STOCK—MEASURE OF DAMAGES—PURCHASE FROM INNOCENT PARTY.

Where defendants misrepresented value of bank stock, and plaintiff, relying on the representations, bought stock from a third person,

[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 139 Cal. xix.

the measure of damages was the difference between the actual value of the stock and the amount paid, and not the difference between the value of the stock and what its value would have been had it been of the value represented; since, as to such stock, plaintiff had no bargain with defendants to the benefit of which he was entitled.

In Bank. Appeals from Superior Court, Alameda County; J. O. Moncur, Judge.

Action by A. S. Macdonald against George Roeth and George D. Gray. From the judgment rendered, defendants appeal, and plaintiff also appeals. Judgment affirmed on both appeals.

Pillsbury, Madison & Sutro and A. D. Plaw, all of San Francisco, for appellant.

Fitzgerald, Abbott & Beardsley, of Oakland, and W. F. Williamson, of San Francisco, for respondents.

RICHARDS, Judge pro tem. The case out of which these two appeals arose was before this court upon a previous trial and appeal. Macdonald v. De Fremery et al., 168 Cal. 189, 142 Pac. 73. The judgment of the court upon the first trial of the cause was therein reversed, whereupon the cause was retried and a judgment rendered in favor of the plaintiff, from which these two appeals were taken to this court; and, the cause having been transferred to the District Court of Appeal, both appeals were therein heard together and a decision rendered wherein the judgment, in so far as it was assailed by the defendants upon their appeal, was affirmed, while as to the appeal prosecuted by the plaintiff the judgment was reversed and the cause remanded to the trial court with directions to enter judgment in plaintiff's favor for a much larger sum than the trial court had awarded him. Upon the defendants' petition for a rehearing, the cause was transferred to this court for decision.

The facts of the case, in so far as they were developed at the first trial thereof, are fully and correctly set forth in our decision upon the former appeal (Macdonald v. De Fremery et al., supra) and need not be restated here; and the law relating to the state of facts as therein set forth was also fully and correctly stated in that decision and hence does not require restatement upon these appeals. This court reversed the judgment of the trial court involved in that appeal on account of the incompleteness, evasiveness, and contradictoriness of some of the material findings as well as the absence of other material findings. The findings thus criticized as found wanting upon the first trial of the cause had special reference to the nature of the deceit and of the false statements and representations alleged to have been made use of by the defendants to induce the plaintiff's purchase of the stock of the bank in question. After certain amendments to the pleadings suggested by the terms of that decision, the cause was retried, at which trial the facts educed at the former trial were again presented, and there was also introduced evidence of certain further facts bearing upon the alleged deceit and false statements and representations which, according to the plaintiff's averments, had induced the purchase by him from the defendants of 54 shares of the stock of said bank and the further purchase by him of 50 shares of a new issue of the stock thereof and which also induced the purchase by him of 270 shares of such stock from one Perine, for all of which stock he was alleged to have paid the par value of $100 per share. The trial court upon these proofs made findings in the plaintiff's favor upon the issue of deceit and of the reliance of the plaintiff upon the false statements of the defendants as to the true condition of the affairs of the bank and value of its stock in respect to his purchases of stock as to both the 104 shares thereof acquired directly from or through the defendants, and for which he paid in money and property the par value of $100 per share, and also as to the transaction whereby the plaintiff acquired 270 shares of such stock from Perine. As to the latter transaction, the court found that the plaintiff had given in exchange for the said Perine stock certain real and personal property upon which at the time of such transfer he had placed a valuation of $27,000, the equivalent of the par value of said stock, but which property the court found to have had at said time an actual value of but $18,000. The court further found that the actual value of the stock of said bank at the time of both of the foregoing transactions was $35 per share. Based upon these findings of fact, the court rendered its judgment wherein it awarded the plaintiff damages as a result of the first of the foregoing transactions in the sum of $6,760, which would be the difference between what the 104 shares of the stock of said bank was actually worth at the time thereof and what the plaintiff actually paid for that stock; and which would also represent the difference between the actual value of said stock and the value which said stock would have had if the statements and representations of the defendants as to the value of said stock had been true. As to the transaction of the plaintiff in respect to the Perine stock, the trial court by its judgment awarded the plaintiff damages in the sum of $8,985, which amount represented the difference between the sum of $9,450, the actual value of the Perine stock, and the sum of $18,435, which the court had found the properties which had been given by said plaintiff to said Perine for said stock to have been actually worth. These two amounts of damage aggregated the sum of $15,745, for which judgment was given by the trial court.

From this judgment these two appeals have been taken to this court, one by the defendants, urging that certain material find-

ings of the trial court, chiefly relating to the element of the defendants' deceit, were unsupported by the evidence and hence that the judgment should be reversed; and one by the plaintiff, insisting that the judgment, while correct in so far as it was founded upon the sufficiency of the evidence, and findings showing deceit, was for an insufficient sum in respect to the plaintiff's damages suffered thereby, and that in that respect the amount of damages awarded by the trial court should be increased upon appeal. These appeals having been transferred to the District Court of Appeal of the First District for hearing and decision, that tribunal affirmed the judgment upon the defendant's appeal, but upon the plaintiff's appeal determined that he was entitled to have the amount of his judgment for damages increased from $15,745 to $24,310, and so concluding returned the case to the trial court with instructions to increase the amount of the judgment accordingly. In its decision the District Court of Appeal sustained the plaintiff's contention as to the sufficiency of the plaintiff's evidence as supporting the findings and judgment showing deceit. With that portion of its decision which deals with that phase of these appeals this court is in accord, and it hereby adopts that portion of the decision of the said court touching that subject, which reads as follows:

"Two material findings—both challenged as unsupported by the evidence—are the basis of the judgment in favor of plaintiff from which this appeal is prosecuted. They are that defendants represented to plaintiff that the stock of the bank when the plaintiff bought it was worth $100 per share, and that the report of the bank's condition made to the 'Comptroller on May 14, 1908,' was a true statement of the bank's condition. The published summary of this report was handed to the plaintiff by the defendants in front of the bank when they were endeavoring to induce him to invest in its stock. It transpired at this trial—as it apparently did not at the first trial—that the report so handed to plaintiff was not the full report made to the comptroller, but only a published summary thereof. This summary showed the amounts at which loans, discounts, bonds, securities, etc., were carried on the bank's books, but did not disclose the bad debts or suspended and overdue paper, nor was the summary required to do so. The report was made on the blanks furnished by the comptroller; and if the whole report had been shown Macdonald he would have found listed therein bad debts and suspended and overdue paper amounting to $194,663.12. When the published summary alone was shown him, he was told that it showed the real condition of the bank at the date of the report, and that the bank's condition had not been changed since that report had been presented. He was also told that this summary was the only report that the defendants had of the bank. They actually had at the time in the bank a copy of the entire report made to the comptroller and the Knight report referred to in the Supreme Court's opinion, and also Gray's estimate of the value of the bank's assets. The Knight report and this estimate showed that the published summary did not indicate the bank's real condition.

[1] "In this state of the case, the appellants contend that they practiced no deceit upon Macdonald by so showing him the summary of this report, because the summary under the law was not required to show anything except the value of the bank's assets as carried on the books of the bank.

"With this contention, under the facts of this case, we are unable to agree. The trial court was justified in finding that, when the summary was presented to Macdonald with the statement that it was the only report of the condition of the bank which the defendants had, he was justified in believing that the fragmentary summary, although strictly legal so far as its publication was concerned, was a statement of the real condition of the bank and not a statement of the showing made by its books. They knew perfectly that this summary did not represent the real financial condition of this bank; and they also knew that Macdonald understood them to represent that the actual value of the bank's stock was $100 a share, and that the actual value of its assets was that shown by the summary. 'The reliance which the plaintiff was entitled to place upon this report, then, was a reliance that the report was a true statement of the bank's financial condition, and not a mere transcript of the condition of the bank as shown upon its books.' This statement of the Supreme Court in the reported case is still applicable to this case, even in view of the additional facts developed at the second trial, as is also the following statement: 'Deceit may be negative as well as affirmative. It may consist in the suppression of that which it is one's duty to declare as well as by the declaration of that which is false. If it be so, that defendants did not believe and could not have believed that the report contained a true statement of the bank's financial condition, their failure to disclose this fact to the plaintiff in handing him the report forms the foundation for an action for deceit under the principle above stated. Civ. Code, § 1710.'

"It seems to us that this statement applies with greater force in view of the fact that had the entire report, which was a few feet away in the bank, been shown Macdonald instead of the published summary the actual financial condition of the institution would have been disclosed to him, or he would at least have been placed upon notice as to its actual financial condition.

"We are satisfied that the evidence sustains the finding as to the misrepresentation by the defendants to the plaintiff of the true condition of the bank; and also as to the fact that they represented the stock to be worth $100 a share when it was worth only about $35 per share.

"As to the question whether the latter representation was one of fact or opinion, we think that point settled by the Supreme Court in its opinion referred to."

The point of departure between the views of this court and those of the District Court of Appeal expressed in that portion of its opinion which is not above quoted is as to the proper rule for the admeasurement of the plaintiff's damages to be applied to each of the two transactions out of which the plaintiff's right to damages arose. As to the transaction directly with the defendants for the purchase by plaintiff of the 54 shares of their stock in said bank and also as to the acquisition by him of 50 additional shares of the new issue of stock therein, it is not necessary to draw the distinction which is drawn in the case of Hines v. Brode, 168 Cal. 507, 143 Pac. 729, between the rule of damages in this class of cases which has been adopted in this state and that which obtains in the federal courts and in certain

other state jurisdictions, for whichever rule was adopted as applicable to that branch of this case the result would be the same, since under either rule the plaintiff would be entitled to a recovery in damages of the difference between what the stock was actually worth and that which it would have been worth if the defendants' representations had been true, since the value which the defendants represented said stock to have and the amount which he paid for it were identical. In the case of Hines v. Brode, supra, this court took pains to state that the rule of damages in actions founded upon deceit which had been theretofore adopted in this state, and by which a wronged plaintiff would be entitled to recover the difference between the actual value of the purchased property and its value had the property been as represented, and that the measure of such recovery was not affected by the price actually paid, "is the extreme rule and one that should only be applied in clear cases and upon just terms." As to the first transaction, therefore, upon which the plaintiff predicates his right of recovery, viz., the transaction directly with the defendants for the purchase from or through them of the 54 shares of their stock and of the 50 shares of the new issue of the stock of said bank, we are of the opinion that, measured by either rule of damages, the judgment of the trial court was correct in affixing the sum of $6,760 as the proper amount of the plaintiff's recovery on account of that transaction.

[2] With respect to the transaction involving the purchase by the plaintiff of the Perine stock, the District Court of Appeal undertook to apply also to that transaction the rule of damages reiterated in the case of Hines v. Brode, supra, and in the earlier cases from which it was taken. In so doing we think the District Court of Appeal was in error, and that its action in so doing had the effect of extending said rule beyond the limits to which, as above shown, it was expressly meant to be confined. In the case of Hines v. Brode, supra, and in certain of the earlier cases referred to therein, the action involved the immediate transaction between the parties with direct inducement to which the false statements and representations were made, and the court in such cases held that the plaintiff was entitled to the benefit of his bargain, and hence should recover the difference between what the purchased property was actually worth and what it would have been worth had the false representations as to its value been true, regardless of the price paid. But in the case at bar and with respect to the purchase by plaintiff of the Perine stock the state of facts which would have justified the application of this rule of damages did not exist. The transaction for the purchase of the Perine stock was not one to which the defendants directly or indirectly were parties. They had no knowledge nor any connection as parties with the plaintiff's transaction with Perine, nor does the evidence anywhere disclose, nor do the findings of the court show, that whatever false representations were made by them to the plaintiff were made with any direct intent to induce the purchase by the plaintiff of the Perine stock. As to these defendants, therefore, in respect to this particular transaction, he had no bargain to the benefit of which he was entitled. It is true that in respect to the reports which, under section 5211 of the National Bank Act, are to be made periodically by national banks to the Comptroller of the Currency, it has been held that such reports as to the financial condition of such banks are not made solely for the information of the Comptroller or of the stockholders and depositors of the bank, but are intended also to afford public information to all persons having or contemplating business transactions into which the condition of the bank enters as a material fact (Macdonald v. De Fremery, supra; Stuart v. Staplehurst, 57 Neb. 569, 78 N. W. 298; Gerner v. Yates, 61 Neb. 100, 84 N. W. 596; Hindman v. First Nat. Bank, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108); and consistent with this holding it has been further held that the directors or other officers of such banks who join in the making of reports of this character by preparing or attesting the same, are liable for any material falsity which they may contain to persons who, in reliance upon such reports, are induced to deposit funds in the bank (Jones Nat. Bank v. Yates, 240 U. S. 541, 36 Sup. Ct. 429, 60 L. Ed. 788), or who purchase its stock (Gerner v. Mosher, 58 Neb. 135, 78 N. W. 384, 46 L. R. A. 244), or who lend money upon such stock as security (Merchants' Nat. Bank v. Thoms, 11 Ohio Dec. [Rep.] 632).

In all of the foregoing cases, however, and in many others in which damages arising out of the falsity of the statements contained in such official reports to the Comptroller of Currency were sought, both the federal and the state courts elsewhere have uniformly held that the rule of damages to be applied to this class of cases is one by which the measure of the plaintiff's damage is the difference between the actual value of the stock and the amount actually paid by him therefore in reliance upon the representation found to be false. In a transaction such as that involved in this phase of the instant case, viz., the purchase by plaintiff of the Perine stock, we are of the opinion that the rule of damages last above stated is the proper and just rule to be applied to that transaction, rather than the more extreme rule adopted in Hines v. Brode, supra, as applicable to the facts of that particular case. The trial court applied the correct rule to each of the transactions out of which the plaintiff's claim of damages arose and there-

by reached the proper amount which the plaintiff as to each cause of action was entitled to recover.

As to both appeals, therefore, the judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; WILBUR, J.; MELVIN, J.

---

179 Cal. 220

WIENKE et ux. v. SMITH et al. (ASH et al., Interveners). (S. F. 7635.)

(Supreme Court of California. Nov. 4, 1918.)

1. ESTOPPEL ⊜110—WAIVER—NECESSITY OF PLEADING.

Waiver is an affirmative defense requiring the facts on which it claimed to be set up in the answer, and merely making it a ground of motion for nonsuit is not enough.

2. MORTGAGES ⊜408—DEFAULT IN INSTALLMENT—FORECLOSURE FOR ENTIRE AMOUNT—WAIVER OF RIGHT—ACCEPTANCE OF PORTION.

Acceptance, after maturity of an installment of mortgage debt, of a portion thereof, works no waiver of right given by mortgage to foreclose for entire amount on default in installment; the payments being pursuant to agreements collateral to the mortgage, requiring the mortgagors to turn over to the mortgagee all payments on account of sales of lots, and the mortgagee to accept them, and on payment in full for a lot to release it, and such agreements providing that they shall not affect the mortgage.

3. ESTOPPEL ⊜52—"WAIVER."

"Waiver" always rests on intent, and is the intentional relinquishment of a known right after knowledge of the facts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Waiver.]

4. MORTGAGES ⊜414—FORECLOSURE—CONDITION PRECEDENT — NOTICE—ACCELERATING DUE DATE.

Under provision of mortgage and secured note that on any default in payment of an installment the whole sum secured shall become due at mortgagee's option, prior notice of election is not a prerequisite to commencement of foreclosure suit.

5. MORTGAGES ⊜581(2) — FORECLOSURE—ATTORNEY'S FEES—DEMAND OR NOTICE BEFORE SUIT.

Under provision of mortgage for counsel fee of certain per cent. of debt due, if foreclosure suit be brought any time after default in payment of any installment, demand or notice before suit after default in installment is not necessary to liability for attorney's fees, which arises coincidentally with right to foreclose.

6. MORTGAGES ⊜581(7) — FORECLOSURE — JUDGMENT FOR COUNSEL FEES.

The mortgage providing that mortgagors and mortgaged property are hereby made liable for counsel fees, there is a right, not merely to personal judgment, but to foreclosure therefor.

7. MORTGAGES ⊜415(1) — FORECLOSURE — CONDITION PRECEDENT—COLLATERAL AGREEMENT.

Mortgagee before foreclosure need not collect all payments due on contracts of sale of lots assigned to him by mortgagor by collateral agreement, or terminate such contracts; such agreement providing that nothing in or arising from it shall be defense to foreclosure suit.

8. MORTGAGES ⊜491—FORECLOSURE OF VENDEES' RIGHTS.

All payments under contracts of sale of lots covered by mortgage being due at time of interlocutory decree, giving vendees 90 days in which to make payment, and receive deeds for their respective lots, making decree absolute at end of that time against those not paying is proper.

In Bank.

Appeal from Superior Court, San Mateo County; Henry C. Gesford, Judge.

Mortgage foreclosure action by J. F. Wienke and wife against C. B. Smith and others. From judgment of foreclosure and an order denying a new trial, the named defendant and another, and William H. Ash and others, interveners, appeal. Affirmed.

J. E. Pemberton, Gavin McNab, and R. P. Henshall, all of San Francisco, for appellants.

J. N. Young, of Oakland, for appellants interveners.

Daniel A. Ryan, of San Francisco, Ross & Ross, of Redwood City, and J. J. Lermen, of San Francisco, for respondents.

PER CURIAM. The defendants C. B. and Julia Smith, and a number of persons who appeared as interveners during the pendency of the action, prosecute appeals from the judgment and from an order denying a new trial.

The complaint stated a cause of action to foreclose a mortgage upon lands described therein, given to secure a debt of $43,655.25, evidenced by a note executed by C. B. Smith and George O. Rich. The appellant Julia A. Smith is the wife of her codefendant C. B. Smith and is not otherwise interested in the action. The debt was payable in installments: $5,000 on May 1, 1911; $5,000 on March 1, 1912; $10,000 on March 1, 1913; and $23,655.25 on or before March 1, 1916. The note provided that—

"Upon any default being made in the payment of any installment, or in the payment of any interest, the whole amount of the principal sum then unpaid shall become due at the option of the holder hereof."

The mortgage contained a similar provision.

The first installment, due May 1, 1911, was paid. The action was begun on April 24, 1912. The complaint alleges that $3,112.15 had been paid on the $5,000 due March 1, 1912, and that the balance of that installment remained unpaid. The prayer was for the recovery of judgment for the entire amount of the promissory note remaining unpaid, and for the foreclosure and sale of the property mortgaged. The final judgment was that the plaintiffs recover of Smith and Rich $43,685.28, and for the foreclosure and sale of the property then remaining subject to the mortgage, for the purpose of paying said sum and costs.

In March, 1906, Wienke and wife, being

the owners of the land in controversy, made a contract with C. B. Smith, providing that the land should be subdivided into lots, and should be sold by Smith, who, after deducting commissions, should pay the proceeds to Wienke and wife, until they had received $30,000, or that Smith might pay them $30,000 at any time within five years, and that upon the receipt of said sum Wienke and wife should execute a deed to Smith for an undivided one-half of the property remaining unsold. Sales were made by Smith under this contract from time to time, the price being made payable in installments, and the proceeds as collected were paid to Wienke. On January 5, 1911, said contract was canceled. Rich became interested with Smith, and several instruments, including the note and mortgage herein sued upon, were executed for the settlement of the transactions had. The other instruments were as follows: (1) A deed from Wienke and wife, conveying to Smith and Rich all the interest of the grantors in the property described in the contract of March, 1906; (2) an agreement whereby Smith and Rich assigned and transferred to the Wienkes all of the outstanding contracts for the sale of parcels of the land, as additional security for the payment of the mortgage debt. This agreement (described in the record as the "assignment") provided that Smith and Rich should collect the installments due under the contracts of purchase, and pay the amount thereof over to the Wienkes monthly; the sums so collected and turned over to be applied as payments on the note and mortgage. It provided, further, that nothing therein contained should in any way interfere with the terms and conditions of the mortgage, and that, in the event of any suit being brought upon the note to foreclose the mortgage, nothing contained in the agreement "or arising or resulting therefrom shall be any defense whatsoever to any action by said parties of the second part [Wienke and wife] to foreclose said mortgage or said mortgagors' right of redemption. It is further stipulated and agreed that in case of such action this contract, except as otherwise expressly provided herein, shall be considered only for the purpose of ascertaining how much money said parties of the second part received thereby, and in ascertaining the amount due said parties of the second part upon said promissory note." Only one further clause of this writing need here be mentioned, namely, one requiring Smith and Rich to pay all taxes on the land, and providing that, if they should fail so to do, Wienke and wife might pay the same and deduct the amount so paid from the first money afterwards received by them under the outstanding contracts of sale, and that to that extent such payments should not be applied on the mortgage debt. (3) On the same day, January 5, 1911, the Wienkes made a written agreement with Smith and Rich, providing for the release from the lien of the mortgage, upon payment of specified sums, of the various lots embraced in the mortgaged tract. We shall refer to this instrument as the "release agreement."

The answer of the defendants C. B. and Julia Smith does not deny—on the contrary, it expressly admits—the default alleged in the complaint. It sets up certain affirmative matter designed to show that payment of the installment due on March 1, 1912, was prevented by the acts of Wienke. The findings of the court are against this defense, and the appellants have not in their briefs questioned the sufficiency of the evidence to sustain the findings in this regard. There is no plea that the plaintiffs waived the right given to them by the terms of the note and mortgage to declare the entire sum due for default in the payment of any installment. Nevertheless, it is contended that upon the facts shown in evidence the court below should have held that the plaintiffs had waived their right to foreclose for the entire sum named in the note. The evidence is substantially without dispute. The payments made on the mortgage debt consisted of collections made by Smith and Rich under the outstanding contracts for sales of lots, and turned over to the Wienkes in accordance with the provisions of the "assignment." Some of these payments were made by the lot purchasers direct to Wienke, instead of passing through the hands of Smith and Rich. The entire first installment of $5,000, due May 1, 1911, was paid. Of the $3,112.15 paid on the installment due March 1, 1912, the greater part had been paid prior to the date upon which the installment fell due. Between March 1, 1911, and April 24, 1912, the day the action was begun, sums amounting to several hundred dollars were paid to the plaintiffs pursuant to the contracts of purchase and the "assignment." A portion of these sums was properly applicable by the plaintiffs to their reimbursement for taxes which they had paid in October, 1911. There still remained in their hands, however, applicable to the payment of the principal of the note and mortgage, out of the moneys received after March 1, 1912, and before the commencement of the action, a small sum. The respondents maintain that it amounted to $47.50. The department opinion, heretofore filed herein, fixes it at $217.50. It is not important, for the purposes of the present discussion, to determine which of these figures is correct. The contention of the appellants Smith is that by accepting, after the maturity of the installment payable March 1, 1912, a portion of the sum then due, the plaintiffs waived their right to declare the entire sum of the note due for a default in the payment of such installment. They rely upon the rule declared in Boone v. Templeman, 158 Cal. 290, 295, 110 Pac. 947, 139 Am. St. Rep. 126, and similar cases, where it was held that under a contract of sale

for a price payable in installments, with provision for a forfeiture for failure to pay any installment when due, time being made of the essence of the contract, the acceptance of a part of one installment after its maturity waives the right of the vendor to terminate the contract for that default. We may assume, for present purposes, that the rule is equally applicable to the foreclosure of a mortgage, where the sum due is payable in installments, and the note and mortgage give the payee the right to declare the principal sum due for default in the payment of any installment. But, so assuming, we think the appellants in this case are not entitled to the benefit of the rule for which they contend.

[1] In the first place, there was, as we have already pointed out, no plea of waiver. Waiver is an affirmative defense, and a defendant desiring to take advantage of it must set up in his answer the facts upon which he bases his claim. Hewitt v. Dean, 91 Cal. 5, 27 Pac. 423; Patten v. Pepper Hotel Co., 153 Cal. 460, 469, 96 Pac. 296. It is no answer to this point to say that the defendants made the asserted waiver a ground of motion for nonsuit. Their motion was denied, and we must assume that the court denied it, as it might properly have done, for the very reason that the pleadings laid no foundation for the attempted defense. The appellants Smith and wife did, it is true, offer to file an amended answer, but leave so to do was denied them, and it is not claimed that the court erred in this ruling.

[2, 3] But beyond the mere matter of pleading, we think the acceptance by the respondents of the sums paid them should not, under the circumstances of this case, be held to have worked a waiver of their right to declare the principal sum due. These sums were not paid and received in performance, solely of the obligation embodied in the note and mortgage. They were paid pursuant to the collateral agreement of even date (i. e., the "assignment"), whereby Smith and Rich were bound to turn over to the Wienkes, and the latter were bound to receive, all payments made by purchasers of lots under their contracts. The Wienkes had no right to refuse any such payments. Under the "release agreement," executed contemporaneously with the mortgage and the "assignment," they were required, upon payment in full for any lot, to release that lot from the lien of the mortgage. The holders of contracts were therefore interested in the transmittal to the Wienkes of all installments paid by them. Being under an obligation, arising from transactions outside of the note and mortgage, to receive such payments, the Wienkes cannot by such receipt be held to have waived their right to declare the principal sum due. "Waiver always rests upon intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts." Alden v. Mayfield, 164 Cal. 6, 11, 127 Pac. 45, 48. It implies "the intentional forbearance to enforce a right" (id.), and necessarily, therefore, assumes the existence of an opportunity for choice between the relinquishment and the enforcement of the right. In this case the Wienkes were not in a position to elect whether to accept the payments or to refuse them. The "assignment" required them to accept the sums collected from lot purchasers, and there is no good ground, in reason and equity, for saying that by so accepting they manifested an intention to surrender the privilege given to them by the note and mortgage of declaring the entire principal sum due for default in the payment of an installment. This conclusion is fortified by the provisions of the contract of "assignment," already quoted, to the effect that nothing therein contained shall in any way affect the terms and conditions of the mortgage, or be any defense to an action of foreclosure, and that the contract shall be considered only for the purpose of ascertaining the amount due by Smith and Rich upon the note. These clauses clearly manifest the intention of the parties that the payments provided to be made under this agreement are not to affect the rights created by the note and mortgage.

The other points made by the appellants Smith are plainly without merit, and require only the briefest notice.

[4, 5] Both the note and the mortgage provided for the acceleration of the due date of the principal on default in the payment of any installment. The payees were not required, as a condition precedent to the institution of the action, to give notice of their election to declare the principal sum due. The commencement of the suit was a sufficient notice. Whitcher v. Webb, 44 Cal. 127; Hewitt v. Dean, 91 Cal. 5, 27 Pac. 423; Trinity Bank v. Haas, 151 Cal. 553, 91 Pac. 385. The mortgage provided for counsel fees of 5 per cent. of the debt due, if suit should be brought for the foreclosure of the mortgage, "at any time after default made in the payment of any of said installments." The liability to pay attorneys' fees arose coincidentally with the right to foreclose, and a prior demand or notice was no more essential with respect to counsel fees than it was with respect to the collection of the principal. The contrary contention is not supported by the cases cited by the appellants, all of which deal with an entirely different state of facts.

[6] It is asserted that there should have been merely a personal judgment for counsel fees, because, as is claimed, the obligation to pay such fees was not secured by the mortgage. The argument has no foundation in fact. The mortgage provides specifically that "the mortgagors and mortgaged property are hereby made liable to the mortgagees for such counsel fees." The instrument is not at all similar to that considered in Klokke v.

Escailler, 124 Cal. 297, 56 Pac. 1113, where, by the express terms of the mortgage, the lien did not cover counsel fees.

[7] The claim that the mortgagees were bound, before foreclosing, to collect all payments due under the contracts of purchase assigned to them, or to terminate such contracts, is sufficiently answered by the provisions of the "assignment" itself, which expressly provided that nothing contained in it or arising from it should be any defense to an action of foreclosure.

[8] The appellants make one further point, which also arises on the appeal of the interveners. The latter were holders of contracts under the agreement above mentioned between the plaintiffs and Smith. Upon the trial of the action their rights were fully investigated, the amount each one still owed upon the contracts was determined, and an interlocutory decree was made, giving those who had not forfeited their contracts the right to make full payment thereon and receive a deed conveying to them, respectively, the particular parcel purchased, free of the said mortgage lien, within 90 days after the date of said decree. This decree was made after all of the installments of the purchase money on said contracts had become due and payable, according to their terms. After the expiration of the 90 days prescribed by said interlocutory decree, a further hearing was had, the rights of those who had paid up in the meantime were adjusted and determined, some of them received deeds for their lots free of the mortgage, and as to the others the decree of foreclosure of the mortgage was made absolute. The decree deprived the interveners (and, a fortiori, the appellants Smith) of no substantial right. It was in effect the usual decree of a strict foreclosure of a vendee's right to purchase upon his failing to make the payments as provided in his contract.

The judgment and the order denying a new trial are affirmed.

---

179 Cal. 218

In re BOSELLY'S ESTATE. (S. F. 8738.)

(Supreme Court of California. Nov. 4, 1918.)

EXECUTORS AND ADMINISTRATORS ⊂=197—ALLOWANCE TO WIDOW—REDUCTION.

The court may from the filing, or at least the service, of application for modification, reduce allowance made to widow pending administration.

Department 1. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Frederic James Boselly, deceased. On petition of Violet Aline Holbo, allowance, pending administration, to Eugenie Susan Boselly, widow, was reduced, and the widow appeals. Affirmed.

See, also, 175 Pac. 4.

Thomas, Beedy & Lanagan, of San Francisco, for appellant.

J. D. Lederman, of San Francisco (T. E. Powlicki, of San Francisco, of counsel), for respondent.

SLOSS, J. Pending the administration of the estate of Frederic James Boselly, and after the return of the inventory, the court, on June 11, 1915, made an order, under section 1466 of the Code of Civil Procedure, granting the widow an allowance of $350 per month until the final distribution of the estate. On April 28, 1916, Violet Aline Holbo, a daughter of the decedent, and one of the beneficiaries under his will, filed a petition for the termination of the allowance granted by the order of June 11, 1915. The court set the matter for hearing, and directed that notice be given the widow by posting and by service upon her attorneys. Such notice was duly given, and, an amended petition having been filed, the widow, on June 15, 1916, filed her answer.

Hearings were had and continued from time to time and the court finally, on May 25, 1917, made its order reducing the allowance from $350 per month to $150 per month "for the period commencing with the 19th day of October, 1916, and ending with the final distribution of the estate." The widow appeals from this order.

The estate was solvent, and the allowance was not limited in duration to one year from the grant of letters, as it would have been in case of insolvency. Code Civ. Proc. § 1466; Estate of Treat, 162 Cal. 250, 121 Pac. 1003. No appeal was taken from the order of June 11, 1915, granting the allowance during the pendency of the administration, and that order was therefore conclusive in favor of the widow, so long as it remained in force. The court was, however, vested with power to modify the provision theretofore made upon a showing that conditions had so changed as to call for a revision of the prior order. Estate of Nelson, 167 Cal. 321, 139 Pac. 692. The propriety and extent of such alteration are matters committed to the discretion of the trial court. The appellant does not claim that, on the evidence here presented, the court abused its discretion in ordering a reduction of the allowance for the remaining period of the administration. The sole point made is that the court was without authority to cut off or reduce the accruing allowance at or from any time prior to the actual making of the order of reduction on May 25, 1917; or, as appellant puts it, that the court had no power to make its order reducing the family allowance operate retroactively.

What the court did was to make its modification operate from a period prior to the actual making of its second order, but subsequent to the filing and service of the notice of intention to move for such modification. In so doing, the court did not attempt

to give to its new order a retroactive effect, or to cut off vested and accrued rights. It is true that an order or judgment takes effect, ordinarily, only from the date of its rendition or entry. But the institution of a proceeding, and the service of process therein, vests in the court jurisdiction to adjudicate every matter embraced within the issues tendered. A judgment frequently, if not usually, determines a status or the existence of a fact as of the time of the commencement of the action. So here, the application for a modification of the existing order for family allowance gave the court authority to fix the future extent of the allowance from the filing, or at least the service of the application. In Estate of Nelson, supra, the very case on which appellant places her main reliance, the court, on the appeal of the widow, affirmed an order reducing her family allowance from the date of the service of the notice of motion for modification. To the same effect is Ford v. Ford, 80 Wis. 565, 50 N. W. 409, where the Supreme Court of Wisconsin, recognizing that the trial court could not give retroactive effect to an order terminating a prior order for family allowance, yet held that the allowance might properly be cut off from the time of the presentation of the petition in that behalf.

It follows that there is no ground shown for disturbing the action of the court below.

The order is affirmed.

We concur: ANGELLOTTI, C. J.; RICHARDS, Judge pro tem.

---

178 Cal. 418

## STEWART v. CALIFORNIA MEDICAL MISSIONARY & BENEVOLENT ASS'N.

## STEWART et al. v. SAME.

(Sac. 2430.)

(Supreme Court of California. June 19, 1918. Rehearing Denied July 15, 1918.)

1. CHARITIES ⟸45(2)—HOSPITAL—LIABILITY FOR TORT.
In action against corporation owning hospital for negligence of nurse, the question of whether hospital is a charitable institution or is operated for profit is determined, not only from the powers of the owning corporation as defined in its charter, but also by manner of conducting the hospital.

2. CHARITIES ⟸45(2)—HOSPITALS—ACTIONS—NONCHARITABLE CHARACTER.
Where a hospital charged prices similar to those charged by other hospitals being conducted for profit and had operated for 13 years without receiving any charity patients, it was a hospital being conducted for profit and not a charitable institution, though corporation had been organized for charitable purposes.

3. CHARITIES ⟸45(2)—LIABILITY FOR TORTS—HOSPITALS—PAY PATIENTS.
That corporation owning a hospital is a charitable organization does not preclude a patient from recovering for negligence of nurse, where patient paid for accommodations at rate ordinarily charged by hospitals conducted for profit and had no knowledge of charitable character of corporation.

4. CHARITIES ⟸45(2)—LIABILITY FOR TORTS—EVIDENCE—SUFFICIENCY.
In negligence action against hospital, where defendant claimed exemption from liability because it was a charitable corporation, evidence *held* sufficient to support finding that hospital was operated for profit.

In Bank. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Actions by D. M. Stewart, and by Lola A. Stewart and another, against the California Medical Missionary & Benevolent Association (a corporation). Judgments for plaintiffs in both actions, and defendant appeals from both judgments; the appeals being consolidated. Affirmed.

Theodore A. Bell, of San Francisco, and Power & McFadzean, of Visalia, for appellant.

Larkin & Bailey, of Visalia, for respondents.

WILBUR, J. The defendant appeals from two judgments, consolidated by stipulation for purposes of appeal, rendered against it for damages suffered by the plaintiffs, who are husband and wife, by reason of personal injuries received by Lola A. Stewart, the wife, hereafter referred to as the plaintiff, caused by the negligence of a nurse in the St. Helena Hospital, operated by the defendant, a nonprofit corporation. Trial was had before the court without a jury. On July 6, 1911, while still unconscious from the anæsthetic administered during an operation, plaintiff was burned by a hot water bag, placed in her bed for the purpose of warming it. The court found that the nurse was negligent in failing to remove the hot water bag from the bed before placing the plaintiff therein, and also found that the defendant was negligent in not providing covers for the hot water bags for use by the nurses. The court found that the nurse was competent. Defendant claims that under the circumstances found it is not liable for the injuries suffered by the plaintiff for the reason that it is a charitable corporation.

The defendant corporation was organized June 10, 1898, and took over the St. Helena Sanitarium, which was founded in 1878. The court found that the defendant had never received any patients for prices less than those ordinarily charged by similar institutions conducted in this state for profit, and that no charity patients would be received or had been received or treated except by previous arrangement. It found that the defendant carried on the business in question under the name of the St. Helena Sanitarium and that all business thereof was transacted in the name of said sanitarium; that there was nothing to indicate to a person applying for treatment that the sanitarium was conducted by the defendant; it was not shown that any property was ever conveyed, transferred

in trust, or donated to the defendant for charitable purposes; that plaintiff did not know or believe that the defendant owned the sanitarium in question, or that it was carried on or run as a charitable institution, but that plaintiff believed that she was dealing with the St. Helena Sanitarium, and in all her dealings she had no knowledge that it was or claimed to be a charitable institution; and that she paid the full price for the operation and all treatment and for the room furnished to her, and was not the recipient of any charity. The court also found with reference to the powers and purposes of the corporation and drew legal conclusions therefrom; but, as the articles of incorporation and the by-laws are before this court, we will deal with them rather than with the specific findings of the trial court with reference thereto. The articles of incorporation authorized the defendant:

"To found hospitals or charitable asylums for the care and relief of indigent and other sick or infirm persons, at which institutions may be received also patients and patrons who are able to and do pay for the benefits there received, and which institutions shall devote the funds and property acquired and received by them from time to time from all sources, exclusively to maintaining themselves, improving their conditions and facilities, extending their benefits and usefulness and facilities, and promoting their purpose by such sanitary, dietetic, hygienic, philanthropic, dress and temperance reforms and efforts as are germane or auxiliary thereto, and to oppose the use of tobacco, tea, coffee, and other narcotics, as well as of alcoholic liquors, disseminate the principles of social purity, find homes for homeless children and outcast men and women, and care for the aged and infirm; train and send out missionary physicians and missionary nurses, to engage in the promulgation of the principles of hygiene, temperance reform, and Christian philanthropy, and enter upon various lines of work for the relief and betterment of the ignorant, unfortunate, degraded and suffering, both rich and poor, without distinction to race or creed, and to manufacture and sell hygienic goods and sanitary products, and to promote the objects of said institutions by means of classes, lectures, publications, and other appropriate methods, all of which work and acts shall be done without pecuniary profit or dividend, direct or indirect, to any person or persons, and to acquire and hold by purchase, lease, gift, devise, and bequest, or any lawful means, such real estate, water rights and other privileges, as may be necessary, useful or convenient in entering upon, promoting or maintaining the objects of said incorporation, * * * become a member or stockholder in any other institution having for its object the treatment of invalids or sick people, and to sell, incumber, or otherwise dispose of the same."

[1, 2] The purposes outlined in the articles of incorporation are almost as broad as the field of Christian philanthropy, extending its limits throughout the whole world. It is obvious, however, that the intent of this corporation is to utilize the profits made by one institution in furthering the interests of that and of other institutions, or religious or hygienic propaganda, or for manufacture of hygienic goods, etc. The sanitarium in question had been operated at the time of the injury to the plaintiff for 13 years (1898–1911) without having at any time received any charity patients. Whatever the intent of the organization generally, it was evident that the hospital itself was being used as a money-making institution and should be treated as such, unless the fact that the corporation was a nonprofit making corporation and that all money made in the hospital was ultimately devoted to some charitable purpose would prevent that. The character of the institution is to be determined, not alone by the powers of the corporation as defined in its charter, but also by the manner of conducting the hospital. See Del Mar Water, etc., Co. v. Eshleman, 167 Cal. 666, 678, 140 Pac. 591, 948. In the case of Vermillion v. Woman's College of Due West, 104 S. C. 197, 88 S. E. 649, the defendant claimed to be exempt from responsibility for a tort on the ground that it was a charitable corporation. The court, in disposing of the contention, said:

"Defendant offered no evidence to prove its relation to the public, but relied upon certain statutes" to prove "its incorporation and association with the Associate Reformed Presbyterian Synod to show that it is a public charity. Careful consideration * * * shows that, while they warrant an inference that defendant is a public charity, they do not prove that fact beyond dispute, for they are not inconsistent with the view that defendant is a private corporation conducted for gain."

And, in reply to the argument that the corporation in question was by law under the control of the Presbyterian Synod, a "public charity corporation," and was therefore of the same character, the court said:

"That may be so, but it is not the only inference of which the facts are susceptible. The synod may be invested with like authority over a private enterprise conducted for gain, on account of the benefit which would probably and naturally inure to such an institution by reason of its association with a great religious organization."

And so we may say here, the declaration in the articles alone are insufficient to establish the character of the St. Helena Hospital as a public charity, and the evidence of the manner it was conducted shows that it was not. The courts of this country have almost unanimously arrived at the conclusion that hospitals organized for charitable purposes are not liable to their patients for injuries arising from the negligence of their employés, where reasonable care is used in the selection and retention of the employé, although the reasons given for this rule vary in the different states. Among the more recent authorities on that subject, in which the decisions from other states are collated, are Morrison v. Henke (Dec. 5, 1916) 165 Wis. 166, 160 N. W. 173; Magnuson v. Swedish Hospital (Wash, Jan. 11, 1918) 169 Pac. 828; Bishop Randall Hospital v. Hartley (Oct. 30, 1916) 24 Wyo. 408, 160 Pac. 385; Loeffler v. Trustees of Sheppard & Enoch Pratt Hospital, 130 Md. 265, 100 Atl. 301, L. R. A. 1917D, 967; Vermillion v. Woman's College of Due

West, supra; Gamble v. Vanderbilt University (Tenn., Feb. 9, 1918) 200 S. W. 510. See, also, 11 Corpus Juris, 374 et seq., §§ 106, 108, 5 R. C. L. 374 et seq., §§ 121, 124, and cases cited. The question was also considered by this court in department (July, 1914) in Thomas v. German Gen., etc., Society, 168 Cal. 183, 188, 141 Pac. 1186. It was there said, without discussing the doctrine, that:

"All of the authorities pro and con have been industriously collated and learnedly reviewed in Basabo v. Salvation Army, 35 R. I. 22 [85 Atl. 120, 42 L. R. A. (N. S.) 1144]. With the conclusion there reached we are in accord. That conclusion is that the true doctrine amounts to this: That where one accepts the benefit of a public or of a private charity, he exempts by implied contract the benefactor from liability for the negligence of the servants in administering the charity, if the benefactor has used due care in the selection of those servants."

In view of the fact that the court had arrived at the conclusion that under the ordinary rules pertaining to corporate liability the defendant in that case was not liable for the injury complained of because of the fact that the proximate cause of the injury was the negligence of a fellow servant, for which the defendant was not in any event liable, and in view of the further fact that the court does not attempt to apply the rules enunciated in Basabo v. Salvation Army, supra, to the facts of that case, the case cannot be considered as having committed this court to any one of the several theories on which the nonliability of charitable corporations is based, or to the doctrine of nonliability. It may be noted, however, that if this rule is followed, the defendant could hardly claim to be thereby relieved of responsibility, for the reason that the plaintiffs had no knowledge whatever of the charitable character of the organization.

[3, 4] The most liberal theory of exemption from liability for the negligence of the servant is that based upon what is known as the "trust fund theory." That is to say, that the exemption is based upon the proposition that the court will not allow funds held in trust for a charitable purpose to be diminished by the payment therefrom of damages due to the negligence of those employed by the trustees in charge of the trust property. This doctrine obtains in South Carolina, and the case of Vermillion v. Woman's College, etc., supra, was decided in view of that rule. A more direct decision to the effect that a corporation organized to conduct a public charity may also conduct an enterprise for gain, and be liable for the negligence of its employés in such enterprise, although the profits derived therefrom are devoted to the general purposes of the charity, is found in Tennessee, one of the most recent states to adopt the trust fund theory of nonliability. That court was asked to apply the rule in the case of Gamble v. Vanderbilt University, supra, in a case where the injury arose by reason of the negligent operation of an elevator in the building held by the university as an endowment. The court in holding the defendant responsible, admitted that a strict application of the trust fund theory to the facts of that case would exempt the defendant from liability, but there said:

"Although this building was lawfully operated by the university as an investment for the purpose of making profits to be used in its educational work, as held in Vanderbilt University v. Cheney, 116 Tenn. 259, 94 S. W. 90, yet it was in our judgment an enterprise sufficiently distinct and remote from the central activities of the charitable organization to make it inadvisable, from the viewpoint of public policy, to extend the exemption from liability thereto. * * * In our opinion as to such a remote enterprise the corporation should be held liable as any other corporation; but such damages as may be adjudged against it for breaches of duty in respect of such management should be charged as expenses of the operation of the particular property, and only the residue of the income should be available for the uses of the charity" —citing Winnemore v. Philadelphia, 18 Pa. Super. Ct. 625; Holder v. Massachusetts Horticultural Society, 211 Mass. 370, 97 N. E. 630.

In reference to the trust fund theory of nonliability in holding the defendant liable, the court said:

"How this shall be applied to particular cases or classes of cases is a matter in the wise discretion of the courts of each jurisdiction, according to their conception of sound policy. We can see no objection to the application of public policy as a ratio decidendi. Every really new question that comes before the courts is, in the last analysis, determined on that theory, when not determined by differentiation of the principle of a prior case or line of cases, or by the aid of analogies furnished by such prior cases. In balancing conflicting solutions, that one is perceived to tip the scales which the court believes will best promote the public welfare in its probable operation as a general rule or principle. But public policy is not a thing inflexible. No court is wise enough to forecast its influence in all possible contingencies. Distinctions must be made from time to time as sound reason and a true sense of justice may dictate."

In the instant case, we hold that the trial court was required to look, not only to the defendant's articles of incorporation and bylaws to determine the character of the hospital conducted by it, but also to the method of transacting the business of the corporation. Its finding that the hospital was in fact operated for profit is supported by the evidence, and we see no good reason for exempting the defendant from the liability incurred by other hospitals conducted for profit. See Williams v. Pomona Valley Hospital Ass'n, 21 Cal. App. 359, 131 Pac. 888. It is therefore unnecessary to pass upon the nonliability of public charities for negligence or the reasons therefor.

With reference to other rulings claimed to be erroneous, it is sufficient to say that the demurrer to the complaint was properly overruled, the motion for nonsuit properly denied (Vermillion v. Woman's College, supra), and that the error, if any, in permitting the plaintiff to cross-examine witnesses concerning the method of conducting the hospital as a charity was not prejudicial.

Judgments affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; SHAW, J.; LORIGAN, J.; RICHARDS, Judge pro tem.

38 Cal. App. 293

## PACIFIC TELEPHONE & TELEGRAPH CO. v. STANDARD AMERICAN DREDGING CO. et al. (Civ. 2457.)

(District Court of Appeal, First District, California. Sept. 28, 1918. Rehearing Denied Oct. 28, 1918; Denied by Supreme Court, Nov. 25, 1918.)

PRINCIPAL AND AGENT ⊂=159(1)—LIABILITY OF PRINCIPAL AND AGENT — AUTHORIZED WRONGFUL ACT.

Where dredging company acting through railroad company, both having notice of location of telegraph cable at bottom of bay, severed cable by driving piles, both dredging company and railroad, under Civ. Code, §§ 2338, 2343, subd. 3, were liable; former as having authorized act, latter because it was wrongful.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by the Pacific Telephone & Telegraph Company against the Standard American Dredging Company and the Southern Pacific Company. From a judgment for plaintiff, defendants appeal. Affirmed.

C. Irving Wright, F. E. Boland, and John Douglas Short, all of San Francisco, for appellant Standard American Dredging Co.

A. A. Moore and Stanley Moore, both of San Francisco, for appellant Southern Pacific Co.

Pillsbury, Madison & Sutro, of San Francisco, for respondent.

STURTEVANT, Judge pro tem. The plaintiff sued the defendants for damages caused by injury to its cable. The case was tried by the trial court without a jury, a jury having been expressly waived. The plaintiff had judgment. Both defendants appealed and have brought up the judgment roll and a bill of exceptions. Each defendant claims that the responsibility for the wrong complained of rests on the other defendant. The trial court made findings which included, among others, findings to the effect that, at the time of the injury complained of, the plaintiff was the owner of a certain telegraph and telephone cable resting on the bottom of San Francisco Bay, parallel with and along the north side of Long Wharf; that it had complied with the provisions of sections 536–540 of the Civil Code as to marking by monuments and giving notice of the locus of said cable; that the defendants at all times had knowledge and notice of the locus of said cable; that on July 14, 1912, the defendants negligently failing to take any precautions or take proper or any care to avoid striking or damaging said cable, drove certain piles upon said cable, and thereby crushed, severed, and damaged the cable. From the bill of exceptions it is clear that on July 14, 1912, one of the defendants, the dredging company, was constructing a platform adjacent to Long Wharf; that it employed the Southern Pacific Company to furnish its servants and appliances to drive the piles at the time and spot designated by the authorized agent of the dredging company; that it further appears that the act complained of was done pursuant to such engagement by the servants and agents of the respective defendants at the times and at the spots so designated.

Under the facts found by the court and the uncontradicted testimony which we have cited, the act complained of was wrongful in its nature.

The defendant the Southern Pacific Company was acting within the scope of its authority in doing what it did, and for its acts its principal is responsible, even though such act is wrongful. Civ. Code, § 2338; Shearman & Redfield on Negligence, §§ 150–175; Stewart v. California Imp. Co., 131 Cal. 125, 63 Pac. 177, 724, 52 L. R. A. 205; Trabing v. Cal. Navigation Co., 121 Cal. 137, 53 Pac. 644; Philadelphia Ry. Co. v. Mitchell, 107 Md. 600, 69 Atl. 422, 17 L. R. A. (N. S.) 974; Castroville Co. v. Col, 6 Cal. App. 533, 537, 92 Pac. 648.

As the act complained of was wrongful in its nature, the agent, the Southern Pacific Company, was also liable to this plaintiff. Civ. Code, § 2343, subd. 3; Stewart v. California Imp. Co., supra; Shearman & Redfield on Negligence, § 175; Hodgson v. Plow Co., 78 Minn. 172, 80 N. W. 956, 50 L. R. A. 644, and note.

It follows that the judgment should be affirmed as against each defendant, and it is so ordered.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

38 Cal. App. 337

## KING v. PAPAZIAN et al. (Civ. 2458.)

(District Court of Appeal, First District, California. Oct. 2, 1918.)

1. FRAUDULENT CONVEYANCES ⊂=74(3)—VOLUNTARY CONVEYANCE WITHOUT CONSIDERATION—INSOLVENCY OF GRANTOR.

Under Civ. Code, § 3442, a voluntary conveyance by an insolvent grantor without receiving a valuable consideration was void as to creditors.

2. APPEAL AND ERROR ⊂=1011(1)—REVIEW—FINDING—CONFLICTING EVIDENCE.

An appellate court will not disturb a finding which rests on conflicting evidence.

3. FRAUDULENT CONVEYANCES ⊂=156(1)—ACTION TO SET ASIDE CONVEYANCE — BURDEN OF PROOF.

In creditor's action to set aside alleged fraudulent conveyance, creditor need not show that grantee had knowledge of grantor's fraudulent intent, where conveyance was without valuable consideration.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Elizabeth King against Peter

Papazian and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Ernest Klette, of Fresno, for appellants.

J. P. Bernhard, of Fresno, for respondent.

STURTEVANT, Judge pro tem. [1-3] This is an action in the nature of a creditor's bill. The plaintiff had judgment in the trial court, and the defendants have appealed from the judgment and the order denying a new trial. The record was brought up under section 953a, Code of Civil Procedure. The principal point made by the appellants is that certain findings are not supported by the evidence. The findings are general and special. The plaintiff alleged, and, by its general finding, the trial court found, that the transfer under attack was made voluntarily and without a valuable consideration at a time when the grantor was insolvent, and was therefore void. These findings alone fully support the judgment. Civ. Code, § 3442. The plaintiff alleged, and the trial court made a special finding, that the transfer in question was made with intent to defraud the creditors of the grantor and particularly this plaintiff and to prevent this plaintiff from collecting her judgment recovered in the basic suit. The record contains evidence to support each of said findings, and the most that can be said is that there were some conflicts in the evidence. But an appellate court may not disturb a finding which rests on conflicting testimony. As the trial court found that the transfer was not given for a valuable consideration, this case does not come within the rule, stated in Hart v. Church, 126 Cal. 471, 58 Pac. 910, 59 Pac. 296, 77 Am. St. Rep. 195, that the plaintiff must show the grantee's knowledge of the fraudulent intent of the grantor.

It follows that the judgment should be affirmed, and it is so ordered.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

---

38 Cal. App. 315

## HARBOR CENTER LAND CO. v. COUNCIL OF CITY OF RICHMOND et al. (two cases). (Civ. 2421, 2501.)

(District Court of Appeal, First District, California. Sept. 30, 1918.)

1. MUNICIPAL CORPORATIONS ⟨⟩108—LEGISLATIVE POWERS — REFERENDUM — CHOICE OF SITE FOR CITY HALL.
The city council's choice of a site for a city hall is a legislative act, subject to be set aside by the city voters upon referendum.

2. INJUNCTION ⟨⟩84 — MUNICIPAL CORPORATIONS—LEGISLATIVE POWERS.
In view of Code Civ. Proc. § 526, subd. 7, an injunction cannot be granted to prevent a legislative act by a municipal corporation within the scope of its powers.

3. MUNICIPAL CORPORATIONS ⟨⟩57—LEGISLATIVE POWERS—LOCATION OF CITY HALL.
The selection of a location for a city hall is a legislative act clearly within the scope of the powers of a municipal corporation.

4. MUNICIPAL CORPORATIONS ⟨⟩228 — CONTRACTS BASED ON LEGISLATIVE ACTS—REFERENDUM.
A person making an agreement with the city council concerning the location of a city hall does so in contemplation of the legislative character of the act done, knowing that the city is not bound by the contract if rejected upon referendum.

5. CONSTITUTIONAL LAW ⟨⟩278(7)—DUE PROCESS.
The act of the electors of a municipal corporation in rejecting upon referendum the council's legislative act accepting plaintiff's offer to furnish ground for a city hall is not violative of the constitutional provisions on the subject of due process of law.

6. CONSTITUTIONAL LAW ⟨⟩121(2) — IMPAIRING THE OBLIGATION OF CONTRACTS.
Where plaintiff's offer to furnish ground upon which to build a city hall was accepted by the council, the rejection of such legislative act by the voters upon referendum was not an impairment of the obligation of a contract.

7. EMINENT DOMAIN ⟨⟩2(1)—TAKING OF PRIVATE PROPERTY—WHAT CONSTITUTES.
One offering ground to city for the construction of a city hall must know that the city would not be bound by ordinance accepting the gift, if rejected by the electors upon referendum, and such rejection did not constitute a taking or damaging of private property for public use.

Appeals from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Two actions by the Harbor Center Land Company against the Council of City of Richmond and others. Judgments for defendants, and plaintiff appeals. Affirmed.

Denson, Cooley & Denson and W. H. H. Hart, all of San Francisco, for appellant.

D. J. Hall, of Richmond, and C. S. Hannum, W. T. Kearney and Titus, Creed, Jones & Dall, all of San Francisco, for respondents.

BEASLY, Judge pro tem. These cases between identical parties involve the same questions, and will be determined together.

The purpose of the actions was to secure an injunction restraining the city of Richmond and its officers from removing the municipal offices from a certain building upon lands which the plaintiff claims were donated to the city by it for use as a city hall, and from entering into a contract for the erection of a city hall for the city of Richmond.

So far as we can find the questions presented for decision are all settled in this state. Most of them were disposed of in the case of Hopping v. Council of the City of Richmond, 170 Cal. 605, 150 Pac. 977, and a case bearing the same titles and reported in 170 Cal. 618, 150 Pac. 982. In those cases the Supreme Court by mandate compelled the city of Richmond to submit to the electors of the city for approval or rejection up-

on a referendum petition the question of providing for the acquisition from plaintiff by the municipality of the tract of land from which the city now proposes to remove its offices and the construction of a city hall thereon. At the election held pursuant to the mandate of the Supreme Court the resolution by which the city council proposed to enter into an agreement with the plaintiff was rejected; and at the same time the electors of the city seem from the record to have selected another site for the city hall. The facts down to the time the mandate issued appear in the opinion of the Supreme Court in those cases. Following the election the council undertook to remove the municipal offices from the site upon plaintiff's property which the electors had rejected at the referendum election to the other site selected at the same election. The plaintiff seeks in these actions, as above stated, to enjoin this removal, and bases its application upon the contention that such removal would violate several sections of the state and federal Constitutions.

[1] We think it unnecessary to discuss these contentions, for it was held in Hopping v. City of Richmond, supra, that the choice of a site for a city hall by the council was a legislative act; that the act of the council could be set aside upon referendum by the voters of the city, and it follows that the decision of the electors at such election held for said purpose was itself legislative and binding, therefore, upon the city council under our constitutional provisions establishing the referendum.

[2-7] There seems to us to be a very simple reason why this injunction was properly refused by the superior court. An injunction cannot be granted in this state to prevent a legislative act by a municipal corporation within the scope of its powers. Code Civ. Proc. § 526, subd. 7; Glide v. Superior Court, 147 Cal. 21, 81 Pac. 225. Of course, no act could be more clearly within the scope of the powers of this municipal corporation than the selection of a location for its city hall. The plaintiff must be taken to have made his so-called agreements with the governing body of the municipality with knowledge and in contemplation of the legislative character of any act done by that body in passing the resolution accepting the proposal made by it—which was to furnish the block of land for this purpose, and of the right of the electors of the city to take the matter out of the hands of the council by referendum, and to reject the agreement which the council proposed to make, and select another site if they saw fit to do so. If the plaintiff contracted obligations and spent money upon the faith of the council's action in passing the resolution accepting its proposal before the municipality had in due course acted directly through the referendum, it simply showed bad legal judgment. It had no binding contract, because the act of selecting the site—a prerequisite to making a contract for its acquisition—was legislative, and could be reviewed and set aside by the electors, and until so reviewed, or until the right of review by referendum was lost by lapse of time or otherwise, no contract based thereon was finally binding upon the city. The act of the electors in rejecting the offer of the plaintiff to furnish the ground for the city hall was, therefore, not violative of the provisions of the Constitution upon the subject either of due process of law, of the impairing of the obligation of contracts, or of protecting property or of taking or damaging private property for public use.

The judgment in each case is affirmed.

We concur: LENNON, P. J.; STURTEVANT, Judge pro tem.

---

38 Cal. App. 321

MICKEL v. ALTHOUSE et al. (Civ. 2581.)

(District Court of Appeal, Second District, California. Sept. 30, 1918. Rehearing Denied by Supreme Court Nov. 29, 1918.)

1. MASTER AND SERVANT ⟸401 — ACCEPTANCE OF EMPLOYERS' LIABILITY ACT—BURDEN TO PLEAD.

Burden was upon building contractors, in common-law suit against them by a carpenter for personal injuries, to plead in bar that they had elected to accept the provisions of the Employers' Liability Act, if such fact existed.

2. MASTER AND SERVANT ⟸279(4)—INJURIES TO SERVANT—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

In action against contractors for injuries to carpenter when scaffold fell, evidence *held* to justify finding that plaintiff's injuries were caused by negligence of contractors, represented by employé who constructed the scaffold, and for whose negligence the employer was liable under the Employers' Liability Act.

3. MASTER AND SERVANT ⟸235(4)—CONTRIBUTORY NEGLIGENCE—RELIANCE ON CARE OF FELLOW SERVANT.

In view of the Employers' Liability Act, abolishing the fellow servant doctrine, a carpenter *held* not guilty of negligence in failing to see and know that a fellow workman, who constructed a scaffold, insecurely fastened a ledger thereon.

4. MASTER AND SERVANT ⟸330(3) — INDEPENDENT CONTRACTOR—SUFFICIENCY OF EVIDENCE.

That owner of house under construction, whereon carpenter was injured, had right to say how work should be done, and apportioned payments to contractors to pay carpenters according to number of men on work, was insufficient, as against terms of written contract for carpentry work, to prove injured carpenter was employé of owner.

5. MASTER AND SERVANT ⟸318(1) — INDEPENDENT CONTRACTOR — RIGHT TO SELECT AND CONTROL.

When the right to select the servant and to control his work rests on one of two contracting parties to an independent contract, the party excluded from such selection and control is freed from liability for the negligence of the servant.

6. MASTER AND SERVANT ⟸318(1)—INDEPENDENT CONTRACTOR—RIGHT TO MAKE ALTERATIONS.

That an employer has the right to make alterations, deviations, additions, and omissions from the contracted work does not change relation of party contracting to do work from that of independent contractor to that of mere servant.

7. CONTRACTS ⟸176(1) — CONSTRUCTION — QUESTION FOR COURT.

Where terms of a contract are clear and certain, its meaning and effect, and the relation of the parties to it thereby created, become a question of law for the court.

8. MASTER AND SERVANT ⟸316(2)—INDEPENDENT CONTRACTORS — CONTRACTORS TO FURNISH CARPENTER LABOR—"SERVANT."

Under Civ. Code, § 2009, defining a "servant," contractors to furnish all carpenter labor for roughing and finishing a house and garage, *held* not servants of the owner, who could not be termed their master, as they were doing their work in pursuit of an independent calling.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Servant.]

9. EVIDENCE ⟸511 — OPINION — TIME OF SIGNING CONTRACT.

In action for injury, to carpenter employed by contractors to furnish carpenter labor on house, against contractors and owner, objection to question to handwriting expert, after his examination of contract to furnish carpenter labor, as to whether in his opinion signatures of owner and of contractors were made on same day, should have been sustained.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by Charles C. Mickel against J. B. Althouse, W. Howard Borden, and Al. Borden. From judgment for plaintiff, and an order denying new trial, defendants appeal. Judgment and order against defendant Althouse reversed; judgment and order against the other defendants affirmed.

Frank Bryant, of Los Angeles, for appellants.

Frank A. McDonald, of Los Angeles, for respondent.

CONREY, P. J. The plaintiff obtained judgment against the defendants on account of personal injuries alleged to have resulted from negligence of the defendants. The defendants appeal from the judgment, and from an order denying their motion for a new trial.

On the 20th day of February, 1913, the plaintiff was working as carpenter on a house then being constructed for the defendant J. B. Althouse on land owned by Althouse in the city of Los Angeles. In his complaint the plaintiff alleged that he was working under the direction of the defendants Borden, who had supervision over the plaintiff and the right to direct and control his services, and that those defendants were at that time acting for and on behalf of the owner of the property. In their answer the defendants alleged that the defendants Borden were not acting as superintendents for the owner, but that, on the contrary, they were acting as contractors and not otherwise, and that any work done or services performed by defendants Borden was done and performed under contract with the owner, and that the owner did not have the right to direct and control the services of the plaintiff. The defendants denied the allegations charging them with negligence, and alleged facts showing that the accident was due solely to the negligence of the plaintiff; such conduct being without the direction, knowledge, or consent of the defendants.

At the time when this accident occurred there was in force an act approved April 8, 1911, entitled:

"An act relating to the liability of employers for injuries or death sustained by their employés, providing for compensation for the accidental injury of employés, establishing an Industrial Accident Board, making an appropriation therefor, defining its powers and providing for a review of its awards."

According to the provisions of that act the Industrial Accident Board was not authorized to provide compensation for accidental injury to employés of private persons if, at or prior to the time of the accident to the employé, the employer had not, in the manner provided in the act, elected to become subject to the provisions thereof. In the absence of such election, any employé injured by reason of negligence of the employer was entitled to maintain an action at law for damages; but it was provided that in such cases the liability of the employer would be subject to the provisions of sections 1 and 2 of said act. Section 1 of that act reads as follows:

"In any action to recover damages for a personal injury sustained within this state by an employé while engaged in the line of his duty or the course of his employment as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, or of any officer, agent or servant of the employer, the fact that such employé may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employé, and it shall be conclusively presumed that such employé was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employés contributed to such employé's injury; and it shall not be a defense:

"(1) That the employé either expressly or impliedly assumed the risk of the hazard complained of.

"(2) That the injury or death was caused in whole or in part by the want of ordinary or reasonable care of a fellow servant."

Stats. 1911, p. 796.

[1] Appellants demurred to the amended complaint upon the ground that it did not state facts sufficient to constitute a cause of action. They claim that the court erred in overruling that demurrer. Their contention is that the complaint was insufficient because it did not allege facts showing gross

negligence or willful personal misconduct of the defendants. But we think that the demurrer was properly overruled. The complaint did not allege that the defendants, or either of them, had ever filed with the Industrial Accident Board a written statement to the effect that they accepted the provisions of the act. If such election had been made, the fact would be within the knowledge of the defendants, and we think that the burden was upon them to plead such fact in bar of the action, if the fact existed. The plaintiff was entitled to assume that his ordinary right of action continued to exist. Upon that assumption, the statement of facts showing want of ordinary care on the part of the employer was sufficient to enable the plaintiff to state a cause of action.

[2, 3] Appellants contend that there is no evidence of negligence on the part of them, or of either of them. Appellant J. B. Althouse further contends that there is no evidence tending to prove that the plaintiff was acting as his employé at the time of the accident. The record leaves no doubt that the house on which the accident occurred was the property of the defendant Althouse, and that at the time when he received the injuries the plaintiff was engaged at work as a carpenter in putting on the outside finish of that house. The plaintiff was working in company with another carpenter named Chapman. In order to do their work it was necessary for them to stand on a scaffold. That scaffold was constructed by them out of materials which were on the ground for that purpose. The staging of the scaffold gave way and let the plaintiff fall to the ground whereby he was seriously injured.

It further appears from the testimony introduced on behalf of the plaintiff, that the staging rested upon a crosspiece called a "ledger." This ledger was at one end nailed to a part of the scaffold four feet away from the house, and at the other end was nailed to a piece called a "scab," which in turn was nailed to the side of the house. Instead of notching the scab and resting the ledger on the notch, as it should have been in order to be safe, the ledger was nailed directly to the face of the scab. The scaffolding gave way at the end of the ledger that was fastened to the scab, because the scab was not notched. The scab slipped off from the house. There were several 2x4 studding in the house near that point. The scab was nailed into the siding, and not into the studding. If the scab had been nailed to the studding and the scab notched, and the ledger properly placed on the scab and nailed to it, the accident would not have happened. Chapman built the scaffold, and the plaintiff handed the stuff up to him. Chapman nailed the scab to the house. The plaintiff did not know of the unsafe condition of the scaffold before he went upon it. There were plenty of materials upon the ground, and the men had the privilege of using all that was necessary in the building of the scaffold. When they first started to put up the scaffolding, plaintiff had started to notch the scab, and Borden said that it was not worth while to do so. For that reason the scab was not notched.

From the evidence thus produced the jury was justified in finding that the plaintiff's injuries were caused by negligence of the defendants Borden, represented by their employé, Chapman, and that the plaintiff was not negligent in failing to see and know that Chapman had not securely fastened the scaffolding to the house. Under the provisions above quoted from the statute which was in force at that time, the fact that Chapman was a fellow servant of the plaintiff is not a defense to the action.

[4, 5] It does not necessarily follow, however, that any liability has been established against the defendant Althouse. The plaintiff testified that he was working for Althouse; but the specific facts shown do not support that conclusion. The house was being constructed for Althouse and was his property. But there is no evidence that the plaintiff was hired by Althouse, or that Althouse ever at any time or in any way recognized the plaintiff as his employé. The defendants introduced in evidence a contract in writing in the following terms:

"Los Angeles, Cal., Jan. 25, 1913.

"We, the undersigned, agree to furnish all carpenter labor for roughing in and finishing house and garage No. 514 So. Manhattan Pl., for the sum of eleven hundred and twenty-five dollars ($1,125.00). Borden Bros.

"G. H. Borden.

"Accepted January 25, 1913.

"John B. Althouse."

G. H. Borden testified that he signed that contract, and that it was the contract under which he performed all the carpenter work in the construction of the house; that he wrote the contract on the day of its date, and that it was accepted by Althouse on the same day; that G. H. Borden had general supervision over the carpenters and built according to the plans; that he made no changes from the plans, unless he had orders from the owner; that Althouse furnished the plans and the materials, and had the right to say how the work should be done; that Althouse paid him in weekly payments, according to the number of men that Borden had on the work: "Mr. Althouse gave me the money, and I used it in paying off the men."

[6] The facts that, according to the testimony of Borden, the owner had the right to say how the work should be done, and apportioned his installments of payments according to the number of men that Borden had on the work, are not sufficient, as against the terms of the written contract, to prove, and do not tend to prove, that the plaintiff was an employé of the owner. Borden Bros. were under contract to furnish the carpenter labor, and they had the uncontrolled right to em-

ploy the carpenters, and to retain or discharge them at will. When the right to select the servant and to control his work rests in one of two contracting parties to an independent contract, the party excluded from such selection and control is freed from liability for the negligence of the servant. Callan v. Bull, 113 Cal. 593, 598, 45 Pac. 1017. And the fact that the employer has the right to make alterations, deviations, additions, and omissions from the contracted work does not change the relation of the party contracting to do the work from that of an independent contractor to that of a mere servant. Green v. Soule, 145 Cal. 96, 99, 78 Pac. 337.

[7, 8] Where the terms of a contract are clear and certain, its meaning and effect and the relation of the parties to it thereby created become a question of law to be decided by the court. Green v. Soule, supra. "A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master." Civ. Code, § 2009. Tested by this section, Borden Bros. were not servants of Althouse, and Althouse could not be termed their master, as they were doing their work in pursuit of an independent calling.

[9] The only evidence offered by the plaintiff for the purpose of contradicting the fact of existence of the written contract above set forth consisted of the testimony of an expert on handwriting, who, after examining the written contract, answered negatively the question whether in his opinion the signatures thereto "were made on the same day." The defendants' objection to this question should have been sustained. Assuming the law to be that, as some authorities have determined, the comparative ages of documents and of writings is a proper subject of expert testimony, yet as a ground for the admission of such testimony there should be some reasonably extensive length of time involved in the inquiry, or there should be some controversy over the genuineness of the signatures or the order in which they were made, or concerning interlineations or other irregularities discernible in the document. But none of these conditions exist here. It is not easily conceivable that, under the circumstances here shown to have existed any substantial weight should be allowed to the bald statement that the signatures were made "not on the same day." Consistently with the answer, they might have been made on the very next day.

In its trifling nature the question is analogous to one wherein a party sought to show by expert testimony that a cross, placed in attestation of the signature of a person who could not write, was made by somebody else, or that somebody else held the pen. To which the judge replied: "I draw the line there; I can't stand for it." Wolf v. Gall, 169 Pac. 1017. As we view this case, it therefore is established that defendant Althouse was not the employer of the plaintiff, and that the negligence of Borden Bros. is not negligence for which he is responsible.

The judgment and order against appellant J. B. Althouse are reversed. The judgment and order against the defendants W. Howard Borden and Al. Borden are affirmed.

We concur: JAMES, J.; SHAW, J.

---

38 Cal. App. 234

## INGRAM v. JOHNSTON et al. (Civ. 2577.)

(District Court of Appeal, Second District, California. Sept. 20, 1918.)

1. PARTNERSHIP ⊂⊃53—EXISTENCE OF AGREEMENT—SUFFICIENCY OF EVIDENCE.

In action to establish existence of copartnership, evidence *held* to show that agreement was entered into to form partnership for the purchase of industrial property, the parties thereto to share in profits, and the consideration of which, as to plaintiff, was his knowledge of industrial property, and advice and counsel in the purchase of such property.

2. PARTNERSHIP ⊂⊃76—INTERESTS IN PROPERTY—SHARES—PARTNER.

Where copartnership was entered into for purchase of industrial property, one of the partners contributing his knowledge of industrial property and advice as to property to be purchased, and the others to furnish the capital, the partner who furnished no capital was entitled to his share of property purchased with partnership capital.

3. JOINT ADVENTURES ⊂⊃4(1)—PURCHASE OF PROPERTY—SHARES IN PROFITS.

Where parties entered into agreement to purchase industrial property whereby one was to contribute knowledge of real estate values and advice, and the others to contribute capital, and all to share in the profits, the former was entitled to his share of the profits and in property purchased in name of one of other parties and unsold, whether transaction is regarded as partnership or as a joint venture,

4. FRAUDS, STATUTE OF ⊂⊃56(9)—INTEREST IN PROFITS—SALE OF LAND.

The statute of frauds does not prevent parol proof for the purpose of showing an interest in the profits to be derived from the sale of lands.

5. EVIDENCE ⊂⊃589—DUTY OF COURT—RECONCILING CONFLICTS.

It is the duty of the trial court as far as possible to reconcile inconsistencies and conflicts in the testimony of a party, and in determining the weight thereof it may accept such testimony in part and discredit it in part.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Robert H. Ingram against D. Johnston and another. From judgment for plaintiff, and from order denying new trial, defendants appeal. Affirmed.

Barstow, Beach & Rohe, of Los Angeles (Chester L. Lyman, of Los Angeles, of counsel), for appellants.

Denis & Loewenthal, of Los Angeles, for respondent.

SHAW, J. Plaintiff, alleging the existence of an agreement of copartnership between

himself and defendants, under and pursuant to which certain described land was purchased by defendants, asked for a decree establishing the existence of such copartnership and for incidental equitable relief.

The court found that the partnership agreement was made as alleged, and that, by virtue of the relationship and agreement so made between the parties, plaintiff was entitled to a one-eleventh interest in the unsold property and in the net proceeds of that which had been sold, subject to certain liens and charges established against the same, and entered a decree in accordance therewith.

The appeal is from the judgment and an order of court denying defendants' motion for a new trial, in support of which a bill of exceptions is presented.

[1-3] Appellants' chief contention, and that to which their voluminous brief is almost entirely devoted, is that the finding that the copartnership agreement was entered into under which the property was acquired and plaintiff entitled to such interest in the land is unsupported by the evidence. While as to this alleged agreement the evidence is sharply conflicting, that given on behalf of plaintiff, and which the court found to be true, clearly tends to show that prior to the acquisition of the property plaintiff and defendants entered into an agreement contemplating the purchase, for resale and speculation therein, of what was known as industrial property; that is, property which by reason of its location with relation to railroads was adapted to manufacturing purposes; that for some time prior to the making of this agreement plaintiff had been engaged in acquiring such property for the Southern Pacific Company, by reason of which fact he was in possession of much valuable expert knowledge and information, on account of which it was agreed that he should not be required to furnish any part of the copartnership capital, but that his knowledge, counsel, and advice should constitute his share thereof. Some months thereafter, and after considering a number of pieces of property and advising with plaintiff, it was finally agreed to purchase the property in question, title to which was to be in the name of Johnston for the benefit of the copartners, who were to share equally in the profits derived therefrom. The first payment made upon the property was $22,000, upon the making of which the title was taken in the name of Johnston, who thereafter, without plaintiff's knowledge, conveyed it to the Title Insurance & Trust Company, in trust, which company, as evidence of the trust and interest therein, issued four certificates, one of which, issued in the name of H. B. Smith, was for a two twenty-seconds interest in the property, which certificate is conceded by defendants to have represented the interest of plaintiff in said property. Notwithstanding plaintiff's contention that he was by the terms of the agreement not required to contribute any money towards carrying out the enterprise, it seems that defendant Johnston, some time after the purchase, called upon him and suggested that inasmuch as Mr. Smith was carrying his part of the burden, the latter desired as an evidence of good faith on his part that he should give him a note for $2,000, at the time stating that he would not be called upon for the payment thereof. Plaintiff gave the note as requested, and this note was at all times retained by defendants and produced at the trial, and defendants at all times retained possession of the certificate for a two twenty-seconds interest in the property for which, according to their testimony, the note was given. At the time of the purchase, real estate of the character purchased was quite active in the vicinity of Los Angeles, and it was believed by all parties concerned that a quick turn thereof would be made at a profit. In 1907, however, there was a cessation of such activity and the carrying of the property became a burden, which it appears was assumed by defendant H. B. Smith. At no time was plaintiff called upon to contribute anything towards the carrying charges, nor the payment of the note. That an agreement was entered into to form a partnership for the purchase of property, the parties thereto to share in the profits, the consideration of which, so far as plaintiff was concerned, was his knowledge, counsel, and advice, and that thereafter the parties joined in selecting for purchase and did, in accordance with the agreement to share in the profits of the joint adventure, acquire in the name of Johnston the property in question, clearly appears from the evidence offered by plaintiff. That the undissolved relationship and transaction had thereunder entitled plaintiff to relief is supported by Koyer v. Willmon, 150 Cal. 785, 90 Pac. 135, Doudell v. Shoo, 20 Cal. App. 424, 129 Pac. 478, Whitley v. Bradley, 13 Cal. App. 721, 110 Pac. 596, Coward v. Clanton, 79 Cal. 26, 21 Pac. 359, Bates v. Babcock, 95 Cal. 484, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. Rep. 133, and Arnold v. Loomis, 170 Cal. 95, 148 Pac. 518.

Moreover, while conceding that plaintiff acquired such one-eleventh interest in the profits of the deal for which he gave his promissory note, defendants insist that he voluntarily surrendered the same by returning the certificate issued in evidence thereof. But plaintiff's testimony is that the certificate was never delivered to him, nor did he even know of its existence, and hence he could not and did not return it. The fact that defendants retained his note, producing it at the trial, showing that it had never been returned to him, taken in connection with plaintiff's testimony, sufficiently establishes the fact that plaintiff never at any time surrendered the interest conceded by defendants to have been acquired by him, nor agreed to a release of such interest. Hence, if the transaction, as claimed by defendants, he

deemed to have created a trust wherein plaintiff to the extent of a one-eleventh interest was a beneficiary in the profits arising therefrom, he was entitled to have an accounting made by defendants as to their management of the property and to receive the interest which the decree awarded him. As we view the record, it is immaterial whether the transaction, in a technical legal sense, constituted a partnership or a trust, since in either case plaintiff was entitled to at least a one-eleventh interest in the net profits derived from the property and for an accounting by defendants of their management thereof. The language used in Bedolla v. Williams, 15 Cal. App. 741, 115 Pac. 748, is peculiarly applicable here. It is there said:

"We think it unnecessary in this case to decide whether or not the agreement between the parties constituted them copartners, or provided for such a joint venture as would entitle either of them to an accounting from the other, because the allegations of the complaint show that the plaintiff is entitled to some remedy, either legal or equitable. In such a case, where, as here, an answer has been filed, the court may grant plaintiff any relief consistent with the case made out by him and embraced within the issues."

The evidence received on behalf of plaintiff and considered in connection with the testimony of defendants, together with the reasonable inferences to be drawn therefrom, clearly shows that as to the property described in the complaint a fiduciary relation, never dissolved, nor, until shortly before the commencement of the action, repudiated, was in fact established, from which it follows that, whatever its technical nature, plaintiff was entitled to an accounting by defendants of their management of the property involved, and, as found by the court, to not less than a one-eleventh interest in the net profits arising therefrom.

[4] Thus viewed, appellants insist that any right of action on the part of plaintiff would be obnoxious, not only to the statute of frauds, but to the statute of limitations. In reply to this we may say that the statute of frauds does not prevent parol proof for the purpose of showing an interest in the profits to be derived from the sale of lands, but declares that an agreement by which an estate or interest in lands is to be created must be in writing. Bates v. Babcock, supra. To the same effect are Doudell v. Shoo, supra, and Bond v. Taylor, 68 W. Va. 317, 69 S. E. 1004. Appellants failed to plead the statute of limitations. However, it sufficiently appears that if the transaction constituted a trust, it was a voluntary trust, against which the statute of limitations could not begin to run until the trustee repudiated it (Arnold v. Loomis, supra), and this from the record appears to have been a short time before the commencement of the action.

[5] We deem it unnecessary to notice a number of alleged errors predicated upon rulings of the court in the admission and rejection of evidence. As appellants in their brief say, these are minor matters, and an examination of them show that, under our view of the case, they could in no event have prejudiced the substantial rights of defendants. In this connection, suffice it to say that the record, taken as a whole, shows the case to be one for the application of section 4½ of article 6 of the Constitution, and, conceding the existence of technical errors, they have not resulted in a miscarriage of justice; and, conceding, further, a conflict in the evidence and inconsistencies in the testimony of plaintiff himself, it was the duty of the court, so far as possible, to reconcile such conflicts and inconsistencies, and in determining the weight thereof it might accept plaintiff's evidence in part and discredit it in part.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

---

38 Cal. App. 290

COWARD v. DE CRAY et al. (Civ. 2530.)

(District Court of Appeal, First District, California. Sept. 27, 1918. Rehearing Denied by Supreme Court Nov. 25, 1918.)

1. GIFTS ⊂⊃82(2) — CAUSA MORTIS OR INTER VIVOS—EVIDENCE.

Evidence *held* to sustain a finding that a deposit of certificates of stock to be delivered at the death of the depositor was a gift inter vivos, and not causa mortis.

2. GIFTS ⊂⊃41, 43—REVOCATION.

Delivery of certificates of stock to a third person, to be delivered to another at the death of the depositor, not in contemplation of speedy death, vests a present title in the donee, subject to a life estate in the depositor, and was irrevocable.

3. GIFTS ⊂⊃81 — PROOF OF INTENT — SUBSEQUENT ACTS OF DEPOSITARY.

Where one deposited deeds and certificates of stock with a third party, to be delivered to various persons at the depositor's death, testimony that depositary, after the death of the depositor, delivered and recorded the deeds, was admissible to throw light on the intent with which the certificates were delivered in a suit by one claiming a revocable gift causa mortis.

4. APPEAL AND ERROR ⊂⊃204(1) — MATTERS REVIEWABLE — EVIDENCE — SAVING OBJECTIONS.

Admission of evidence cannot be reviewed where no objection was made upon the trial.

Appeal from Superior Court, Santa Cruz County; Benj. K. Knight, Judge.

Action by Mary V. Coward against Agnes De Cray, as executrix of the last will and testament of Catherine A. Wilkins, deceased, Agnes De Cray, and Frank De Cray and others. Judgment for plaintiff, and the named defendants appeal. Affirmed.

Chas. B. Younger, of Santa Cruz, for appellants.

Wyckoff & Gardner, of Watsonville, for respondent Coward.

Emmet C. Rittenhouse and Ralph H. Smith, both of Santa Cruz, for respondents Cody and others.

LENNON, P. J. Catherine A. Wilkins owned certain bank stock, evidenced by two certificates and also owned two tracts of land. On the evening of November 4, 1905, Mrs. Wilkins, who was suffering from a dislocated shoulder at the time, sent for her attorney, one Maher, indorsed the bank stock to the plaintiff, her niece, and made two deeds of the land, one tract to Agnes De Cray, also her niece, and the other tract to Frank De Cray, the husband of Agnes. She delivered the certificates of stock and the deeds to her attorney for the indorsee and grantees, respectively, and directed him to hold them until her death, and then to give them to said indorsee and grantees. About six weeks later Mrs. Wilkins obtained possession of the stock certificates from Maher for the purpose of surrendering the certificates and obtaining new ones, the change being necessary, she claimed, because the bank intended to change from a state to a national bank, and she further stated that when the change was made she would replace the certificates with Maher. She did not do so, but kept them until her death. No question was made, either in the lower court or on this appeal, but that the stock, now the subject of this litigation, is the same stock indorsed to plaintiff on November 4, 1905, although reissued and represented by different certificates. Mrs. Wilkins died testate. By her will she assumed to give plaintiff but a small part of the stock in question, and she further attempted to give plaintiff an interest in the tract of land which had been the subject of the deed to Agnes De Cray. The deeds to the land were delivered by Maher to Mrs. De Cray and her husband after Mrs. Wilkins' death, but he was unable to deliver the certificates of stock because of Mrs. Wilkins' retention of them.

The lower court found in effect that by the indorsement and delivery by Mrs. Wilkins of the stock certificates, title to the stock vested in plaintiff; and the question upon appeal is whether there is sufficient evidence to support that finding.

[1, 2] It is contended that the delivery of the certificates on November 4, 1905, was a gift causa mortis, and that therefore it could be and was afterward revoked. While there is some evidence that Mrs. Wilkins thought that she was seriously ill, there is other evidence which strongly points to the conclusion that she was not acting in fear or contemplation of speedy or immediate death. Her ailment, a dislocated shoulder, was not such as would reasonably cause expectation of death, and, in fact, she soon recovered from it. Although a Catholic, she did not have a priest called. She was not confined to her bed, but sat up throughout the transaction with her attorney. She did not tell the attorney anything about being in fear of death. Her only remark to him about the condition of her health was to the effect, that she was suffering considerably with her shoulder, and that she could not use her hand to write.

Moreover, the evidence shows that Mrs. Wilkins intended to make and did make an absolute gift inter vivos of the stock. She told her attorney that she wanted to give the stock to Mary, her niece, that she wanted her to have it at the time of her death, and that she wanted the delivery made so there would be no administration. Maher, the attorney, testified that he advised her that she could not avoid an administration of her estate unless she made an absolute delivery of the indorsed stock certificates during her lifetime, such delivery to be either to Mary direct, or to Maher for her, with the understanding that the delivery must be beyond recall. She thereupon proceeded with the transaction and made the delivery to Maher for Mary, and directed him to give the certificates to Mary at the time of her (Mrs. Wilkins') death. The effect of such a delivery is to vest a present title in the grantee subject to a life interest in the grantor (Bury v. Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186; Ruiz v. Dow, 113 Cal. 490, 45 Pac. 867), and no subsequent act of the grantor, such as a retaking of the certificates, can detract from the title which has already vested in the grantee (Ruiz v. Dow, supra; Estate of Cornelius, 151 Cal. 550, 91 Pac. 329; King v. Fragley, 19 Cal. App. 735, 127 Pac. 813).

[3, 4] It was not error to admit in evidence testimony to the effect that the depositary, after the death of Mrs. Wilkins, delivered and recorded the two deeds. The deeds were delivered by Mrs. Wilkins at the same time as, and as a part of the same transaction with, the delivery of the stock certificates. Evidence of subsequent acts of the depositary under such circumstances is admissible as throwing light on the intent with which the original delivery was made. Devlin on Deeds (3d Ed.) vol. 1, § 280a. Moreover, it appears that no objection was made upon the trial to the admission of the evidence in question.

Judgment affirmed.

We concur: BEASLY, Judge, pro tem.; STURTEVANT, Judge, pro tem.

---

38 Cal. App. 783

COWARD v. DE CRAY et al. (Civ. 2606.)

(District Court of Appeal, First District, California. Sept. 27, 1918.)

Appeal from Superior Court, Santa Cruz County; Benj. K. Knight, Judge.

Action by Mary V. Coward against Agnes De Cray and others. Judgment for plaintiff, and defendants Catherine L. Cody, Nellie Cody Keefe, and John Doe Keefe, appeal. Affirmed.

R. H. Smith and E. C. Rittenhouse, both of Santa Cruz, for appellants.

Wyckoff & Gardner, of Watsonville, for plaintiff-respondent.

Chas. B. Younger, of Santa Cruz, for defendants-respondents.

LENNON, P. J. In this case it has been stipulated by the parties, and in accordance therewith ordered by the court, that the appeal should be submitted to the court for decision upon the briefs and transcript filed and arguments made in an appeal involving the same parties and the same questions, numbered 2530, and entitled Mary V. Coward, Plaintiff and Respondent, v. Agnes De Cray, as Executrix of the Last Will and Testament of Catherine A. Wilkins, Deceased, Agnes De Cray and Frank De Cray, Defendants and Appellants, Catherine L. Cody et al., Defendants and Respondents, 176 Pac. 56.

A decision in the above-entitled appeal, No. 2530, has this day been rendered and filed, and for the reasons given therein, and in accordance with the stipulation and order filed herein, the judgment herein is affirmed.

We concur: STURTEVANT, Judge pro tem.; BEASLY, Judge pro tem.

---

38 Cal. App. 279

## LA FLEUR v. M. A. BURNS LUMBER CO.

(Civ. 1782.)

(District Court of Appeal, Third District, California. Sept. 26, 1918. On Petition for Rehearing, Oct. 28, 1918; Denied by Supreme Court Nov. 25, 1918.)

1. MASTER AND SERVANT ⊂=278(5) — DEFECTIVE MACHINERY—EVIDENCE.
In an action for personal injury, evidence *held* to sustain a finding that conveying machinery in a sawmill was improperly constructed and dangerous.

2. MASTER AND SERVANT ⊂=280—ASSUMPTION OF RISK—EVIDENCE.
In an action for personal injuries from defective conveying machinery in sawmill, evidence *held* sufficient to sustain a finding that plaintiff informed defendant of its unsafe condition, and that defendant refused to allow him to repair it, but promised to remedy the defects.

3. MASTER AND SERVANT ⊂=281(6) — DEFECTIVE MACHINERY—DUTY OF SERVANT.
In an action for personal injuries from defective conveying machinery in sawmill, where it was plaintiff's duty to keep machinery in repair, evidence *held* to sustain a finding that slasher chains were necessary for successful operation, and that plaintiff was not responsible for damages resulting from not removing them.

4. MASTER AND SERVANT ⊂=276(4)—PERSONAL INJURIES—CAUSE OF INJURIES.
In an action for personal injuries alleged to be due to defective conveying machinery in sawmill, evidence *held* to sustain a finding that the injury occurred in the manner and at the time and placed alleged.

5. MASTER AND SERVANT ⊂=281(1)—INJURIES TO SERVANT—PERFORMANCE OF DUTY—EVIDENCE.
In an action by foreman in a sawmill for personal injuries, evidence *held* to sustain a finding that plaintiff was in the performance of his duties at the time of the injury, although he was doing the work of the slasherman, who was absent.

6. MASTER AND SERVANT ⊂=101, 102(10)—DUTY TO FURNISH SAFE MACHINERY—KNOWLEDGE OF DEFECTS.
The duty of a master to provide safe machinery is not affected by knowledge of the defect on the part of the servant, under Employers' Liability Act of 1911.

7. MASTER AND SERVANT ⊂=221(4)—ASSUMPTION OF RISK—PROMISE TO REMEDY DEFECT.
Where employé notifies master of defects in machinery and latter promises to remedy them, servant is justified in continuing employment, unless danger arising therefrom is so glaringly obvious that no prudent man would undertake it.

8. MASTER AND SERVANT ⊂=221(7) — ASSUMPTION OF RISK—PROMISE TO REPAIR.
That rollers in conveying machinery in a sawmill were only 24 inches long and live chains arose above them at right angles, did not render it so obviously perilous that a servant working around the conveyor assumed the risk, where master had promised to remedy defect.

9. MASTER AND SERVANT ⊂=265(14) — CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.
In an action by servant for personal injuries, burden is upon the master to establish contributory negligence.

10. MASTER AND SERVANT ⊂=233(4) — INJURIES TO SERVANT—DEFECTS IN MACHINERY—DUTY OF SERVANT.
A foreman in a sawmill, whose duty it was to keep the machinery running and in repair, is entitled to damages for personal injuries occasioned by improperly constructed machinery, which the master refused to allow him to change.

Appeal from Superior Court, Shasta County; J. E. Barber, Judge.

Action by E. La Fleur against the M. A. Burns Lumber Company, a corporation. From a judgment for plaintiff and an order denying a motion for new trial, defendant appeals. Affirmed.

John Ralph Wilson and Gillett & Cutler, all of San Francisco, for appellant.

Dean & Carter, of Redding, for respondent.

BURNETT, J. [1] The action was for damages caused by an injury in a lumber mill. The cause was tried without a jury, and the court found in favor of plaintiff in the sum of $3,000. The appeal is from the judgment and the order denying the motion for a new trial. The only claim for a reversal is that the evidence is insufficient to support certain material findings. Of them, the first one assailed is as follows:

"That at the time aforesaid, to wit, on or about the 15th day of November, 1913, and while plaintiff was employed by defendant as aforesaid, certain machinery in said mill which the plaintiff was required to operate and oversee was imperfectly and improperly constructed and was defective and unsafe; said imperfection and unsafeness was caused by live chains rising above live rollers, which said chains and said rollers were revolving and rotating at right angles with each other; that by reason of said live chains rising above said live rollers said machinery was dangerous and unsafe in this, that said chains would come in contact with and catch upon the lumber and other sawed materials which were rolled out on said live rollers,

and said chains would forcibly throw said lumber or other sawed material off of said live rollers, said rollers being too short to properly convey the timbers which were usually rolled out on same."

As to this finding it may be said that it is not disputed that, on said date, plaintiff was employed, as foreman, by defendant, to operate and oversee said machinery. That the said machinery was improperly constructed, and that it was dangerous to operate, as specified in said finding, is abundantly supported by the testimony. There was strong evidence to the contrary, but with that, of course, we cannot be concerned. How is it possible to maintain that the trial court was not legally justified in its conclusion as to the character of the said machinery when we recall the following statements of witnesses? The plaintiff testified:

"Basing my opinion upon my experience as a millwright, I would say that machinery as shown by the model is not properly constructed. The top of these chains ought to be under the surface of these rolls, and the rolls are too short for the timber they saw; they are 24 inches long, and they should be 30 inches, or 3 feet long, anyway. The purpose of having the rolls along there is so you can run anything wide across it. The live skids and chains rise above the live rolls at a point almost halfway across. When the timber is caught by the live chains it pulls it off into the slasher saws. We had to have a man standing there with a bar at the north end of that truss to keep crowding the timbers clear over on this side, in order to get them through, and lots of times they would have to crowd them on and follow them clear through in order to get them over. * * * No mill is properly constructed that has the skids above the surface of the rolls. That skid should be below the surface."

The witness, G. R. Jones, an experienced millwright, also testified that in order to be properly constructed, "the skids must be below the rollers and the rollers ought to be longer."

Witness W. E. Lane testified that the machinery was defective for the same reason and "the rolls that were put into the truss in said mill were 2 feet long. We put in these rolls at the order of Mr. Broadwell. They were furnished to us." Furthermore, that the purpose of these live chains is to "throw the slabs off the live rolls into the edger pits," and that the proper construction of a skid is "to have clearance from the rolls so the timber can pass over without catching. I mean below the live rolls."

W. H. Gusha also testified to the same effect and declared:

"In the operation of the mill, the result would be that timber came along there and would strike these things there like it does there now, that wouldn't go over the thing. That would carry it over here into these saws. Anything—don't make any difference what it is, slabs, boards, timbers or anything else."

We may quote this from Charles Noble's testimony:

"That transfer skid is too high, too high to let your timbers come down," and as to the rolls he said they should be 3 feet long, "so that the machinery won't drop off. They don't always come down the rolls straight. If it is narrow rolls, they drop off."

There is no controversy as to the competency of these witnesses, nor is it pretended that the subject is not a matter of expert testimony. If the foregoing does not justify the court's finding as to the character of the machinery, then we are at a loss to understand what should be required.

[2] Nor is there any more doubt as to the legal support for this finding:

"That said defendant was, shortly prior to the said 15th day of November, 1913, warned by plaintiff of the defective and unsafe condition of the machinery in said sawmill, in the particulars hereinabove, in paragraph 4, set forth, and said defendant had, after being so warned by plaintiff, promised to repair said machinery, and to put the same in good repair and in a safe condition, but defendant despite said warning, and contrary to said promise, did fail and neglect to do so; that plaintiff had, shortly prior to said 15th day of November, 1913, requested of defendant permission to repair said defective machinery, and to put the same in a safe condition and had requested defendant for permission to place and keep the same in good repair, but defendant did at all times refuse to permit plaintiff, and did fail to authorize plaintiff, to put said machinery in a good and safe condition; that at no time was it the duty of plaintiff, nor did plaintiff have the authority or permission, nor had he at any time been delegated by defendant, to put said machinery in good repair or in a perfect condition, nor did plaintiff at any time have in his charge or under his control the assistance or supplies or tools necessary to enable him to keep said machinery in good repair and in a safe and perfect condition or working order."

Every material fact contained therein is asserted by the plaintiff in his testimony. He testified that after becoming foreman he directed the attention of Mr. Danforth, the manager of the company to these defects and asked permission to overhaul the machinery, but Mr. Danforth said: "We might do it some time, but we can't do it now." As to the repairs he desired to make, the plaintiff testified:

"I was to build that truss over, and I wanted to get rolls the same length that came from the head saw right straight through. I wanted to tear that slasher table out and shove it ahead so that when the slab pulls through it won't catch in the conveyor and break the saws; I wanted twelve inch rolls so it would run above those skids, and get longer skids; the chains would run the same way only they would be under the surface of the rolls."

As to his authority to make changes, he testified positively that:

He had no such authority "without receiving orders from the managing officers. I had to make the application to Mr. Danforth; if anything broke I had to go to Mr. Danforth and get an order to get it. I couldn't do any repairs excepting keep the mill moving"; that he couldn't take down anything and put in new machinery without asking. "The change I really wanted to make was to get longer rolls and bigger rolls and make a new truss that would hold up the weight right straight through."

[3] It is, however, contended by appellant that the trouble was with these slasher chains, that they performed no useful function, that they should have been removed by

respondent, and, since he failed to do so, he is responsible for any damage resulting from their presence. There is testimony on behalf of appellant supporting this theory, but it is flatly contradicted by respondent's showing. The plaintiff testified:

"There is a man working all of the time here at the end of this truss, whose duty it is to take a pickeroon when slabs come along, and throw them off the truss onto the table. He moves them over so that they catch the chains, and as soon as they catch the chains, then the chains carry them."

It is a fair inference from his testimony and other evidence in the record that these chains, if properly placed, were necessary for the efficient and successful operation of the machinery, and that, without them, the output of the mill would have been impaired. That the chains were useful is also strongly confirmed by the circumstance that the mill was never operated for a day without them. Even while Mr. Burns was foreman, during the summer of 1914, the chains were left on the truss, and they were not removed until after the mill was closed down. Nor is the situation affected by the consideration of the "automatic bumper" that was in use at one time. There is evidence that it did not remedy the said defective construction of the truss, and that it was discontinued before plaintiff took charge of the mill as foreman. As to this he testified:

"Well, we had a lot of trouble with it. Sometimes we would use it; sometimes we couldn't use it. It was simply a spring that was put on there; it was just a common little spring that came off. It would be broken all the time, and it was almost impossible to keep it going and sometimes it was in use and sometimes it wasn't. It wasn't in use when Mr. Broadwell left, I am pretty sure."

It also appears from the testimony of Mr. Broadwell that, when the bumper was in use, it was necessary to keep a man at the north end of the truss to guide the lumber and timbers away from the chains and over said truss. We may therefore regard the bumper as a feature of no moment in the determination of the cause.

The other important points are involved in the consideration of whether plaintiff was engaged in the performance of his duty at the time he claims to have received his injury, whether he was actually injured, and if so, whether it can be said to be the result of the unsafe condition of said machinery.

That he was doing work in the line of what was required of him under the circumstances as detailed by him is not disputed, and therefore we need not quote testimony to support the proposition.

[4, 5] As to the fact of the injury and how it occurred plaintiff testified:

"I was on the slasher table, and there was a timber 16x16 which was 4 pieces of 8x8 which came down the live rolls and the chains on the live rolls truss pulled it off and struck me in the back and crowded me toward the saw, and I swung around the end, and I had to crowd them back against the live chain and shove them clear back on the live chains and let them go through. As I done that I felt like I had been cut open in the groin. I had a pain all the time. I didn't know what it was, until I went and saw the doctor. It was the end of the timber that struck me. * * * When I was struck I was standing some place halfway between the truss and the saws. The blow didn't knock me down because I braced myself. I could not have walked on ahead because I was too close to the saws to walk ahead; it crowded me."

It appears, further, that immediately thereafter he told Mr. Danforth that he had been injured, but the manager walked away and did not answer him. There is testimony, also, that he told his wife about it, but it seems that he mentioned it to no one else. He continued to work for the company, to look after the operation of the mill for two weeks thereafter until it closed down on December 2d. He went to see Dr. Cornish on December 3d following, and on the 8th day of the month he was operated on for hernia. It may be admitted that plaintiff's story appears somewhat strange, singular, and suspicious, but we cannot say that it is inherently improbable. Attention is devoted by appellant to certain circumstances that tend to discredit his account of the occurrence, but they are not of sufficient weight, considered either separately or in the aggregate, to compel the conclusion that plaintiff was either mistaken in any material point or was fabricating any portion of the story. The circumstances surrounding the transaction were, no doubt, carefully considered by the trial judge, who concluded that plaintiff realized and related what happened, and his finding to that effect is not to be overturned here. It would accomplish no good to comment upon his story, as we find no sufficient reason to take it out of the rule that commits the determination of the weight of the evidence and the credibility of the witnesses to the trial judge when passing upon questions of fact. It may be said, also, to be a reasonable inference from plaintiff's testimony that the accident would not have occurred had it not been for said defects in the construction and operation of said machinery. The timbers were thrown off by reason of the extension of the chains over the rolls. The circumstance of the width of said rollers was probably, also, a factor in the movement of said timbers. It may be that if the man, whose duty it was to stand near the truss and guide with a "pickeroon" the movement of the lumber, had been in his place, the accident would not have happened, but we must accept the statement of plaintiff that the former was not at his post. Plaintiff was not responsible for this condition, and it does not and cannot weigh in appellant's favor.

[6-8] We may then briefly recapitulate the facts as follows: Plaintiff was employed as foreman by defendant to oversee and keep the mill running; he was furnished with imperfect and unsafe machinery which he had no authority to correct; he asked permission

to make the necessary changes, but his request was denied, although he was promised that the defects would be remedied; he was at work in connection with said machinery in discharge of his duty when he received a serious injury by reason of said defective construction.

That these facts warranted the conclusion that defendant was legally responsible for the damage suffered by plaintiff cannot be disputed. The duty of the employer to provide for the employé a safe place and safe machinery for his work is, of course, well settled. This obligation was not neutralized nor affected in any manner by the knowledge of the defects on the part of respondent. At the time of the accident, the "Employers' Liability Act of the State of California" of 1911 was in force. Stats. of 1911, p. 796. That statute changed the rule theretofore existing as to assumption of risk and to contributory negligence. Moreover, in a case where the employé notifies an employer of the defects and the latter promises to remedy them, the former is justified in continuing in the employment upon the faith of the promise; and the employer is deemed to have assumed the risk of the work, unless the danger arising therefrom is so glaringly obvious that no prudent man would undertake it even under the direction and promise of the employer. Anderson v. Seropian, 147 Cal. 201, 81 Pac. 521. It cannot be said that such obvious danger existed in this case. The court below was justified in concluding that by reason of the said defects the danger of the work was augmented, but it would be unreasonable to hold that it was thereby rendered so perilous as to terrify and repel the man of average caution.

[9] In reference to "contributory negligence," it may be said that it was not pleaded, but, if we may consider it, the burden of proof was upon the defendant to establish it, and there is sufficient ground for holding that plaintiff was not so chargeable.

[10] It is, however, strongly urged by appellant that it was the duty of respondent to correct the defects, that he was charged with full responsibility to keep the machinery in repair, that he was authorized to do whatever was necessary for the successful operation of the mill, and that the case is one for the application of the doctrine enunciated in Duffy v. Hobbs, Wall & Co., 166 Cal. 210, 135 Pac. 1093, L. R. A. 1916F, 806. Therein it is said:

"Here it was the duty of Duffy to take care that the railing and posts alongside the conveyor were kept in good order and repair. He had undertaken to perform that obligation for and on behalf of the defendant, who relied on him to see that it was duly performed. The negligence, if any, which caused the injury, was the failure to examine the post to ascertain if it was decayed or had otherwise become incapable of holding nails securely and the failure to replace it with a new one, a thing which Duffy himself was under obligation to do. The neglect was his own. It would be unjust to hold his employer liable for the consequences of his own want of care and circumspection."

But it is only necessary to notice two vital circumstances that distinguish this case from that. Herein, the defect was not hidden or concealed. It was obvious and well known. Again, the court found upon sufficient evidence, as we have already seen, that it was not the duty of plaintiff to correct the defect, and he was not authorized to do so. Manifestly, he could not be chargeable with negligence for his failure to do something not within his authority and which it was the duty of defendant to perform.

Of course, we have considered the case upon the theory supported by the evidence in favor of plaintiff. The mistake made by appellant, one to which appellate courts often have occasion to advert, is in assuming as true the testimony favorable to its contention and ignoring the evidence upon which the findings are based. It is true that certain statements made by respondent, if considered alone, lend some support to appellant's contention, but the whole of his testimony, when fairly regarded, is consistent only with the position that it was not the duty of respondent nor was he authorized to correct said defect.

Some other matters of minor importance are discussed by counsel, but it would not be profitable to notice them further.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

On Petition for Rehearing.

PER CURIAM. The able counsel for appellant in their petition for rehearing lay particular stress upon the point that the plaintiff was not in the discharge of his duty at the time of the alleged accident, but was performing the work of the slasherman, who was absent. Hence the contention is made that the doctrine of the Duffy Case applies to the facts herein. The proposition was not elaborately treated in the opinion, but it was considered by the court, and it was deemed sufficient to make the general statement, based upon the testimony of plaintiff, that he was at work "in discharge of his duty." It was a fair inference, indeed, from his testimony that it was his duty to see that the mill continued to operate, and that, if he observed the work being neglected in any way, it was incumbent upon him to see that it was properly attended to. He was not required to stop the mill and go in search of the slasherman, but he was authorized to take his place during his absence. In determining the matter we must, of course, regard the rule that leaves the credibility of the witnesses to the jury or the trial court.

This case has received our very careful consideration, and, while we are not insensible to the force of appellant's argument, we are constrained to hold that there was a suf-

ficient showing within the established controlling principles of law to warrant a finding upon the merits in favor of plaintiff.

The petition for rehearing is denied.

---

38 Cal. App. 274

## BEARCE et al. v. DAVIS. (Civ. 1545.)

(District Court of Appeal, Third District, California. Sept. 25, 1918.)

1. APPEAL AND ERROR ⊂⊃1126—ABANDONMENT OF APPEAL—AFFIRMANCE.

Where, when time for filing opening brief expired, it was extended, no further extension was asked or granted, cause was placed on calendar and notice given attorneys, and at call of calendar there was no appearance by either party, and cause was ordered submitted on record, consisting of clerk's and reporter's transcripts, the appellate court might affirm on assumption appeal has been abandoned.

2. BILLS AND NOTES ⊂⊃538(5) — ACTION — INSTRUCTIONS.

In action on note, defendant claiming he signed no note on date alleged, instructions as to date of signing and defendant's liability on note of prior date for like amount, execution of which he admitted, *held* clearly to present issues to jury.

3. APPEAL AND ERROR ⊂⊃1002—REVIEW—VERDICT ON CONFLICTING EVIDENCE.

In action on note, where there was substantial evidence to support verdict for defendant based on conflicting evidence as to execution of note, appellate court will not interfere.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Byron A. Bearce and others against J. M. Davis. From judgment for defendant, plaintiffs appeal. Affirmed.

James D. Meredith, of Sacramento, for appellants.

F. W. Henderson, of Merced, for respondent.

CHIPMAN, P. J. [1] The transcript on appeal in this case was filed April 30, 1916. The time for filing opening brief by appellants expired May 22, 1916, and on that day the time for filing appellants' brief was extended 30 days. No further extension of time was asked and none granted. The cause was placed upon the September calendar, 1918, and due notice thereof given to the attorneys for the respective parties. At the call of the calendar there was no appearance by either party and the cause was ordered submitted on the record. We have before us nothing but the clerk's transcript, showing the judgment roll, and the reporter's transcript of the proceedings at the trial. We might, with propriety, affirm the judgment on the assumption that the appeal has been abandoned. We have, however, examined the record. The nature of the action and the defense thereto will be seen from the following instruction given by the court:

"This is an action in which plaintiff seeks to recover judgment against defendant J. M. Davis upon a promissory note alleged to have been executed by defendant and thereafterwards indorsed by him and delivered to B. H. Payne, who plaintiff claims subsequently sold and assigned said promissory note to plaintiff. Plaintiff alleges that said promissory note is for the principal sum of $1,000 together with interest on said sum from January 12, 1915, until paid at the rate of 6 per cent. per annum. Plaintiff contends that the promissory note sued on herein was executed on the 12th day of January, 1915, by defendant J. M. Davis, and sold and assigned before the maturity thereof by B. H. Payne, defendant's indorsee, to plaintiff for a valuable consideration. Plaintiff alleges that no part of the principal sum nor any of the interest thereon has ever been paid by defendant.

"By way of defense, defendant denies the execution of the note pleaded in plaintiff's complaint, denies that he ever signed the same, or that he ever indorsed it or delivered it to B. H. Payne."

The cause was tried by a jury, and defendant had the verdict, and judgment followed in his favor.

Defendant testified to the circumstances surrounding the execution and delivery to Payne, in 1914, a note for like amount, but positively denied the execution of any other note or of the note in suit. Payne testified quite as positively that this note was executed by defendant and delivered to him by defendant on the day of its date. Upon the question of execution and delivery of the note the evidence was in conflict.

The court instructed the jury as follows:

"Plaintiff alleges that on the 12th day of January, 1915, defendant executed the note pleaded in its complaint, and defendant denies this. I instruct you that the date of said instrument as alleged is material, and you must find, if you find in favor of the plaintiff, that on the 12th day of January, 1915, or thereabouts, defendant executed a note for the principal sum of $1,000, bearing date January 12, 1915, as alleged in plaintiff's complaint.

"Defendant admits that on or about the 25th day of July, 1914, he executed a promissory note for the principal sum of $1,000 bearing date on said day and delivered the same to B. H. Payne. I instruct you that proof of or admission of the execution by defendant of the last-mentioned note is no proof of the execution, if any, of the note sued on in this action.

"In order for plaintiff to recover, among other things, it must be proved that defendant executed and delivered the identical note pleaded in its complaint; proof of the execution of another note will be of no avail."

[2, 3] The issues were thus very clearly placed before the jury. There was testimony as to the circumstances under which Payne received the note given by defendant in 1914 and their subsequent relations which we do not think it necessary to set forth, but which may have influenced the jury in reaching their verdict. However, there was a conflict in the testimony upon the main issue. The jury accepted the defendant's testimony as true, and, having done so, the verdict for defendant necessarily followed. Under the rule, where there is substantial evidence sufficient to support the verdict the reviewing court will not interfere.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

---

38 Cal. App. 270

## HENDERSON v. FISHER. (Civ. 1698.)

(District Court of Appeal, Third District, California. Sept. 25, 1918.)

1. CHATTEL MORTGAGES ⟸262(3)—FORECLOSURE—PURCHASE BY MORTGAGEE—STATUTE.

Where chattel mortgagee, through his agent, conducted foreclosure sale of property, and became purchaser, his position, under Civ. Code, §§ 2967, 3005, and Code Civ. Proc. § 694, was analogous to that of a sheriff in conducting execution sale, and effect of sale as to him was same as if sheriff bid at execution sale, in which case sale would have been voidable, if not void.

2. CHATTEL MORTGAGES ⟸262(1)—FRAUDULENT FORECLOSURE SALE.

Finding that sale of plaintiff's property covered by chattel mortgage was unfairly and fraudulently conducted by defendant mortgagee, who purchased the property himself en masse, *held* justified by facts that plaintiff made reasonable effort to have property sold in lots to suit bidders, and that property was worth $2,500, but sold to defendant for $506.

3. CHATTEL MORTGAGES ⟸262(1)—FORECLOSURE SALE—FAIRNESS.

To be effective, foreclosure sale by chattel mortgagee must be fairly and honestly conducted in all respects, and he has no right by any unfairness to sacrifice property for anything less than its fair market value, his conduct, fairness of sale, and rights acquired under it being always open to investigation by mortgagor.

4. CHATTEL MORTGAGES ⟸262(3)—FORECLOSURE SALE—PURCHASE BY MORTGAGEE.

As a general rule, a chattel mortgagee cannot purchase at his own foreclosure sale under power, in absence of agreement in mortgage, or of statutory provisions. His purchase may invalidate the sale, and does not bar mortgagor of his equity of redemption.

5. CHATTEL MORTGAGES ⟸262(3)—FORECLOSURE SALE—PURCHASE BY MORTGAGEE—LIABILITY.

By purchasing property at sale to foreclose chattel mortgage, mortgagee becomes liable to mortgagor for actual value at sale, without reference to amount bid; his liability being for difference between market and actual value of property sold, though he was not guilty of actual fraud.

6. CHATTEL MORTGAGES ⟸262(2)—FORECLOSURE SALE—OFFERING PROPERTY IN LUMP—UNFAIRNESS.

Where property covered by chattel mortgage consists of many parcels, and mortgagee at foreclosure sale offers whole in a lump, instead of in such lots as would suit buyers, the manner of sale is unfair.

Appeal from Superior Court, Modoc County; Clarence A. Raker, Judge.

Action by W. R. Henderson against W. F. Fisher. From judgment for plaintiff, defendant appeals. Affirmed.

Jamison & Wylie, of Alturas, for appellant.
C. S. Baldwin, of Alturas, for respondent.

BURNETT, J. The action involved the validity of a sale of certain horses and mules under chattel mortgage of the same given in connection with a real estate mortgage to secure the payment of a promissory note of $4,000 and interest. The sale of said personal property was set aside by the court by reason of irregularity in the proceedings connected with said sale, and also because the court found that said sale was unfairly and fraudulently conducted by the defendant with the—

"intent and design on his part to foreclose plaintiff's equity of redemption in and to the mortgaged personal property and to purchase the same thereat for himself and for his own use and benefit at a sum far less than the actual value thereof."

The irregularity in said sale consisted in the fact that the defendant was a purchaser of the property and that he disregarded the directions of plaintiff as to the order in which the property should be sold.

There can be no doubt that the findings of the court in these particulars are amply supported by the evidence, and that the said findings warrant the judgment that was entered in favor of plaintiff for the recovery of the sum of $1,941.66.

As to the sale, the law provides that it must be had at—

"public auction, in the manner and upon the notice of sale of personal property under execution." Civ. Code, §§ 2967, 3005.

Section 694 of the Code of Civil Procedure prescribes the manner of sale under execution, and the portions of this section particularly applicable to the case at bar are as follows:

"Neither the officer holding the execution nor his deputy can become a purchaser, or be interested in any purchase, at such sale. When the sale is of personal property, capable of manual delivery, it must be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price."

Furthermore:

"The judgment debtor, if present at the sale, may also direct the order in which the property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately, and the sheriff must follow such directions."

[1] Since it appears, both from the pleadings and the evidence, that the mortgagee, through his agent, conducted the sale and became a purchaser of the mortgaged property at such sale the position of appellant was analogous to the sheriff in conducting an execution sale; and hence the effect as to appellant of said sale would be the same as if the sheriff had bid at an execution sale. But in the latter instance, under the decisions, there can be no doubt that the sale would be at least voidable, if not void. Wickliff v. Robinson, 18 Ill. 145; Price v. Thompson, 84 Ky. 219, 1 S. W. 408; Carr v. Houser, 46 Ga. 477.

The case of Wright v. Ross, 36 Cal. 442, is cited by appellant in support of the position that the mortgagee may become a purchaser of the mortgaged property. It is to be observed, however, that this case related to a judicial sale, and was had before section 3005 of the Civil Code was amended in 1909. That decision is not in point upon the proposition before us.

As to the manner of sale the court found:

"That at said sale all of said property was sold en masse; that plaintiff was present at said sale and made a reasonable effort to have said property sold in parcels to suit the convenience of bidders present at said sale and that his efforts in that behalf were ignored by defendant and his agent who conducted said sale; that bidders present at said sale offered to defendant and to his agent who conducted said sale to bid reasonable sums for certain portions of said property less than the whole, but that said offers were ignored by defendant and his agent who conducted the sale; and that the character of said personal property is such that it would probably bring more if sold in parcels than if sold en masse."

[2] As before stated, this finding is supported by the evidence. It further appears from the evidence and the court found that the value of said mortgaged property was at the time of said sale and ever since has been of the amount of $2,500. It was all sold, however, for the sum of $506. It was upon that fact in connection with the manner in which the sale was conducted that the court based its decision that this sale was unfairly and fraudulently conducted by defendant, which finding we have hereinbefore sufficiently recited. We think that this finding was justified by the facts to which we have hereinbefore alluded.

As to the principles of law applicable to the facts of the case there can be little dispute and we may briefly state them.

[3-5] To be effective a sale by a mortgagee must in all respects be fairly and honestly conducted, and he has no right by any unfairness to sacrifice the property for anything less than its fair market value. The conduct and fairness of a sale of chattels by a mortgagee, and the rights acquired under such sale will always be open to investigation at the instance of the mortgagor. As a general rule, the mortgagee cannot purchase at his own sale under the power in the mortgage in the absence of an agreement in the mortgage or of statutory provisions to that effect. His purchase may invalidate the sale and does not bar the mortgagor of his equity of redemption. By such act, a mortgagee becomes liable to the mortgagor for the actual value of the property at the time of the sale without reference to the amount bid. His liability, in such cases, is for the difference between the market and the actual value of the property sold, notwithstanding he was not guilty of actual fraud.

[6] Where the mortgaged property consists of many parcels, and the mortgagee offers the whole for sale in a lump, instead of offering it in such lots as would suit the convenience of buyers, this is considered an unfair manner of sale.

The foregoing principles of law applicable to the situation are enunciated in a note to the case of Wygal v. Bigelow, 16 Am. St. Rep. 495, to which we may refer for a comprehensive discussion of the whole subject. Many cases are therein considered which have an important bearing upon the position of respondent herein and are in harmony with the decision of the trial court.

It may be remarked in conclusion that the court allowed appellant credit for the balance due on his note, and gave plaintiff judgment for the difference between that and the actual value of the stock as shown by the evidence. We can see no merit in the claim of appellant, and presume he probably concluded that there was no valid answer to respondent's contention, as he has filed no final brief in the case and did not appear for oral argument.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

---

(38 Cal. App. 289)

WALDTEUFEL v. JONES. (Civ. 2456.)

(District Court of Appeal, First District, Division 1, California. Sept. 26, 1918.)

BROKERS ⊜86(6) — ACTIONS FOR COMPENSATION — IDENTITY OF CONTRACT AUTHORIZED WITH THAT CONSUMMATED.

In broker's action for commission, evidence *held* to sustain finding that the broker had not proved that contract entered into was the same as that which he was authorized to negotiate.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by J. A. Waldteufel against C. H. Jones. Judgment for defendant, and plaintiff appeals. Affirmed.

W. D. L. Held, of Ukiah, for appellant.
Robert Duncan, of Ukiah, for respondent.

STURTEVANT, Judge pro tem. This is an action to recover broker's commissions for obtaining interests in certain real estate. The defendant had judgment in the trial court, the plaintiff has appealed, and has brought up the record under section 953a, Code of Civil Procedure. In his complaint the plaintiff alleged that the defendant employed him "to acquire for and on behalf of said defendant, an option to purchase said property and to lease the same." The trial court made a negative finding on the above allegation. The appellant claims such finding is not supported by the evidence.

The allegation is not clear, but the plaintiff tried the case on the theory that the allegation of his complaint was to the effect that he was employed to obtain an agreement for a lease containing an option to purchase. Taking plaintiff's theory as to the meaning of his pleading, we think the finding complained of is sustained by the record. It is an admitted fact that at San Francisco, in the absence of the plaintiff, the defendant leased from J. A. Ridemeyer the property known as Vichy Springs; that the lease commenced June 1, 1914, and was to expire March 1, 1917; the

rental was fixed at $2,500 per year, payable, June 1, 1914, March 1, 1915, and March 1, 1916; the property leased was described (partly by government subdivisions and partly by metes and bounds) as "containing in the neighborhood of 900 acres," also the equipment of the hotel, consisting of kitchen range, kitchen and dining room and bedroom furniture, and linen; the lease contained an option to purchase for the sum of $55,000 the above-mentioned real and personal property, or to purchase for $70,000 that property and adjacent lands, 1,400 acres in all. The plaintiff did not produce any evidence that he ever obtained an agreement for a contract containing such terms. The lessor, J. A. Ridemeyer, testified positively that he never gave to the plaintiff any agreement for any lease. The record shows a conflict in the evidence on the quoted finding, if not a failure of proof.

The judgment should be affirmed; and it is so ordered.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

---

38 Cal. App. 296

## HOWARD v. STEPHENS. (Civ. 1871.)

(District Court of Appeal, Third District, California. Sept. 30, 1918. On Petition for Rehearing, Oct. 30, 1918.)

1. GIFTS ⟸49(4) — GIFTS OF LAND INTER VIVOS—EVIDENCE—SUFFICIENCY.
In a suit to quiet title to land claimed by plaintiff under a parol gift as against a subsequent deed to another by the donor, evidence *held* to sustain a finding that the fee to the land was given to plaintiff outright instead of merely the use of the land for life.

2. APPEAL AND ERROR ⟸1010(1)—REVIEW—QUESTIONS OF FACT.
If there is substantial evidence to support a conclusion reached by the trial court as to sufficiency of the evidence, the finding will not be reviewed, even where the law requires proof of the fact to be clear and convincing.

3. FRAUDS, STATUTE OF ⟸158(4)—PAROL GIFTS OF REALTY—IMPROVEMENTS—ESTOPPEL—EVIDENCE.
In a suit to quiet title to land held by plaintiff under a parol gift as against a subsequent deed by the donor, evidence *held* to show improvements made by the plaintiff with the donor's knowledge sufficient to take the case out of the statute of frauds under the doctrine of estoppel.

4. FRAUDS, STATUTE OF ⟸129(7) — PAROL GIFT OF LAND—VALIDITY.
A verbal gift of land may be taken out of the statute of frauds by the construction of improvements thereon by the donee.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Suit by Eliza Howard against L. H. Stephens to quiet title to realty. From a judgment for plaintiff, defendant appeals. Affirmed and rehearing denied.

Elmer W. Armfield and Arthur B. Eddy, both of Woodland, for appellant.

Arthur C. Huston, of Woodland, for respondent.

CHIPMAN, P. J. The action is to quiet plaintiff's title to a certain 40-acre tract of land situated in Yolo county, to wit, the northeast quarter of the southeast quarter section 20, township 10 north, range 2 east, M. D. B. and M., and to have canceled a certain deed to the same land under which defendant claims title. The cause was tried by the court, and plaintiff had findings and judgment in her favor. Defendant appeals from the judgment under the alternative method.

It is alleged in the complaint that on February 22, 1875, Rhoda S. Bonynge was the owner of said land, and that on said day she—

"made a parol gift of the said tract of land to the said plaintiff herein, and stated to the said plaintiff that the said land should then and there be her property, and that she should immediately occupy the same; that, acting upon the said gift as aforesaid, the said plaintiff immediately took possession of the said tract of land, and ever since said date has been and now is in the exclusive possession thereof; that the said plaintiff so entered into and has ever since remained in the possession of the said premises with the knowledge, consent, and concurrence of the said Bonynge, and has made lasting and valuable improvements thereon, and paid the state and county taxes thereon; that during all of said times herein referred to said plaintiff has been in the open, notorious, and exclusive possession of the said land; that while said plaintiff was in such possession, to wit, on the 7th day of March, 1914, the said Rhoda S. Bonynge conveyed the same to the defendant, L. H. Stephens; that the said Stephens knew that said plaintiff was in possession of the said premises at the time of said conveyance, and also knew that the said plaintiff had been in the possession thereof for many years previous to such conveyance to him; that said Stephens accepted said conveyance with full notice of all the legal and equitable rights of the said plaintiff in and to said premises and in subordination to those rights; that said deed to said Stephens was made without any consideration."

As a second cause of action plaintiff claims ownership by adverse possession.

A general and special demurrer was overruled, and defendant answered specifically denying the averments of the complaint as to plaintiff's alleged ownership and means of acquiring the same.

It is alleged in the answer as follows:

"That said Rhoda S. Bonynge never at any time gave to said plaintiff the title to said property or any interest therein, and never at any time promised to give to said plaintiff the said title to said property or the title to any interest therein, and that the right of said plaintiff in said premises was a mere tenancy at will, and disposition thereof was at all times subject to the right of said Rhoda S. Bonynge to terminate the same; that said conveyance was made to this defendant for the purposes expressed by said Rhoda S. Bonynge at the time said conveyance was made, to wit, that the legal title to said premises should be conveyed to this defendant, that this defendant should permit the plaintiff in this action to retain the possession thereof or the right to the use of the rents, issues, incomes, and profits thereof for and during the term of her natural life, and that upon her death this defendant should sell the said premises and dispose of the proceeds thereof by distribution to certain persons named

by the said Rhoda S. Bonynge at the time the conveyance was so made to this defendant as aforesaid."

The court made the following findings of fact:

"(1) That all of the allegations of the said complaint are true.

"(2) That all of the allegations of the first cause of action of said complaint are true.

"(3) That all of the allegations of the second cause of action of the said complaint are true.

"(4) It is not true that during all of the time mentioned in the plaintiff's complaint said Rhoda S. Bonynge did permit said plaintiff to occupy said premises and to collect, retain, and keep the rents, issues, and profits thereof for the support and maintenance of the plaintiff. It is not true that said Rhoda S. Bonynge never, at any time, gave to said plaintiff the title to said property or any interest therein. It is not true that the said Rhoda S. Bonynge never, at any time, promised to give to said plaintiff the said title to said property or the title to any interest therein. It is not true that the right of plaintiff in said premises was or is a mere tenancy at will. It is not true that the control and disposition thereof was at all times, or at any time, subject to the right of the said Rhoda S. Bonynge to terminate the same. It is true that, at the time of the conveyance from Rhoda S. Bonynge to the defendant, she stated to him that the purpose of said conveyance was to convey the legal title to said premises, and that said Stephens should permit the plaintiff to retain possession thereof, or the right to the use of the rents, issues, income, and profits thereof for and during the term of her natural life; that said Bonynge also expressed said purpose at the time of the making of the said conveyance to the said defendant; that upon her death the defendant should sell the said premises and dispose of the proceeds thereof by distribution to certain persons named by said Rhoda S. Bonynge at the time the said conveyance was made to said defendant. However, in this respect, the court finds that at the time of the conveyance of said property by said Rhoda S. Bonynge to the said defendant herein she was not the owner thereof, had no interest whatever in the same, and had no right, title, or interest of any kind or character, either in law or in equity, in or to the said property or any part thereof; that at said time the said plaintiff herein was the owner of said property.

"(5) That the defendant, L. H. Stephens, did not acquire any right, title, or interest in and to said property by virtue of the said conveyance made to him by the said Rhoda S. Bonynge or otherwise; that the said defendant, Stephens, is not, and never has been, the owner of any right, title, or interest in and to said property, or any part or parcel thereof; that the said plaintiff, Eliza Howard, is the owner of the said lands and premises described in said complaint, and the whole thereof, and is entitled to the possession thereof."

As conclusions of law the court found that plaintiff is the owner of said land, and that the deed executed and delivered to defendant be annulled and canceled.

In his opening statement counsel for defendant said:

"And so that your honor may understand the situation as we see it, we at this time, and at all times during the trial of this case, will admit that so far as Mrs. Bonynge is concerned, that she did intend that Mrs. Howard, the plaintiff in this case, should have a life estate in the property, or the right to the use of the rents, issues, incomes, and profits for and during her natural life, but the remainder was absolutely subject to the control of Mrs. Bonynge, and has been conveyed to Mr. Stephens."

The sole question in the case is thus presented.

Defendant makes the following contentions: (1) That the finding that a parol gift was made by Mrs. Bonynge to plaintiff in 1875 is not supported by the evidence. (2) Assuming a parol gift to have been established, "the same is absolutely void and unenforceable under the statute of frauds," as the proof of the alleged valuable improvements on the premises "does not measure up to the requirements of the decided cases." (3) That the judgment, so far as it is founded upon adverse possession, is not supported by the findings.

It appeared that plaintiff and her husband, Stephen A. Howard, came to California in 1861, and took up their residence in Yolo county, in a neighborhood called Buckeye, some 20 miles distant from the town of Woodland, and were engaged in farming. Mrs. Rhoda Bonynge, then Rhoda Stephens, plaintiff's sister, came to the state in 1862. She was then unmarried, and made her home with her sister, Mrs. Howard. About three years later she married C. W. Bonynge, and thereafter, and until her husband removed to London, England, resided in San Francisco. Mrs. Bonynge made frequent and protracted visits to her sister, Mrs. Howard, their relations being of the most affectionate character, so remaining until Mrs. Bonynge's death at her home in London in June, 1914, except for an incident which occurred in relation to some property in Yolo county belonging to Mrs. Bonynge and which had been looked after and managed by plaintiff and her husband for a long period of years. This incident will be referred to later. Mrs. Bonynge was a very warm-hearted and generous woman, and very fond of her relatives, several of whom resided in California. This generosity manifested itself by gifts of money and property. To one of her sisters, Mrs. Hawxhurst, she gave a dwelling house in San Francisco. It was during one of her visits at the home of her sister that Mrs. Bonynge announced her intention of purchasing a more suitable home for her sister Mrs. Howard.

Plaintiff's deposition was taken prior to the trial (October, 1915), in which the foregoing facts appear. She testified that her sister Rhoda, before her marriage to Mr. Bonynge, "made her headquarters" with witness for about three years; that her family lived at Buckeye about ten or twelve years before moving to the land in question, to which she testified they moved "about 40 years ago." She testified:

"Q. Now, how did you come to move on this tract of land that we are having this suit about? A. Well, she bought the place and give it to me. Q. By 'she' you mean whom? A. My sister, Mrs. Bonynge. Q. Well, now, what did she say to you in regard to this place before you moved there? A. Well, she bought it and made it a present to me. Q. Made you a present of it? A. Yes, sir. Q. This conversation occurred before you moved on the ranch, did it? A. Of course it did. Q. Now, after the conversation occurred, did you and Mr. Howard

and your family move on the ranch? A. Well, Mr. Howard went down first and fixed it up, you know, and made a home, I guess, for a month or six weeks before we moved there. Q. What was the condition of the property at the time you went on it—did it have any buildings on it? A. No, nothing to speak of, worth speaking of. Q. Did it have any barn? A. No, sir. Q. What kind of a house or dwelling? A. Oh, just a shack like, so we went down there and had it all fixed up in good shape. Q. Was it fenced at that time? A. No, sir; that is, it was fenced, but you know how the fencing they used was 40 years ago, old acorn wood—I mean — Q. Oak trees? A. Oak trees, they sawed down and made posts of; they all rotted down. The first thing we done was to make new fence, build a new barn, and put up a windmill. Q. Did you build a dwelling? A. Yes. Q. Now, subsequent to the putting up of that barn, was it destroyed by fire? A. Yes, sir. Q. Did you rebuild it again? A. Yes. Q. Were any of the other buildings on the lands ever destroyed by fire outside of the barn? A. No, sir. Q. About what kind of barn did you put there the first time? A. $450 barn, the first one. Q. Do you know how much you spent on the house? A. Oh, laws, no; I used to keep account and did for years. Q. I mean, Mrs. Howard, how much you spent right at the first time, when you put the house on the place? A. I don't know that I could tell you that; my husband was living then, he attended to all such business; didn't bother me. I didn't know what business was. Q. After you moved on the place involved in this action, how long did you live, actually live, on the place before you left it? A. Well, I must have lived there 20 years or more. Q. To put it in another way, were you living there at the time of Mr. Howard's death? A. Oh, yes, yes. Q. For how many years after Mr. Howard's death did you remain on the place? A. I guess for about five years. Q. And then when you did leave the premises, did you lease them to anybody? A. Yes, I rented it out. Q. In whose name did you rent it? A. My own. Q. Who collected the rents? A. I did. Q. And kept them? A. Yes, sir. Q. During all of the time following your occupation of the land after Mrs. Bonynge told you she would give it to you and to the present time, who has paid the taxes on the property? A. Well, indeed, I have. Q. You have paid them all the time? A. Always. Q. Now, going back, Mrs. Howard, at the time you moved on the premises, was Mrs. Bonynge then living in California when you went out on the ranch? A. When I first moved there? Q. Yes, when you first moved there. A. Yes, she was here then." She testified that after moving to their new home Mrs. Bonynge visited her many times—"come and stay a month and bring her children"—before she made her home in England. "Q. After you moved on the place, did you have any conversation with Mrs. Bonynge in regard to her giving you a deed to the place? A. Well, the last time she was over here we were talking about it; she was so glad to see how we had improved everything and made such a lovely home; that I says, 'Well, that is all right, of course; why don't you deed me the place?' I had no deed to it, but it was a gift. She says, 'Well, if I deed it to you, you would do just like Sister Kate'—she gave her a home in San Francisco and deeded it to her, and as soon as her husband needed the money she mortgaged it and she lost the home; so she says to me, 'The way it is, it is yours, and if you die first it will go to your children;' and so I never gave it a thought any more, just went ahead as though it was all right. Q. Well, do you remember about the year that she paid her last visit here? A. No, sir, I don't; but her daughter, her oldest daughter, was a grown young lady then. Q. That was after she had removed to England? A. Yes, after they were located there. Q. Subsequent to her last visit to you on the ranch, when this conversation occurred, did you ever have any correspondence with her? A. Always. Q. How long did the correspondence continue? A. Until her death."

She testified that after Mr. Bonynge moved to England many letters passed between them, in none of which, "until the dispute arose over the deeding of this property," did Mrs. Bonynge say anything in regard to plaintiff's ownership of this property; that witness and her husband managed and attended to the leasing of the Esparto ranch for Mrs. Bonynge, collecting and accounting for the rents from year to year for many years, and at no time did Mrs. Bonynge ask for any accounting of rents for the land in question. It was the sale of this Esparto ranch to Mr. Clowe (Mrs. Howard's son-in-law, we infer) at a price Mrs. Bonynge thought too low, though previously agreed to by her, that caused some criticism by Mrs. Bonynge. She claimed that she was not informed of his purpose to put water on the land, thus enhancing its value, which had she known she would not have sold the ranch at the price agreed upon. Mrs. Howard seems to have been blamed somewhat for this, and by her it is claimed, not without some show of reason, that the incident had something to do with Mrs. Bonynge's making the deed to the property in question to defendant. At the trial Mrs. Howard was called as a witness and testified to the circumstances connected with the gift. She was asked again to state what was said by Mrs. Bonynge "in regard to her making a deed to this property to her," and answered:

"Well, she gave Mrs. Hawxhurst a home, and she had mortgaged it, you know, for money for her husband to spend in his business, so they lost it, and that was why, now, she says, 'Your home will be yours and your children's;' but she says, 'I'll not give you a deed to it until later.' Q. Until later? A. Yes, sir; and so Mrs. Clowe wanted to buy the place. I asked for the deed, you know. I didn't know there was any trouble. Q. How do you mean, you didn't know there was any trouble? A. Well, of course Mrs. Bonynge didn't give me the deed as she promised to; I didn't know what the trouble was. * * * The Court: In one of the answers in the deposition, this one thing I wanted to have Mrs. Howard speak about. On page 6—it is in about the same relation that you were just questioning. You made part of this answer, Mrs. Howard: 'The way it is'—this is in response to this matter in regard to her giving you a deed: 'The way it is, it is yours, and if you die first it will go to your children.' Now, is that the exact language, or is that substantially the language, that she used? A. Yes, sir. Q. And what did you understand by that, that she was yet to give you a deed or something before it would go to your children? A. Well, the understanding was that if—we didn't think but what I would die first, I was ten years older than she was—that she would see that it went to my children. Mr. Huston: What the judge is trying to get at, Mrs. Howard, is whether or not, as I understand it—is whether or not Mrs. Bonynge told you that the property was to be yours outright, or whether you were to have it, and at your death it would go to your children. That's what you have in mind? The Court: Yes. Mr. Huston: In other words, whether it was an absolute gift to you, or then to your children?

A. Yes. Q. Which was it? A. It was to me and then to my children, and if I wanted to sell the place—you see, now, Mrs. Clowe said she would take it. The Court: The only thing that bothered me was whether something else was to be done. Mr. Huston: All right. Q. Explain whether it was to be your place outright, or whether it was to go to you and then to your children. A. It was my place outright. Mr. Huston: I'll read you so you can get the connection. This is a talk after you moved on the place, you will notice: 'Did you have any conversation with Mrs. Bonynge in regard to her giving you a deed?' Now that's after you got out there. Answer: 'The last time she was over here we were talking about it; she was so glad to see how we had improved everything and made such a lovely home that I says, "Well, that's all right, of course; why don't you deed me the place?" I had no deed to it, but it was a gift. She says, "Well, if I deed it to you, you would do just like Sister Kate." She gave her a home in San Francisco and deeded it to her, and as soon as her husband needed the money she mortgaged it and she lost the home; so she says to me, "The way it is, it is yours, and if you die first it will go to your children," so I never give it a thought any more; just went ahead and thought it was all right.' A. Well, that's all right, too. Q. And that was the talk you had with her afterward? A. Yes, sir. Q. Before you moved on the place was there anything said that you were to only have it for your life, or whether you were to have it outright? A. No, I was to have it outright, or I wouldn't moved there any other way. Q. Before you moved there, as I understand your testimony, you and Mr. Howard were living over there near Buckeye, farming it there? A. Yes; my children was old enough to be in college. She thought I ought to move down there, so I did. Q. Then, as I understand you, she said it would be yours outright, and she held this deed back so Mr. Howard could not mortgage it? A. Yes; that's what she said, because he was trading all the time, and she says, 'You would do like Sister Kate,' and I said, 'I guess I would.' Q. Can you state whether Mrs. Bonynge ever at any time prior to her deeding this property to Mr. Stephens made any claim in your presence or to your knowledge that you were only to have this as long as you lived? A. Never did. Mr. Huston: I think that's all I have. Mr. Armfield: Is that all, Judge? The Court: Yes, that's all; but of course there are remarks in there to which you could give two interpretations. Q. You felt, did you, Mrs. Howard, at the time the property was purchased, that it was purchased for you absolutely? A. Yes, sir; absolutely. Q. And in your conversation with Mrs. Bonynge she indicated to you the same whenever you spoke of it? A. Yes, sir."

Mrs. Howard testified that she first learned of the deed to defendant when she saw it mentioned in a local newspaper; that she shortly afterwards had a conversation with defendant about it at her home when Mrs. Clowe was present.

"Q. Can you state just what was said between you and Lawrence Stephens at that time in regard to this property, substantially as you remember it, stating what you said and what he said, and what, if anything, Mrs. Clowe said? A. I said, 'Why Lawrence, I see you have got a deed to my home.' He says, 'Yes.' I says, 'How did it happen, what is the cause of it?' He says, 'I don't know, Aunt Liza, it is a mystery to me; I didn't know Aunt Rhoda—never had a letter from her'— Q. He never had a letter from her? A. Not until she wrote to him that she wanted to give him a deed to my home; so I says, 'Why, Lawrence, the best thing you can do to save trouble is to deed it back to me.' Q. What did he say to that? A. He says, 'I can't unless I had her consent,' you see, so he said then. I says, 'Well, you write to her then and see the cause.' I says, 'I don't understand what it is done for; it is undermining work, that is a mystery to me.' Q. What did he say in regard to writing to her? A. He said he would. Q. Then after that conversation did you have any other talk with him—a second one? A. No, sir; I never did. Q. Never heard anything more about it? A. No, sir; nothing at all."

J. C. Maxwell testified that he had lived in Yolo county for 60 years, and in the Buckeye neighborhood when plaintiff's family resided there; that he knew the Howards, and had known Mrs. Bonynge "all of her life nearly"; that he remembered the fact of the Howards moving to the land in question.

"Q. Now, before Mr. and Mrs. Howard moved on to this place north of Woodland, or about that time, did you meet Mrs. Bonynge anywhere? A. Yes, sir. Q. Where? A. Several times. Q. Now, did you ever have any conversation with Mrs. Bonynge in regard to Mrs. Howard coming on to this place? A. Well, twice; yes, sir. Q. And where was your first conversation? A. At Mr. Howard's. Q. At Buckeye or Woodland? A. Yes, sir. Q. And where was your second conversation? A. At Mr. Joe Stephens' at Madison. Q. And on what place? A. Madison. Q. At Madison? A. Yes, sir. Q. And was it before or after Mrs. Howard came to Woodland? A. It was before. Q. Both conversations were before? A. Yes, sir. Q. Can you tell the court, as near as you can recollect, what was said between you and Mrs. Bonynge upon this subject, giving us substantially the conversation? A. Which conversation? Q. The first one. A. Mrs. Bonynge was unwell and was lying on a couch, and I came in and was talking, and in the conversation, during the time, the children came in from school. Q. Mrs. Howard's children? A. Yes; and she looked at them and she said, 'It's too far for the children to walk;' but she said she was looking at a place to buy for her sister—she always called Mrs. Howard her sister; that's about all—she said she was looking at a place at that time. Q. What did she say in the second conversation you had with her? A. The second time I don't remember anything more than she said she had bought the place, when Mr. Stephens and Mrs. Stephens, Mr. Stephens' first wife, and I were talking to her; she said she had bought it, and we all spoke about the place. * * * Q. Can you think of anything else she said in regard to this property? A. No, sir; I can't. Q. And that was before Mrs. Howard moved over here? A. Well, yes, sir; that was before Mrs. Howard came to Woodland. Q. Now, I want to ask you what, if anything, was said as to the education of the Howard children—was there anything said? A. Well, she said she was—in our first conversation she said that it was too far for the children to walk. They were walking to the Union schoolhouse; it was about 2 or 3 miles. She said she was looking at a place near Woodland to buy for her sister so that the children would be nearer school. Q. And in the next conversation she informed you that she had bought it? A. That she had bought the place. I don't remember anything else she said about it, only that she had bought the place, in the conversation."

Mrs. Kate Hawxhurst, sister of Mrs. Bonynge and of plaintiff, a witness for defendant, testified that Mrs. Howard moved to the land north of Woodland in 1875.

"Q. Did you at about the time, or at the time in 1875, when the Howards moved to this place north of Woodland, did you have any conversation with Mrs. Bonynge relative to that place? A. Yes. Q. Where? A. In San Francisco. Q.

And at your house, or her house, if you know? A. Oh, I don't know. The conversation was what she told me—of course I know nothing except what she told me. Q. Was any one else present? A. That I don't know. Q. And what did she say to you? Mr. Huston: Just a minute. Was Mrs. Howard present? Mr. Armfield: No. Mr. Huston: Object on the ground it is incompetent; any declaration or statement of Mrs. Bonynge in the absence or out of the presence of Mrs. Howard cannot bind her, is self-serving, and for the purpose of establishing any fact in this case is hearsay, irrelevant, and immaterial. Mr. Armfield: Even under the doctrine of Bury against Young this would be admissible. It is a statement made by Mrs. Bonynge against her own interest; and, further, under the later doctrine laid down in Williams against Kidd and Rice against Carey it is admissible, in any event, whether it had been against Mrs. Bonynge's interest or not." After some further discussion: "The Court: I will admit the testimony; objection overruled. I understand the evidence will be short? Mr. Armfield: One question only, I think, on this particular point. The Witness: She said that she had bought this ranch and given Mrs. Howard the use of it for her lifetime, so that her children might have better advantages in Woodland than they had out at Buckeye. Mr. Huston: I move to strike it out on the grounds contained in our objection. The Court: Objection overruled."

She also testified to having received a letter from Mrs. Bonynge, bearing date February 28, 1914, which was introduced in evidence, over plaintiff's objection, on the grounds previously stated, and particularly that it was the declaration of Mrs. Bonynge 40 years after the event of which she speaks. Among other things the letter stated:

"I am sorry I can do nothing more for you now. I have written to Lawrence Stephens, Brother Larry's eldest son. I have told him that when Sister Eliza dies he can sell the forty acres of land which I own outside of Woodland and divide the proceeds between you, Laura Marshall, Bunce Stephens, Mary Birch, his (Bunce's) sister, and himself. Nothing can be done before Sister Eliza's death, for we loaned this place to her for her life, and the rent of it is what she lives on. It will not be much, but it is all that I can give. I am sending you two parcels of my best and newest dresses. I don't think I shall ever be well enough to wear them again. With best love, yours affectionately,

"Rhoda Bonynge."

She also testified that in a conversation with Mrs. Howard "two or three years ago," Mrs. Howard said to her, "Mrs. Clowe has always wanted to own that place (the land in suit) and wanted to buy it from the Bonynge's." Mrs. Howard testified that no such conversation occurred.

L. H. Stephens testified in his own behalf. He is the son of L. D. Stephens—Mrs. Howard and Mrs. Bonynge's brother, and nephew of Mrs. Bonynge. Witness testified that he was born in 1881, some years after Mrs. Howard had moved to this property, and that he knew Mrs. Howard was living on the place. He testified that the title to the property stood in the name of Rhoda Bonynge. Over objection, he testified that it was always understood by the Stephens family that this 40 acres "belonged to Mrs. Bonynge and that Aunt Eliza (plaintiff) had the use of it for her lifetime"; that the first time he knew of Mrs. Bonynge's desire to convey the property to him was when she wrote to him, the letter being dated February 13, 1913. In this letter a request is made to collect the amount due on a certain insurance policy on the life of Mr. Bonynge, who had recently died in London. Of this 40-acre tract she wrote:

"I hope you or brother Larry are attending to the taxes on the forty acres I have there, which after Aunt Eliza's death must be sold, and the money equally divided between Aunt Kate, Laura Marshall, Bunce Stephens, Mary Birch, his sister, and yourself, so you will understand what I want done in case of my death. Unless I change my mind in the meantime I have thought of putting this land in the name of the bank so as to escape death duties, but I don't know if it would be wise to do so. With best love, yours affectionately,

"Rhodie S. Bonynge."

The next letter received by him was dated February 20, 1914, in which she speaks of several matters she desired attended to, and, among others, certain bonds which had been sold: "You will find out from my dear brother Larry, your father, whose memory is as bad as my own—he sold the bonds for me." She also speaks of the money paid for the Esparto ranch, stating that the money belonged to Virginia Deerhurst, her daughter. She wrote:

"I want you to have a deed made out there and sent to me at once, of the forty acres of land which Aunt Eliza has the use of for her life, situated just out of Woodland, and I will deed it to you. Then I want, after Aunt Eliza's death, you to sell it for me and divide the money equally between Kate Hawxhurst, Laura Marshall, Bunce Stephens, Mary Birch, his sister, and yourself. Now, Lawrence, don't neglect these things. There is no time to be lost, and if you can't attend to it I must get Walter Bonynge to do it for me. I don't want to leave anything in my name in America, after the trouble and worry of the few things Mr. Bonynge left there. With best love to you, your affectionate Aunt, Rhodie Bonynge."

A letter written by Mrs. Bonynge to defendant's father, L. D. Stephens, dated September 4, 1912, was introduced. In this letter, among other things, she said:

"Write me what I ought to get for the place I have near Woodland, 40 acres and a little house on it. I have always left it to Eliza, but I don't think she cares for it now. I would prefer giving her something in the way of the rent she gets for it."

Some other letters followed in which this 40-acre tract was mentioned as previously, and, finally, March 24, 1914, she writes, as we understand the letter, sending the deed to defendant. The deed is dated March 7, 1914, and was recorded April 8, 1914. The date of its actual execution and acknowledgment does not appear. These letters went in, over plaintiff's objection, as tending to show Mrs. Bonynge's intention. There was some evidence, taken from the books of the Bank of Woodland, that for certain years payment of certain high school taxes on this land had been charged to Mrs. Bonynge's account, of which plaintiff testified she knew nothing. There was also evidence, taken from the Bank

of Woodland books showing that a credit of $1 per year as rent had been credited to Mrs. Bonynge's account for certain years, as to which Mrs. Howard testified she had no knowledge of any payments made for rent, and never made any or authorized any to be made. The knowledge of such credits was not brought home to Mrs. Howard.

Virginia Deerhurst, married daughter of Mrs. Bonynge, in a deposition taken in London, testified to conversations she heard between Mrs. Bonynge and her husband at the time the Esparto ranch was sold to Mr. Clowe, as to which she said her mother was very much annoyed. The sale was made in June, 1912.

"Q. What did Mrs. Bonynge say about the ranch in question; that is, the one there is the dispute about? A. I heard over again that my aunt was to live there for her life. I mean that is one of the dates when I heard it again. * * * Q. Do you remember having any conversation at all as to what was to happen after your aunt died? A. What was to happen was that my aunt was to be left in full possession and never disturbed in any way; but at that time I believe that my sister and I would have had the property. It would simply have come with her other property. * * * Q. Try and give us, as nearly as you can recollect, what was said. Did she say anything as to what was to happen with regard to your aunt living at the ranch? A. That she was to be left absolutely as she always had been. Mrs. Bonynge thought of that very often, and always thought of how to arrange it. Q. You say 'absolutely.' Do you mean she was to be left without being interfered with? A. Without being disturbed in any possible way. Q. For how long? A. For her life."

The witness identified certain five or six books of account in which certain entries are found referring to the land in question. These books bear different dates, in 1880, 1881, 1883, 1884, 1885, and in 1891. The entries called to the attention of the court speak of this land as "Ranch occupied by Howard," "Dep. by Howard, $250.00," "Rent paid by Howard, $1.00," of which latter there were three similar entries of different dates. No explanation of these entries was made, and they went in under objection.

With the exception of the declarations made to Mrs. Hawxhurst, as she testified, about the time plaintiff's family moved to the land in question, there were none shown until in the letter written by Mrs. Bonynge to her brother, L. D. Stephens, in 1912, and in subsequent letters to different members of the Stephens family. But at no time during all these years did Mrs. Bonynge inform plaintiff that her intention in giving her the land for a home was that she should have only a life estate in it. The land, in 1875, unimproved as it was, could not have been of much value and in its then condition was uninhabitable. To occupy it as a home the Howards were compelled to build a dwelling, to fence the land, and to erect a barn and other conveniences suitable for the enjoyment of the premises. Plaintiff testified that unless she had been given absolute ownership of the land her family would not have taken possession and they would not have made the improvements necessary to its use. Considering the generous nature of Mrs. Bonynge, her relations to the Howard family at the time, and her avowed affection for her sister, as well as the motive she had in making the gift, we think the court was justified in accepting the testimony of Mrs. Howard as true.

[1] We are aware of the rule, relied upon by appellant, that in such a case as this, where gifts are first asserted after the death of the donor, they must be established by clear and convincing proof, and that it has even been held that gifts of this character are regarded with suspicion by the courts (Humble v. Gay, 168 Cal. 516, 143 Pac. 778); still, a careful reading of the testimony of Mrs. Howard, corroborated as it is in considerable degree by that of witness Maxwell, convinces us, as it manifestly convinced the learned trial judge, that Mrs. Howard's account of the transaction bears evidence of sincerity, honesty, and truthfulness.

Whether or not the court erred in admitting proof that it was generally understood among the Stephens family that the gift was only a life estate, as to which the testimony was both ways, and in admitting the declarations of Mrs. Bonynge made, with the one exception above noted, 40 years after the transaction, are questions we need not consider. If it was error, as to which we express no opinion, the error is not available to respondent, since she had judgment. But in considering this class of evidence the court, no doubt, deemed it of less value than the positive testimony as to the nature of the gift, and therefore insufficient to overcome the force and effect of such direct and positive testimony.

[2] Whether the evidence in a given case is clear and convincing is a question in the first instance to be determined by the trial court, and its conclusion is not to be disturbed unless the reviewing court can say, after an examination of the entire record and all the circumstances surrounding the transaction as there disclosed, that such conclusion is clearly unwarranted by the evidence. "If there is substantial evidence to support the conclusion reached below, the finding is not open to review on appeal," even where the law requires proof of the fact to be clear and convincing. Ward v. Waterman, 85 Cal. 502, 24 Pac. 930; Steinberger v. Young, 175 Cal. 81, 165 Pac. 432.

[3] It is contended that the proof of the improvements made is entirely insufficient to bring the case within the rule as enunciated in Burris v. Landers, 114 Cal. 310, 46 Pac. 162, and other cases. We think the facts in this case much stronger and more persuasive than those shown in the Burris Case. Here the property was unimproved, and so far as appears nonproductive. To convert it into a home such as must have been in the minds of the parties it was necessary to expend considerable money to make

it habitable even for the simple life of those early days. The improvements were not temporary nor trivial, but substantial and commensurate to the uses contemplated, and, we think, were sufficient to bring the case within the rule.

[4] The point is made that the gift was void because the improvements were insufficient to take the case out of the statute of frauds. "The doctrine that verbal contracts for the sale of land, if part performed by the party seeking the remedy, may be specifically enforced," was said, in Kinsell v. Thomas, 18 Cal. App. 683, 695, 124 Pac. 220, 225, to be "an elementary principle in equity jurisprudence and of universal application throughout the American states." Justice Hart in the opinion takes occasion to give the origin and philosophy of the rule.

It may be conceded that the evidence did not support the finding as to plaintiff's second cause of action. The judgment is fully supported by the findings upon the first cause of action.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

On Petition for Rehearing.

CHIPMAN, P. J. Appellant seeks a rehearing upon the single proposition stated thus:

"Assuming a parol gift has been established, the same is absolutely void and unenforceable, as the plaintiff's proof is not of that character which justifies a court of equity in invoking the equitable rule of estoppel in order to take the case out of the operation of the statute of frauds."

Reliance is placed upon the reasoning in the case of Burris v. Landers, 114 Cal. 310. In that case "plaintiff's real claim was that he entered with knowledge and approval of Landers, and under Landers' promise that he would thereafter, upon demand, make him a deed, and that, relying upon that promise, he made lasting and valuable improvements upon the property."

Appellant concedes that a present gift was established from Mrs. Bonynge to Mrs. Howard, which, though defective in form, equity will perfect. Such was not the case of Burris v. Landers, of which the court said: "It is an effort simply to enforce a promise to make a gift, the execution of which was never attempted to be completed by deceased in his lifetime." After stating the nature of the action, the court said: "This, it will be noted, is a different action from one to compel the perfection of a gift presently but incompletely made." In the case cited the property consisted of a dwelling and lot in the city of San Francisco, and was occupied by plaintiff about three years when the donor died. The court held that, even in such a case as this, the donor can be compelled to make his promise good where "the donor by promises induces the donee to change his position to his detriment." In summing up the case the court said:

"The evidence, then, in support of the findings, shows that the total expenditure of the plaintiff did not equal the rental value of the property during the time of his occupancy, and that the so-called permanent improvements were rather expenditures made to suit the convenience and taste of the occupant, and were not such as the law contemplates, of a character to enhance the value of the realty."

We need not stop to inquire whether the rule as to the quantity and character of evidence is the same in both executed and executory gifts. Assuming that the rule is the same in both classes of cases, appellant relies upon certain testimony given to the effect that the property had a rental value of $400 per year for the five years preceding the commencement of the action, and that Mrs. Howard testified that it was worth that less taxes and expenditures, which she fixed at $150 per year, and that her family had made more than that out of it. Conceding this much, the evidence was that when the gift was made the property was practically unimproved, and to make it habitable and of any value as a home they built a dwelling, barn, and convenient outhouses and fenced the land. There was no evidence that it had any rental value prior to the making of these improvements. On the contrary, the only rental value shown was of the property after the Howards had improved it. Such was not the case in Burris v. Landers. The Howards lived upon the premises after making them suitable as a residence for 30 years under the belief that the property had been given to Mrs. Howard. The donor, Mrs. Bonynge, visited them frequently, and, of course, knew of their expending the money required to make the place capable of supporting the family. The gift having been satisfactorily established, we do not think the donee should be precluded from perfecting her title because the gross rental value for all these years would greatly exceed the cost of the improvements made by the donee, especially as this rental value is the result of these very expenditures.

"The rule may be considered as well settled," said Mr. Justice Henshaw in the case cited, "that where a parol gift of real estate is made in præsenti, and the donee has entered under the gift, and has made permanent and valuable improvements upon the realty, and the circumstances are such that it would be unjust to the donee if he were thereafter to be deprived of the property by reason of imperfections in the gift, equity will treat the acts of the donor, together with the acts of the donee, as being such performance of the gift as will relieve the contract from the operation of the statute of frauds, and it will, under such circumstances, lend its assistance to the perfection of the donee's title." The evidence, we think, fully met the requirements of the rule as thus stated. The fact that the permanent

and valuable improvements spoken of have given to the property a rental value it did not hitherto have is a false quantity. Otherwise the very thing equity requires to be done would defeat its object.

The petition is denied.

We concur: HART, J.; BURNETT, J.

38 Cal. App. 318

SLOSS v. HOLLAND et al. (Civ. 1890.)

(District Court of Appeal, Third District, California. Sept. 30, 1918.)

1. EVIDENCE ⊂=437—PAROL EVIDENCE—NOTE—ILLEGALITY OF CONSIDERATION.

In action on note alleged to have been given to secure money to be used, by agreement between the parties, for an unlawful purpose, the law will permit an inquiry into the intention of the parties as to how such money was to be used.

2. LOTTERIES ⊂=12—ILLEGALITY OF CONSIDERATION—PROMOTION OF LOTTERY SCHEME.

Note given to secure money to be used, by agreement between parties, for promotion of lottery scheme, was unenforceable, being based on illegal consideration, under Civ. Code, §§ 1607, 1667.

3. APPEAL AND ERROR ⊂=907(2) — REVIEW — PRESUMPTIONS.

Where maker, being sued on note, resisted payment on ground that it was the intention of the parties that the money was to be used for unlawful purpose, the court on appeal having no evidence before it will presume that such was the intention of the parties; the trial court having found for defendants.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by Ferd A. Sloss against J. A. Holland and another. Judgment for defendants, and plaintiff appeals. Affirmed.

H. N. Mitchell, of Sacramento, and H. N. De Wolfe, of San Mateo, for appellant.

Martin I. Welsh and Ralph H. Lewis, both of Sacramento, for respondents.

BURNETT, J. The action was brought upon a promissory note. Among the allegations found in the answer is this:

"That the consideration if any for said instrument" (referring to said promissory note) "was and is contrary to the policy of law and contrary to good morals, in this: That the said $2,500 was on the date aforesaid invested by plaintiff in said lottery business with the express understanding and intention and purpose that said money was to be used in operating said business for the joint benefit of defendant Holland and the plaintiff herein. That the said plaintiff well knew at the time he so invested the said $2,500 that he was investing the said sum in a business that was contrary to law and contrary to good morals."

A motion was made by plaintiff to strike out the answer and also for a judgment on the pleadings; but each was denied by the court, and the appeal is from a final judgment in favor of the defendants. While the answer is somewhat open to criticism, and some averments are framed upon the erroneous theory that defendants could dispute the obvious character of the written instrument upon which the action is based, yet it does appear from said answer that the said $2,500 was advanced by plaintiff to defendants with the understanding and purpose of all the parties that it should be used for an unlawful purpose, namely, the promotion of a lottery scheme, and that it was so used.

[1, 2] In such case, the law permits an inquiry into the intention of the parties as to how the money shall be used, and, if it be found that a violation of the law is contemplated, the process of the court is not open to either party to enforce any pecuniary obligation that may seem to arise out of the transaction. Each must be content to rely upon the other's sense of honor and responsibility for the enforcement of any promise or supposed obligation. Of course, in ordinary transactions, it is of no concern of the courts what disposition is made of money borrowed; but not so when it is loaned for the express purpose of aiding in the violation of the criminal law. Such intention vitiates the whole transaction, and the contract is regarded as utterly without legal efficacy. Many cases might be cited to the point, but it is sufficient to refer to a few decisions of our Supreme Court.

In Fuller v. Hutchings, 10 Cal. 523, 70 Am. Dec. 746, the validity of a check given for a gambling debt was in controversy. The court said:

"As to all persons except a bona fide holder without notice, the check is void. The statute so expressly declares, and such would be the rule of law independent of the statute. * * * With checks, as with promissory notes, the presumption is that they are given upon a valid consideration; but, this presumption being rebutted, the necessity is thrown upon the holder of proving that he received it in good faith, without notice of the illegality of the consideration."

Mills & Lumber Co. v. Hayes, 76 Cal. 387, 18 Pac. 391, 9 Am. St. Rep. 211, involved a contract for the manufacture and sale of lumber executed for the purpose of increasing the price of lumber, limiting its supply, etc. It was said:

"The general rule is that an illegal contract is absolutely void and cannot form the basis of judicial proceedings. This is equally so in law and equity. The illegality vitiates the contract between the immediate parties, as well as in respect to third parties. A contract tainted with the vice of illegality creates no obligation, not because of the rights of the parties to it, but because the public is interested."

In Chateau v. Singla, 114 Cal. 91, 45 Pac. 1015, 33 L. R. A. 750, 55 Am. St. Rep. 63, the action was for the dissolution of a partnership and for an accounting. The partnership was formed to carry on the business of letting furnished apartments for the purpose of prostitution. The court declared:

"If this contract of copartnership had for its purpose the letting of apartments for purposes of prostitution, and if the business of the copartnership, as pleaded by the answer, was the doing of this precise thing, then the copartnership con-

tract was illegal, against good morals, against public policy, and against the express mandate of the statute, and equity would no more entertain an action founded upon such contract for the relief of either of the parties to it, than it would entertain an action between two thieves for an equitable division of their plunder. A void contract, a contract against public policy or against the mandate of the statute, may not be made the foundation of any action, either in law or in equity."

Union Collection Co. v. Buckman, 150 Cal. 159, 88 Pac. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164, 11 Ann. Cas. 609, involved a promissory note given for a gambling debt. The court said:

"At the outset, therefore, it may be stated that it is clear that under the settled law of this state the consideration for such notes was contra bonos mores and unlawful (Civ. Code, §§ 1607, 1667), and that McMahon (the payee) could not have recovered thereon."

It was further held in that case that a renewal note given in place of the original note and also a compromise of the claim based upon said illegal consideration were both tainted by the same illegality, and that the courts would not entertain any action to enforce the same, but would, even against the express consent of the parties, withhold all relief if the illegality of the consideration is made to appear.

We have a similar situation here. The case would be no different in principle if the action were for an accounting or for money had and received. The unlawful purpose for which the money was loaned to defendants is an inseparable part of the consideration for the note and renders the contract against public policy and void under the plain provisions of the statute. Accepting the theory either of a loan or of an investment, the result is the same.

[3] In the absence of the evidence we must assume, of course, that the intention of the parties as to the use of the money was as contended for by respondents.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

179 Cal. 257

REGOLI v. STEVENSON. (L. A. 4589.)

(Supreme Court of California. Nov. 14, 1918.)

APPEAL AND ERROR ⊂=694(1)—SCOPE OF REVIEW—BILL OF EXCEPTIONS—SUFFICIENCY.

The argument on appeal that the findings on which the judgment is based are not supported by the evidence cannot be reviewed, where the bill of exceptions wholly fails to specify the particulars wherein the evidence is insufficient.

Department 1.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by B. Regoli against H. J. Stevenson. Judgment for defendant and order denying motion for new trial, and plaintiff appeals. Appeal from judgment denying motion for new trial dismissed, and judgment affirmed.

Winslow P. Hyatt and Henry G. Bodkin, both of Los Angeles, for appellant.

F. J. Spring, J. S. Roche, and J. H. Welsh, all of Los Angeles, for respondent.

VICTOR E. SHAW, Judge pro tem. Plaintiff sued defendant for the breach of a written contract whereby it is alleged the latter, for a specified sum per foot, agreed to bore a well on plaintiff's land in section 22, to a depth of 250 feet. Defendant denied the allegations of the complaint essential to plaintiff's recovery, and, by a separate pleading, alleged the making of an oral contract with plaintiff to bore a well on land other than that owned by plaintiff in section 22, for which plaintiff agreed to pay him the reasonable value of his services, alleged to be $350, and upon which defendant admitted the payment of $150.

The court found that plaintiff and defendant entered into a written contract, copy of which was attached to the complaint, under which it was plaintiff's duty to designate a point on the northeast quarter of said section, in which plaintiff held a qualified interest and to which the contract related, as the place where defendant should bore said well; but that plaintiff never at any time designated such point where defendant should bore the well, which fact rendered it impossible for defendant to perform his said contract. The court further found as a fact that defendant, at the special instance and request of plaintiff, performed 14 days' work in boring a well on the northwest quarter of said section, in which plaintiff had no interest, for which he agreed to pay the defendant the reasonable value thereof, found to be $350, and on account of which $150 was paid.

In accordance therewith judgment was entered, from which, and an order denying his motion for a new trial, plaintiff, on December 10, 1915, appealed.

Under section 963, Code of Civil Procedure, no appeal lies from the order denying

plaintiff's motion for a new trial, but the alleged erroneous ruling is reviewable upon a proper record on appeal from the judgment as provided in section 956, Code of Civil Procedure.

That the findings support the judgment must be conceded; indeed, we do not understand appellant to raise any question upon this point.

In his brief, counsel argues that certain of the findings upon which the judgment is based are not supported by the evidence, but the bill of exceptions wholly fails to specify the particulars wherein the evidence is insufficient to support such findings; nor, indeed, are any errors specified therein.

In the absence of such specifications of the particulars wherein the evidence is insufficient to support the findings, the question cannot be reviewed on appeal. Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712; Citizens' Bank v. Jones, 121 Cal. 32, 53 Pac. 354. However, we may say that, notwithstanding such defect in the record, we have examined the evidence upon which the findings are based, and the most that can be claimed is that a substantial conflict is presented.

The affidavits claimed to have been used on the motion for new trial are not included in the bill of exceptions, nor, indeed, authenticated in any manner entitling them to be considered in reviewing the ruling of the court in denying the motion.

The appeal from the order denying plaintiff's motion for a new trial is dismissed, and the judgment is affirmed.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

---

179 Cal. 249

DRIPS v. MOORE et al. (L. A. 4461.)

(Supreme Court of California. Nov. 14, 1918.)

1. VENDOR AND PURCHASER ⊂=95(2)—FORFEITURE FOR NONPAYMENT—WAIVER.
Demands for payment of a past-due installment of interest, or forbearance to exercise the right of forfeiture, under a contract of sale of land, did not constitute a waiver of such right.

2. VENDOR AND PURCHASER ⊂=95(2)—FORFEITURE—WAIVER.
Where vendor under contract of sale of land by his acts of forbearance led the vendee to believe that further leniency in making the payment would be granted, grounds for entertaining such belief were destroyed by a notice in writing on November 4th that unless said payment was made by December 1st the vendee's rights would be forfeited.

3. VENDOR AND PURCHASER ⊂=214(6)—ASSIGNMENT OF CONTRACT—LIABILITY OF ASSIGNEE.
An assignee of a contract to purchase land is subject to its burdens as fully and to the same extent as though he was the original party to it.

4. VENDOR AND PURCHASER ⊂=101—CONTRACT OF SALE—FORFEITURE—NOTICE.
Where vendee in a contract of sale assigned his contract, it was not necessary to serve notice of forfeiture upon the assignor.

5. VENDOR AND PURCHASER ⊂=104—FORFEITURE OF CONTRACT—BURDEN OF PROOF.
Where a vendor, seeking to forfeit the contract of sale, showed that he was owner on a certain date, burden was on defendant, claiming under the contract, to show a compliance therewith, or to show waiver of noncompliance.

Department 1.

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Suit to quiet title by Thomas G. Drips against A. Moore and others. From a decree for plaintiff, and an order denying his motion for a new trial, the named defendant appeals. Affirmed.

George H. Woodruff and Clyde C. Shoemaker, both of Los Angeles, and A. Moore, of Whittier, for appellant.

Carter, Kirby & Henderson, of Los Angeles, for respondent.

VICTOR E. SHAW, Judge pro tem. In this action plaintiff, by a complaint in the usual form in such cases, sought a decree quieting his title to a tract of land.

Judgment went for plaintiff, from which, and an order denying his motion for a new trial, defendant Moore appeals. By answer Moore denied the material allegations of the complaint, and as a separate defense alleged: That on October 18, 1913, plaintiff was the owner of the land in question, at which time he and his wife entered into a contract with James F. and Pearl I. McKinney, whereby they agreed to sell, and the McKinneys agreed to buy, the property in accordance with the terms of such contract. That on December 31, 1913, the McKinneys, for a valuable consideration, duly assigned all their right, title, and interest in said contract to defendant Moore, who entered into possession of the property, which consisted of an orange grove, in the care of which Moore employed plaintiff, paying him wages for the service rendered. That said contract contained a provision as follows: "It is understood and agreed that time is of the essence of this contract, and in the event of a failure to comply with the terms thereof by the buyer, then the seller shall be released from all obligations in law and equity to convey said property, and the buyer shall forfeit all right thereto and to all moneys theretofore paid under this contract." That all the terms of the contract required to be performed on the part of the McKinneys and their assignee have been duly performed, except that an installment of interest, due and payable on October 18, 1914, had not been paid as required by the terms thereof. That notwithstanding such requirement, plaintiff waived the default. That defendant is ready, able and willing to pay said installment of interest and offers to pay the same—followed by a prayer that "plaintiff be required to permit said defendant to pay said

interest and that it be declared that said contract is an existing valid agreement."

[1, 2] For want of sufficient evidence to support the same, appellant attacks the finding of the court to the effect that plaintiff did not waive, or by his acts, conduct, or otherwise excuse, the failure on the part of the defendant to pay the interest due on the contract on October 18, 1914. This contention is based upon testimony of defendant to the effect that upon the making of default in the payment of said interest plaintiff did not at once give notice that the former's rights were forfeited, but, while continuing to care for the property, he on several occasions after October 18th asked defendant to pay the interest then due, and discussed with him the possibility of making a sale of the property in order to enable him to pay it, and further requested defendant to pay his personal taxes out of moneys due from defendant to plaintiff on account of disbursements made by plaintiff in caring for the orchard, to all of which demands for payment defendant told plaintiff that he was endeavoring to raise the money. It cannot be said that plaintiff's demands for payment, or his forbearance to exercise his right of forfeiture pursuant to the provisions of the contract, constituted a waiver thereof. Indeed, we find no evidence whatever tending to show the alleged waiver by plaintiff, but, conceding plaintiff had by his acts of forbearance led defendant to believe that further leniency in making the payment would be granted, all grounds for entertaining such belief were destroyed by the notice in writing served by plaintiff upon defendant on November 4th to the effect that, unless said payment was made by December 1st, his rights under the contract would, as therein provided, be forfeited.

As to this notice, appellant insists that it was improperly admitted as rebuttal evidence, over his objection. Appellant's defense was based upon the theory that plaintiff by his acts waived the prompt payment of the interest; and conceding, but not holding, this to be true, the evidence with reference to the notice was competent to show a revival of the right or termination of the alleged waiver, and that, if defendant did not within the reasonable time specified therein make such payment, the right to forfeiture would be exercised. Stevinson v. Joy, 164 Cal. 279, 128 Pac. 751, and cases therein cited. There is no merit in the contention that the agreement contemplated noncompliance with all the terms of the contract as a condition upon which the right to forfeiture should be exercised.

[3, 4] Moore, having by assignment acquired the contract and claiming the benefits thereof, was subject to its burdens as fully and to the same extent as though he was the original party to it; hence plaintiff, for noncompliance with its terms, might declare all his rights secured thereby forfeited. Nor, since the McKinneys had transferred all their interest, was it necessary to serve the notice of forfeiture upon them. They had no interest to which the act of forfeiture could apply.

[5] As shown by the pleadings, plaintiff was the owner of the property on October 18, 1913, which fact was also stipulated at the trial, whereupon plaintiff rested. Defendant then moved for a nonsuit, which was denied, and this ruling is assigned as error. Since defendant's rights were based upon the contract, it devolved upon him to show a compliance therewith, or, since it appeared from his answer he had failed to comply, to prove, as alleged therein, that plaintiff had waived such want of compliance. This being true, and in the absence of any evidence of such alleged waiver, the court properly denied his motion for nonsuit. There are no other points which merit consideration.

The judgment and order are affirmed.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

---

179 Cal. 239

## EMPIRE SECURITIES CO. v. MATTHEWS et al. (L. A. 4558.)

(Supreme Court of California. Nov. 12, 1918.)

1. MUNICIPAL CORPORATIONS ⇐516—STREET IMPROVEMENT — EXCESSIVE ASSESSMENT — APPEAL TO CITY COUNCIL.

Sole remedy for excessive assessment for street improvement is by appeal to city council under Street Law, § 11, and, in absence of such appeal, amount of assessment is not open to question in subsequent collateral proceeding.

2. MUNICIPAL CORPORATIONS ⇐583—STREET IMPROVEMENTS — DEED FROM TREASURER — COMPLIANCE WITH PRECEDENT STEPS — BURDEN OF PROOF.

In action to quiet title, plaintiff claiming under deed of treasurer of city issued on sale for nonpayment of street assessment and bond, introduction of deed containing appropriate recitals under Bond Act, § 5, subd. k, threw on defendant burden to show want of compliance with precedent steps required by statute, as giving of notice to redeem property, etc.

3. MUNICIPAL CORPORATIONS ⇐581—STREET IMPROVEMENT—BOND ACT—NOTICE TO MORTGAGEE.

Grantee under deed of treasurer of city issued on sale of property for nonpayment of street improvement assessment and bond was not called upon by bond, under Bond Act, § 5, subd. j, to serve notice on mortgagee, but only upon owner or agent of property, if named in certificate, and party occupying it.

Department 1. Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by the Empire Securities Company against Alta Jean Matthews and others. From judgment for plaintiff, defendants appeal. Affirmed.

James, Smith & McCarthy, and A. R. Holston, all of Los Angeles, for appellants.

Crouch & Crouch, of Los Angeles, for respondent.

SLOSS, J. The defendants appeal from a judgment quieting the plaintiff's title to a lot of land in the city of Los Angeles.

[1] The plaintiff claimed under a deed of the treasurer of the city of Los Angeles issued upon a sale of the property for nonpayment of a street improvement assessment and bond. The proceedings were regularly had under the street law and the bond act of 1893. Stats. 1885, p. 147; Stats. 1893, p. 33, and amendments. Neither Alta Jean Matthews, the owner of the property, nor any of the other defendants claiming to have an interest therein, appealed to the city council, or otherwise objected to the assessment or to the issuing of the bond, until after the sale was made and the deed delivered. At the trial they undertook to attack the validity of the sale by showing that the property, after the improvement had been made, was not worth as much as the amount assessed against it, and that the assessment therefore necessarily exceeded the benefits resulting from the improvement. The court received the testimony, but gave it no consideration upon submission of the case, taking the ground, evidently, that the sole remedy for an excessive assessment is by appeal to the city council, under section 11 of the Street Law (Stats. 1885, p. 156), and that, in the absence of such appeal, the amount of the assessment is not open to question in a subsequent and collateral proceeding. The conclusion thus reached was clearly correct. Duncan v. Ramish, 142 Cal. 686, 692, 76 Pac. 661; Brown v. Drain (C. C.) 112 Fed. 582, affirmed, 187 U. S. 635, 23 S. Ct. 842, 47 L. Ed. 343. "Where the property owner has an opportunity given him, under the prescribed proceedings, to appear and contest the question before the legislative body, the determination of that body on the subject of benefits is final, and if he fails to appear he thereby admits the finality of the determination." Duncan v. Ramish, supra. In each of the cases cited above, the property owner, having failed to appeal, attempted to prove in another proceeding that the assessment in fact exceeded the benefit. It was held that he was foreclosed by his omission to seek the remedy given by the statute. The same rule governs the present case.

[2] It is further claimed that the plaintiff failed to introduce any evidence, outside of the deed itself, to show the giving of notice to redeem the property. But under subdivision k of section 5 of the bond act, as amended (Stats. 1899, p. 45), the deed "is primary evidence of the regularity of all proceedings theretofore had." The introduction of the deed, which contained appropriate recitals, therefore threw upon the defendants the burden of showing a want of compliance with the precedent steps required by the statute, and this burden they did not attempt to meet.

[3] The plaintiff was not called upon to serve a notice upon the mortgagee. All that the statute demands is that such notice shall be served upon the owner or agent of the property, if named in the certificate, and upon the party occupying the property, if the property is occupied. Section 5, subd. j.

No other points are made.

The judgment is affirmed.

We concur: RICHARDS, Judge pro tem.; VICTOR E. SHAW, Judge pro tem.

---

179 Cal. 245

## BIRD v. HUBER. (L. A. 4521.)

(Supreme Court of California. Nov. 14, 1918.)

LIBEL AND SLANDER ⊂=104(3)—EVIDENCE—ADMISSIBILITY.

In an action for damages for defamatory statements concerning plaintiff, published in letters delivered to another, where the evidence as to whether defendant was responsible for the publication was conflicting, it was error to admit another defamatory letter in evidence, to which no reference was made in the complaint.

Department 1.

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Action by P. I. Bird against Bertha Huber. Judgment for plaintiff, and defendant appeals. Reversed.

B. E. Tarver, of Santa Ana, for appellant.

Clyde Bishop, of Santa Ana, for respondent.

VICTOR E. SHAW, Judge pro tem. Plaintiff, alleging that defendant had by means of letters delivered to another person written and published false and defamatory statements concerning him, brought this action for damages.

The case was tried by the court without a jury, which, findings being waived, gave judgment in favor of the plaintiff, from which, after the denial of her motion for a new trial, defendant appealed.

While in the complaint defendant was charged with writing and causing the delivery of several specific letters to as many different persons, all of which as to plaintiff were defamatory in character, no evidence was offered touching any of them other than one written to Mrs. Kaiser. As to this letter, a 14 year old boy by the name of Dorsten testified that a woman, who at the time he did not know and had never seen, gave it to him, requesting that he deliver it to Mrs. Kaiser, which he did. Thereafter he, accompanied by a detective employed by plaintiff, saw defendant and identified her as the one who had given him the letter. Against this evidence was that of defendant, who, in the strongest and most direct terms, denied that she had ever written or in any manner published or put in circulation any of the letters in question.

Upon this conflict of evidence the determination of the trial judge would be conclusive, except for the fact that the court erred in permitting plaintiff to introduce another letter, likewise as to plaintiff defamatory, and to which no reference was made in the complaint; the reason assigned for its admission and proof of its delivery being, as appears by the bill of exceptions, not to show malice, but "for the purpose of showing a course of conduct on the part of defendant," thus rendering it probable that she had committed the act with which she was charged. That the ruling was error admits of no question; and that it was prejudicial is equally clear, since in the mind of the court evidence of the delivery of this second letter, with the publication of which defendant was not charged, tended to corroborate the story of Dorsten and lend weight to his testimony, without which the court might very properly have entertained doubts as to the truth thereof. Especially is this so if Dorsten's testimony, on motion for new trial, be viewed in the light of his affidavit filed in support of such motion, and wherein, after referring to his testimony, he stated:

"But I now say that I do not know whether it was Miss Huber or not who gave me the letter; that I am not sure that it was her, and I would not testify again that it was Miss Huber that gave me the said letter, because I am not sure it was her; that after said letter was given to me I did not see the person who gave me the letter any more, but that several months thereafter, when I was in company with Mrs. Firman, the detective, I saw Miss Huber, and I told Mrs. Firman that Miss Huber gave me the letter; that before the trial of said case the plaintiff, Mr. Bird, gave me some fireworks, and Mrs. Firman gave me some pieces of money."

The judgment is reversed.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

---

179 Cal. 253

## HOFFMAN v. PATTERSON. (L. A. 4579.)

(Supreme Court of California. Nov. 14, 1918.)

1. PLEADING ⟸369(6)—ELECTION—NECESSITY OF DEMURRER.
Where complaint was indefinite, because it did not show whether the action was for damages for breach of contract or for false and fraudulent misrepresentations, and defendant failed to demur upon such ground, he could not on the trial require an election of which ground should be relied on.

2. PRINCIPAL AND AGENT ⟸79(1)—MISREPRESENTATIONS BY AGENT—LIABILITY TO PRINCIPAL.
Where plaintiff constituted defendant his agent to acquire public school lands, but plaintiff was not allowed to prove up because failing to take proper preliminary steps, he could recover for the false representations as to necessary steps to secure the land, although after he went on it he found that the land was not as represented, but nevertheless remained thereon.

3. PRINCIPAL AND AGENT ⟸79(1)—RELIANCE ON AGENT.
Where plaintiff made defendant his agent for purchase of school lands, and signed affidavit for the purchase without reading it, his negligence did not preclude recovery from defendant for failure to tell him the necessary steps to secure the land, whereby he lost the land.

4. APPEAL AND ERROR ⟸1033(5)—HARMLESS ERROR—MEASURE OF DAMAGES.
In action for damages against agent for purchase of school land, for failure to inform him as to the necessary steps to procure the land, instruction as to measure of damages *held* favorable rather than adverse to defendant.

Department 1.

Appeal from Superior Court, Los Angeles County; Willis I. Morrison, Judge.

Action by Alfred Hoffman against Hanlon Patterson. Judgment for plaintiff, and defendant appeals. Affirmed.

Jones & Evans, of Los Angeles, for appellant.

Andrew J. Copp, Jr., of Los Angeles, for respondent.

RICHARDS, Judge pro tem. This is an action for damages arising out of a transaction between the parties wherein the plaintiff applied to the defendant for information as to the location of school land of the state of California open to entry which he desired to acquire. The defendant was a real estate dealer, who advertised himself as dealing in school lands and expert in advising and aiding persons who desired to purchase such lands. The plaintiff was a foreigner speaking English but brokenly, and wholly ignorant of the land laws of California relating to school lands. The defendant, upon plaintiff's application to him, represented that he knew the location of a section of school land open to entry, which he described as quite desirable, and further represented that he had personally been upon the land, and had taken the necessary preliminary steps to obtain title thereto under the sections of the Political Code applicable to the purchase of school lands, and had paid the first filing fee of $25, and that he would proceed as the plaintiff's agent to do or have done the things necessary to acquire the title to said land. The plaintiff engaged him so to do, and at his instance signed without reading the same, the formal application and affidavit for the purchase of said land which the defendant had prepared and presented to him for signature. He also transferred to the defendant his equity in a house and lot in Los Angeles, which was to be the consideration to be paid for the defendant's advice and services. The plaintiff's application and affidavit were duly filed in the office of the surveyor, but when the plaintiff came to prove up on the land, as required by law, his application to purchase the same was refused for the reason that it developed that he had not taken the proper steps with re-

gard to going upon the land prior to his application to purchase, as required by the statute. Thereupon he brought this action. The foregoing facts were stated in the plaintiff's complaint and testified to by him upon the trial. The defendant had filed a demurrer, which being overruled, he answered denying that he had misled the plaintiff or had failed to perform the services for which he had received the transfer of the plaintiff's equity in the Los Angeles property.

[1] At the inception of the trial the defendant insisted that the plaintiff's complaint was indefinite, in that it could not be determined whether he was seeking to recover damages for the breach of a contract, or for false and fraudulent misrepresentations, and that he should be limited in his proofs to one or the other cause of action. The court at first seemed to incline to this view, and required the plaintiff to elect between the two alleged causes of action, but later allowed him to prove the entitre transaction as alleged in his complaint. The appellant alleged this as error, but it is evident that the later view of the court was the correct one; defendant not having by his demurrer objected to the plaintiff's pleading upon the grounds stated at the trial. The appellant further contends that the evidence does not support the findings of the court as to the defendant's alleged misrepresentations in relation to the condition and value of the school land, but in this regard the plaintiff testified fully upon all of these matters and the trial court was entitled to accept this version of the transaction.

[2, 3] As to the appellant's claim that the plaintiff should not recover for the reason that after he had entered into the transaction he had gone upon the section of school land and had seen that it was not as represented and had nevertheless gone ahead with his attempt to prove up upon it, this claim has no merit, since the plaintiff does not found his claim for damages upon this misrepresentation alone, but upon his failure to procure said land because the defendant had misled him as to the proper steps to be taken to perfect his right to purchase it from the state. In respect to this phase of the case the appellant urges that the plaintiff is seeking to found his right of recovery upon his own wrong, in this: That it was his duty to have read the affidavit and application to purchase, which he signed, and that if he had done so he would have discovered that he had not done the things which he had therein stated had been done in order to set in motion his right to purchase the land. This contention is also without merit. The relation between the plaintiff and the defendant was a confidential one. The plaintiff was entitled to rely upon the defendant as his agent in the matter of signing without reading the papers which the latter had prepared and presented for his signature. The case of Calmon v. Sarraille, 142 Cal. 638, 76 Pac. 486, is precisely in point in holding that as between parties occupying the confidential relation of principal and agent the former is entitled to rely upon the statements of the agent without reading before signing the papers which the latter prepares and presents for his signature.

[4] The final contention of the appellant is that the court erred in adopting as its basis for the plaintiff's damages the value of his equity in the Los Angeles lot, instead of the value of the school lands which the plaintiff failed to obtain. We think the defendant was rather benefited than injured by this error, if error it was, since the plaintiff's testimony was to the effect that the defendant had represented said section of school land to be of the value of $6,400, whereas in fact it was not worth in excess of one-tenth of that sum. The court took the view that the measure of the plaintiff's damages was what he had actually lost by the transaction, since he had not paid anything for and had not received the school land. The court, therefore, took the value of the plaintiff's equity in the lot which he had transferred to the plaintiff, and, finding this equity to have been worth $400, deducted therefrom the sum of $25, which the proof showed the defendant had paid as the preliminary fee for the school land purchase, and gave the plaintiff judgment for the sum of $375. In so doing it committed no error of which the appellant can complain.

Judgment affirmed.

We concur: VICTOR E. SHAW, Judge pro tem.; SLOSS, J.

---

179 Cal. 232

NEELEY v. NEELEY. (L. A. 4487.)

(Supreme Court of California. Nov. 12, 1918.)

1. DIVORCE ⟸51 — "UNREASONABLE DELAY" — IN BRINGING SUIT.

Where plaintiff wife condoned extreme cruelty by dismissing divorce suit upon agreement that defendant would refrain from acts of unkindness, the condonation under the agreement as well as under Civ. Code, § 117, carried with it the condition subsequent that plaintiff should be treated with conjugal kindness, and, where defendant over three years thereafter broke the condition, the original cause of action was revived (section 121), and plaintiff was not, under sections 124 and 125, guilty of "unreasonable delay," where she brought a second suit within a few days thereafter.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Unreasonable Delay.]

2. DIVORCE ⟸108 — CONDONATION — PLEADING.

Condonation was not a part of plaintiff's case, but new matter, properly pleaded in the answer, which plaintiff had the right to meet by evidence showing justification for revoking condonation in view of Code Civ. Proc. § 462, as to new matter in answer being deemed controverted.

Department 1.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Elizabeth E. Neeley against Elmer E. Neeley. From interlocutory decree of divorce for plaintiff, defendant appeals. Affirmed.

Earl Newmire, of Los Angeles, for appellant.

Fairbanks & Macfarland, of Los Angeles, for respondent.

SLOSS, J. From an interlocutory decree of divorce granted to the wife, plaintiff in the action, the defendant appeals.

The complaint was based on the ground of extreme cruelty, and specified acts committed in October and November, 1911, and on April 26, 1915. The action was commenced on April 27, 1915. The answer denied the charges of cruelty and set up condonation with respect to the alleged acts in October and November, 1911. The court found that the defendant was guilty of extreme cruelty toward the plaintiff in October and November, 1911; that she brought suit for divorce in December, 1911; and that that suit was dismissed upon the agreement of the defendant that he would refrain from acts of unkindness toward his wife. It is further found that he had not thereafter treated his wife with conjugal kindness, and that on the 26th day of April, 1915, he had kicked her, as alleged in the complaint.

The defendant did not, at the trial, attempt to controvert the testimony offered to show that he had, as averred, been guilty of cruelty in 1911. He did deny that he had committed the later acts charged against him, but the plaintiff's testimony, which was not without corroboration, was sufficient to support the findings in this regard also.

[1] The record indicates, however, that the court based its decree upon the acts committed in 1911, rather than those of 1915. As to the earlier occurrences, the appellant's only contention is that they "were too remote to be considered." There is nothing in this claim. Our statutes provide no specific limitation for an action for divorce on the ground of extreme cruelty. It is provided, merely, that a divorce must be denied "when there is an unreasonable lapse of time before the commencement of the action." Civ. Code, § 124. By the following section, "unreasonable lapse of time" is defined as "such a delay in commencing the action as establishes the presumption that there has been connivance, collusion, or condonation of the offense, or full acquiescence in the same, with intent to continue the marriage relation notwithstanding the commission of such offense." Civ. Code, § 125. We should hesitate to say that an unexplained delay of 3½ years must, as matter of law, be deemed unreasonable. But that is not the question here. The plaintiff's failure to proceed earlier is fully accounted for by the dismissal of the prior action, and the conduct of the parties thereafter. Civ. Code, § 125. The plaintiff condoned the offenses of 1911, but under the agreement, as well as by the terms of the law itself (Civ. Code, § 117), the condonation carried with it the condition subsequent that the plaintiff should be treated with conjugal kindness. This condition was broken by the defendant in 1915, and the original cause of action thereby revived. Civ. Code, § 121. Under these circumstances, there is absolutely no ground for claiming that the court below should have held the plaintiff guilty of an unreasonable delay in commencing her action.

[2] The plaintiff was not required to set up, in her complaint, the facts justifying her in revoking the condonation. Condonation was not a part of her case. It was new matter, properly pleaded in the answer. The plaintiff was not required to anticipate it in her complaint, but had the right to meet it by any appropriate proof. Code Civ. Proc. § 462; 9 R. C. L. 386.

The judgment is affirmed.

We concur: RICHARDS, Judge pro tem.; VICTOR E. SHAW, Judge pro tem.

---

(179 Cal. 242)

CORNIC v. STEWART. (L. A. 4567.)

(Supreme Court of California. Nov. 12, 1918.)

APPEAL AND ERROR ⟸102—ORDERS APPEALABLE—RULING ON DEMURRER.

Orders sustaining demurrer to the amended complaint and denying leave to file a second amended complaint are not appealable.

Department 1. Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by J. W. Cornic against Gertie E. Stewart. From two orders sustaining demurrer to the first amended complaint and denying leave to file a second amended complaint, plaintiff appeals. Appeals dismissed.

Willedd Andrews, of Los Angeles, for appellant.

James W. Barnes, of Compton, for respondent.

RICHARDS, Judge pro tem. In this case no respondent's brief has been filed, but a cursory examination of the record discloses that the only appeal before us is an attempted appeal from two orders of the trial court sustaining a demurrer to the plaintiff's first amended complaint and denying the plaintiff's application for leave to file a second amended complaint. Neither of these orders are appealable orders, and there is no appeal from the judgment.

It follows that the appeals must be dismissed, and it is so ordered.

We concur: SLOSS, J.; VICTOR E. SHAW, Judge pro tem.

## In re BEGGS. (Cr. 2213.)

(Supreme Court of California. Nov. 14, 1918.)

ATTORNEY AND CLIENT ⊜39—GROUNDS FOR DISBARMENT—CONVICTION OF OFFENSE.

Where the judgment of conviction of a felony against an attorney at law is transmitted to and filed in the Supreme Court, that court will, in accordance with Code Civ. Proc. § 287, subd. 1, and sections 288, 289, and 299, order such attorney's name stricken from the roll.

In Bank.

Proceeding for the disbarment of Will M. Beggs, an attorney at law, by certification of his conviction of a felony. Defendant disbarred.

PER CURIAM. A certified copy of the record of conviction of Will M. Beggs, an attorney and counselor of this court, in the superior court of Santa Clara county, in this state, of a felony, on which conviction judgment was pronounced by said court on March 30, 1916, having been transmitted to and filed in this court:

Therefore, in accordance with the provisions of subdivision 1 of section 287, sections 288, 289, and 299 of the Code of Civil Procedure, it is ordered and adjudged that the name of said Will M. Beggs be stricken from the roll of attorneys and counselors of the court, and that he be precluded from practicing as such attorney or counselor in all the courts of this state.

ANGELLOTTI, C. J., and SLOSS, MELVIN, and WILBUR, JJ., and VICTOR E. SHAW, Judge pro tem., concur in this judgment.

## In re HERRICK. (Cr. 2223.)

(Supreme Court of California. Nov. 12, 1918.)

ATTORNEY AND CLIENT ⊜52—DISBARMENT PROCEEDINGS — VERIFICATION OF ACCUSATION.

An accusation for disbarment, not verified as required by Code Civ. Proc. § 291, will not be considered, especially in the absence of allegation of facts justifying the proceeding.

In Bank.

Accusation in disbarment proceedings presented by H. S. Herrick. Dismissed.

SLOSS, J. An accusation for disbarment is presented to this court by H. S. Herrick, who appears as accuser in pro. per. The accusation is not verified, as required by section 291 of the Code of Civil Procedure. Furthermore, the facts alleged do not justify the institution of such a proceeding, much less disclose any ground for granting the relief sought.

The proceeding is dismissed.

We concur: WILBUR, J.; MELVIN, J.; RICHARDS, Judge pro tem.; VICTOR E. SHAW, Judge pro tem.

(179 Cal. 243)

## OGDEN v. FORD et al. (L. A. 4552.)

(Supreme Court of California. Nov. 14, 1918.)

1. CONTRACTS ⊜128(1) — CONSIDERATION OF NOTE—COMPOUNDING FELONY.

A promissory note given on an agreement to dismiss criminal proceedings against the maker for embezzlement is void as embodying an illegal consideration.

2. CONTRACTS ⊜141(3) — CONSIDERATION—COMPOUNDING FELONY—EVIDENCE.

In an action against guarantors of a promissory note, evidence *held* to support a finding that the note was not given in consideration of dismissal of an embezzlement prosecution against the maker.

Department 1.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by M. H. Ogden against Benjamin F. Ford and another. From a judgment for plaintiff and from an order denying a motion for new trial, defendants appeal. Affirmed.

W. J. Rodgers, of San Diego, and Ford & Hammon, of Los Angeles, for appellants.

M. H. Fleming, of San Diego, and Geo. M. Harker, of Los Angeles, for respondent.

VICTOR E. SHAW, Judge pro tem. In this action plaintiff obtained judgment against Benjamin F. Ford and Frank J. Becker as guarantors of a promissory note made and delivered to him by Russell T. and George M. Briggs.

From this judgment and an order of court denying their motion for a new trial the defendants, Becker and Ford, have appealed.

[1] As a defense to recovery on the note, defendants alleged that the consideration thereof was an agreement on the part of plaintiff that he would dismiss, or cause to be dismissed, a certain criminal proceeding then pending in the superior court against Russell T. and George M. Briggs, and against whom he had sworn to a complaint charging them with embezzlement. Such agreement, if made as alleged, would, of course, render the note void. Keating v. Morrissey, 6 Cal. App. 169, 91 Pac. 677; Thom v. Stewart, 162 Cal. 415, 122 Pac. 1069. As to this issue, however, the court found adversely to defendants, and further found that the note with the indorsement of defendants guaranteeing payment thereof was duly made and delivered to plaintiff in satisfaction of a judgment obtained by him against the said Russell T. and George M. Briggs, and in the absence of any agreement, promise, or understanding on his part, express or implied, to dismiss the criminal action then pending against the said Briggs, or otherwise to refrain from the prosecution thereof.

[2] Appellants' chief claim is that this finding is not supported by the evidence. The record discloses no ground for such contention. As appears therefrom, the note, payment of which was guaranteed by appellants, was given in satisfaction of a judgment ob-

tained by plaintiff against the Briggses for money of his which they had wrongfully appropriated. Assuming that both they and appellants believed, as the evidence tended to prove, that defendants in the criminal action would fare better if they reimbursed plaintiff for the loss incurred by reason of their offense, their act in so doing was not due to any agreement or promise on his part not to prosecute them. Indeed, the control of the prosecution was in the hands of the district attorney, who says that, upon learning that Briggs had satisfied the judgment, he dismissed the prosecution for the reason that in such cases it was extremely difficult to secure a conviction where the civil liability had been settled. True, he further stated that plaintiff said he did not wish to prosecute them and gave expression to language indicating his desire to have the action dismissed, as to which, however, whether to the district attorney or to others, both plaintiff and his attorney, Freeman, denied the making thereof. Other than this conflicting testimony, no evidence was adduced on behalf of defendants tending to show that plaintiff ever at any time agreed to cause the criminal action against Briggs to be dismissed in consideration of the giving of the note guaranteed by them. While it is, no doubt, true that defendants and Briggs hoped that by giving the note in satisfaction of the civil liability the latter, as they did, would escape prosecution, none of them testified to any act or word of plaintiff which could be interpreted as an agreement on his part to aid in such escape, and the evidence given on behalf of plaintiff shows the nonexistence of such fact.

There is nothing in the record disclosing error on the part of the court in sustaining objections to questions asked on cross-examination of the witnesses Maud S. and Russell T. Briggs, as to conversations had by them with defendants as to the purpose for which the note was to be given. Plaintiff was not present and had no part in these conversations. Moreover, since there had been no examination in chief upon the subject of the interrogation, such fact alone was sufficient reason for the ruling.

The judgment and order are affirmed.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

---

179 Cal. 229

## HOLLENBECK–BUSH PLANING MILL CO. v. ROMAN CATHOLIC BISHOP OF MONTEREY et al. (L. A. 4512.)

(Supreme Court of California. Nov. 12, 1918. On Rehearing, Dec. 12, 1918.)

MECHANICS' LIENS ⊂=291(4) — DESCRIPTION OF PROPERTY—SUFFICIENCY.

Judgment in action to foreclose a materialman's lien describing property as "the northerly portion of block 413–B, of the city of Bakersfield, according to the map of said city of Bakersfield, filed," etc., was insufficient.

Department 1.

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Action by the Hollenbeck-Bush Planing Mill Company against the Roman Catholic Bishop of Monterey and others. Judgment for plaintiff, and defendants appeal. Reversed.

J. Wiseman McDonald, of Los Angeles, and J. W. Wiley and R. B. Lambert, both of Bakersfield, for appellants.

Geo. E. Whitaker, of Bakersfield, and Everts & Ewing, of Fresno, for respondent.

RICHARDS, Judge pro tem. This is an appeal from a judgment in plaintiff's favor in an action to foreclose a materialman's lien. Two questions are presented upon this appeal. The first relates to the issue as to whether the claim of lien was filed within the time permitted by statute for the filing of such liens. As to this question it is conceded that it has been settled in respondent's favor by the case of Hughes Manufacturing & Lumber Co. v. Hathaway, 174 Cal. 44, 161 Pac. 1159, decided since this appeal was taken.

The other point presented upon this appeal relates to the sufficiency of the description of the property against which the plaintiff's claim of lien was filed, which is herein sought to be foreclosed as the same appears in the judgment from which this appeal is taken. Said description is as follows:

"The northerly portion of block 413–B, of the city of Bakersfield, according to the map of said city of Bakersfield, filed in the office of the county recorder of Kern county, November 25, 1898."

We are of the opinion that the appellant's contention that this description, as embodied in the judgment herein, is insufficient, must be sustained. The case of Union Lumber Co. v. Simon, 150 Cal. 751, 89 Pac. 1077, 1081, which is chiefly relied upon by the respondent, is clearly distinguishable from the case at bar. In that case the property was described as "commencing at a point on the northerly line of Sutter street distant thereon 137 feet and 6 inches from the westerly line of Scott street, running thence," etc. The defect in this description consisted in the fact that it did not locate the point of commencement as to whether it was easterly or westerly from Scott street. It was thus applicable to two different pieces of property on the northerly line of Sutter street; otherwise, the description was of a rectangular piece of land of definite dimensions. The court held that such a description was aided by the statement in the claim of lien as to who was the owner or reputed owner of the land, and was thus made "sufficient for identification," which is all that is required by the statute in the claim of lien. But the court also suggested that in the action for

the enforcement of such a lien the plaintiff might enlarge the description in his complaint and proofs so that the judgment would distinctly specify the land which was to be sold. The difference between the description in that case and that in the case at bar is apparent. In that case there was a description of a definite parcel of land which could be applied to either one of two locations by supplying the single word "easterly" or "westerly," which would give the description its point of beginning. But in the case at bar no description of any parcel or amount of land by metes and bounds or otherwise is given.

In the case of Rall Bros. v. McCrary, 45 Mo. App. 365, which is cited with approval in Union Lumber Co. v. Simon, supra, the property sought to be subjected to the lien was described as "a frame barn and one acre on which the same is situated, being erected on a tract of sixty-four acres" in a designated quarter section. This was held to be sufficient; but this case also is to be distinguished from the case at bar by the fact that a definite quantity of land upon which the structure stood was designated, while in the case at bar no quantity of land to be affected by the lien of the judgment is given. In Phillips on Mechanics' Liens (3d Ed.) § 385, the case of Howell v. Zerbee, 26 Ind. 214, is cited with approval, wherein the following description, viz. "a part of lot 3, section 36," etc., was held to be void for uncertainty. In the case of Willamette S. M. Co. v. Kremer, 94 Cal. 205, 29 Pac. 633, this court, quoting from Phillips on Mechanics' Liens, § 379, says:

"'The best rule to be adopted is that if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others, it will be sufficient. There is great reluctance to set aside a mechanic's claim merely for loose description, as the acts generally contemplate that the claimants should prepare their own papers; and it is not necessary that the description should be either full or precise.' See, also, Kennedy v. House, 41 Pa. 39, 80 Am. Dec. 594; McClintock v. Rush, 63 Pa. 205; Northwestern Cement, etc., Co. v. Norwegian etc. Seminary, 43 Minn. 449 [45 N. W. 868]; Cleverly v. Moseley, 148 Mass. 280 [19 N. E. 394]; Seaton v. Hixon, 35 Kan. 663 [12 Pac. 22]; Hotaling v. Cronise, 2 Cal. 60; Tredinnick v. Mining Co., 72 Cal. 78 [13 Pac. 152].

"In an action to foreclose the lien, it is, however, necessary that the property which the plaintiff seeks to subject to a sale therefor should be definitely described, and that the judgment should specifically designate the property affected by the lien and directed to be sold, otherwise the officer executing the judgment can neither point out the property which he offers for sale, nor place the purchaser in possession thereof, and the deed which he may execute will not convey any title; and as the judgment must follow the complaint, it is essential that the complaint should itself contain such specific description."

In the case at bar the appellant does not assail the sufficiency of the description in the plaintiff's claim of lien in the answer and does not do so in the briefs upon appeal, but, on the contrary, concedes that "it is probably sufficiently complete for identification and therefore would constitute a valid description so far as the lien is concerned." The appellant's attack is confined to the judgment, and, under the rule declared in the cases above cited, the contention of the appellant as to the insufficiency of the description as embodied in the judgment herein must be sustained.

Judgment reversed.

We concur: SLOSS, J.; VICTOR E. SHAW, Judge pro tem.

On Rehearing.

PER CURIAM. The petition for hearing in bank is denied.

The effect of the reversal of the judgment is to return the case to the trial court for a new trial and for such proceedings therein, including the right of the respective parties to make such application to amend their pleadings as they may be advised, as though there had been no previous trial of the action.

---

179 Cal. 259

## FIFE v. MATHES. (L. A. 4565.)

(Supreme Court of California. Nov. 15, 1918.)

PRINCIPAL AND AGENT ⇐100(1)—POWER OF ATTORNEY—POSSESSION OF PROPERTY.

A bare power of attorney from plaintiff to acquire, manage, sue for, etc., any real property "to which I now or hereafter may have any interest or right," did not empower plaintiff's attorney in fact, without plaintiff's knowledge and in the absence of any claim asserted by plaintiff, to take possession of and sue for vacant and unoccupied lots in the name of plaintiff.

Department 1.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by H. B. Fife against James H. Mathes. Judgment for defendant, and plaintiff appeals. Affirmed.

Herbert C. Kelly, of San Diego, for appellant.

Hamilton & Lindley, of San Diego, for respondent.

VICTOR E. SHAW, Judge pro tem. Plaintiff sues in ejectment, alleging that on July 10, 1914, while he was in lawful and peaceable possession of certain described city lots, claiming title thereto in fee, he was ousted therefrom by defendant, who, without right or title and by force, entered into possession of the same, which he withholds from plaintiff, all of which allegations are denied by the defendant, who in his answer alleges ownership of the property in himself.

The case was tried by a jury, which, as directed by the court, brought in a verdict for defendant, upon which judgment was entered and from which plaintiff appeals.

Plaintiff's claim to the property was based wholly upon the naked possession thereof, and defendant's right thereto was founded upon a tax deed from the state of Califor-

nia, which the court, over plaintiff's objection to its competency, admitted in evidence. The court's ruling in so receiving the deed in evidence is the chief, and indeed the only, error relied upon by plaintiff for a reversal of the judgment.

It is unnecessary to pass upon the alleged error of the court in so ruling, since, as we view the case, the record fails to show that plaintiff was ever at any time in possession of the property.

As disclosed by the evidence of Herbert C. Kelly, who appeared in the dual capacity of both attorney and sole witness for plaintiff (and in neither rôle with credit to himself), the latter on April 1, 1914, for an expressed consideration of $1 executed to him an irrevocable power of attorney—

"to buy, acquire, receive, sue for, defend, recover, manage, maintain, improve, control, sell, convey, assign, mortgage, pledge, lease, release, receive rents, profits, incomes, proceeds, and price, and reinvest or dispose of the same, compromise, settle and deal in or with in every way whatsoever, as freely as I myself might do in the absence of this grant, any and all real or personal property or interest or right therein or thereto now or hereafter standing in my name, or in or to which I now or hereafter may have any interest or right whatsoever, within the county of San Diego, state of California, and to do any and every act, execute any and every instrument, carry on any and every business, and to make and carry out any and every agreement or arrangement which may in his judgment be convenient or advisable for any of the purposes mentioned herein."

Kelly further testified:

"I don't know anything about H. B. Fife." "I don't know whether Mr. Fife was just a hobo or not." That he had met him only once and that was when alone on the street in La Jolla. That he did not know his present residence and had no correspondence with him as to the power of attorney under which, without any direction so to do, or other authority than that conferred by the document, he some time in April, 1914, at his own expense, had a fence erected around the lots, for the cost of which he was reimbursed by one Max Watson, not shown to have any connection with plaintiff. That he never at any time talked with Mr. Fife concerning the property nor informed him as to the fencing of the same, nor of any acts taken in regard thereto. That plaintiff's claim to the property was not based upon any deed or instrument of conveyance, but solely upon the fact that from some time in April, 1914, when the fence was erected, to July 10th following, when the alleged ouster occurred, he was in possession thereof.

Conceding, as claimed by appellant, that the tax deed was insufficient to divest the real owner of title to the lots, and that defendant's entry thereon was unlawful, plaintiff was in no position to complain unless, as claimed, he was at the time in possession thereof. The acts of dominion over the property whereby his possession was manifested were not had and taken by plaintiff, but by Kelly, whose sole authority so to do in the name of and for plaintiff was the power of attorney, wherein no claim to or reference in any manner was made to the lots. By the terms of the instrument Kelly's authority to act for plaintiff was restricted to acts in connection with real property then or thereafter standing in the name of plaintiff, or to property in which he had some right or interest. This did not empower Kelly, as attorney in fact for plaintiff, in the absence of any claim, right, or interest asserted by plaintiff, to take possession of vacant and unoccupied lots in the name of plaintiff, who, it appears, was never informed of the unwarranted acts, and thus afforded opportunity to disclaim the same. If in the commission of such trespass damage had resulted, could it be said that plaintiff would have been liable therefor? If not, it would seem equally clear that the unauthorized acts of Kelly constituted no ground upon which plaintiff could assert that he was in possession of the lots at the time of the ouster. Our conclusion is that the evidence excludes any inference that plaintiff was at any time in possession of the lots, and since the alleged possession thereof is the sole ground upon which he based his right of action, it must follow that, without regard to whether the court erred in admitting the tax deed in evidence and instructing the jury as to the effect thereof, the directed verdict in favor of defendant was not unwarranted by the facts so made to appear.

There is no merit in the contention that the court erred in denying plaintiff's motion, made at the close of the evidence, to file a supplemental complaint, wherein he proposed to set up a deed from some one purporting to be a conveyance to him of the property in question.

We may say that the action of plaintiff's attorney, as shown by his own testimony, discloses the fact that he was knowingly engaged in conducting an illy camouflaged transaction for himself and others, using the name of plaintiff, who he knew had no interest in the subject of the action.

The judgment is affirmed.

We concur: RICHARDS, Judge pro tem.; SLOSS, J.

---

179 Cal. 247

In re DEXTER'S ESTATE. (L. A. 5604.)

(Supreme Court of California. Nov. 14, 1918.)

EXECUTORS AND ADMINISTRATORS ⇐14—WILLS ⇐130—APPOINTMENT OF EXECUTOR —HOLOGRAPHIC WILL.

Where deceased in writing to nephew informed him as to location of her valuables, expressed desire that public administrator should not handle her property, and told him to keep letter in safe depository, an addendum to letter reading: "I have stated to you before that I wish you to administer on my estate, when it has to be. So will put it in writing. Distributed equally among my nieces and nephews. You receive your pay besides out of the estate" —was written in view of possible death, and should be construed as a holographic will, making nephew executor.

Department 1.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

In the matter of the estate of Hester W. Dexter, deceased. Appeal from order of court admitting a certain document to pro-

bate as the last will and testament of Hester W. Dexter. Affirmed.

Hurst & Hurst, of Woodland, and Haines & Haines, of San Diego, for appellant.

Grant & Bailey, of San Diego, for respondent.

VICTOR E. SHAW, Judge pro tem. This is an appeal from an order of court admitting a certain document to probate as the last will and testament of Hester W. Dexter.

It appears that Thomas J. Dexter died intestate, leaving as the surviving widow of his second marriage Hester W. Dexter, and a community estate, one-half of which went to said widow; hence, under the provisions of section 1386, Civil Code, contestant and her sisters, children of Thomas W. Dexter, deceased, by a former marriage, would, in the absence of testamentary disposition thereof made by Hester W. Dexter, deceased, who left no issue, be entitled thereto.

The document admitted to probate as a will was as follows:

"Woodland, May 9th, 1904.

"I have stated to you before that I wish you to administer on my estate, when it has to be. So will put it in writing. Distributed equally among my nieces and nephews. You receive your pay besides out of the estate.

"Your Aunt, Mrs. H. W. Dexter.

"to
"Charles H. Wright."

This writing was in the form of an addendum written upon a sheet of paper upon which Mrs. Dexter had, on May 8, 1904, written a letter addressed, "Dear Charley and Mabel," in which, after referring to matters of family interest and the fact that she was about to go on a visit for some length of time, she said:

"My valuables are in a box in bank, which I inclose an order for you to get if anything happens to me while I am away. Mrs. Coil will notify you. If any advice. Hurst & Hurst lawyers here.

"Keep this all inclosed. Don't want the public administrator to handle my effects, he will unless a relative in the state.

"Love to both. Truly Hester W. Dexter.

"Hope to come and see you on my return. All is in the box except a bank book I take with me of a deposit in San Francisco Savings Union $500."

The question for determination is, What was the intention of deceased in giving expression to the language employed in the instrument? and this should be ascertained by a consideration of the whole document in the light of the circumstances under which it was written. Thus considered, it appears quite evident that the document formally addressed "To Charles H. Wright" was prepared in view of her possible death, and intended by her not only as a testamentary disposition of her property to her nephews and nieces, but also directed that he act as executor thereof. The wish theretofore expressed that he should administer upon her estate "when it had to be," she put in writing in the form of an olographic will, and therein directed the distribution of her estate. It is evident that the word "distributed," notwithstanding the past tense of the verb, is meant, "to be distributed," and could have reference to no subject for distribution other than her estate, to obtain possession of which she stated in her letter: "I inclose an order for you to get if anything happens to me while I am away." That she understood the importance and character of the writing is apparent from the fact that in the letter of transmittal she impressed upon Wright the importance of keeping it in some safe depository.

In our opinion the document must, as deemed by the trial court, be regarded as the last will and testament of deceased.

The order is affirmed.

We concur: RICHARDS, Judge pro tem.; SLOSS, J.

---

179 Cal. 237

McLEAN v. COLF et al. (L. A. 4476.)

(Supreme Court of California. Nov. 12, 1918.)

1. ASSAULT AND BATTERY ⊂=15—PROTECTION OF PROPERTY.

Where plaintiff seized paper, property of a defendant, she gained only a momentary custody, rather than its possession, and defendant had right to use force to protect his possession, or to regain his momentarily interrupted possession.

2. ASSAULT AND BATTERY ⊂=7—DEFENSE OF PROPERTY—REGAINING POSSESSION—NECESSARY FORCE.

Defendant's right to use force, particularly as against plaintiff's person, in defending or recovering momentarily interrupted possession of a paper, was limited by condition that force must be no more than reasonably necessary.

3. ASSAULT AND BATTERY ⊂=35—DEFENSE OF PROPERTY—EXCESSIVE FORCE—EVIDENCE.

In action for assault and battery in attempting to recover paper belonging to one defendant and taken by plaintiff, evidence *held* to sustain finding that amount of force used by defendants was unreasonable, excessive, and violent.

4. APPEAL AND ERROR ⊂=1010(1) — ASSAULT AND BATTERY ⊂=42—DEFENSE OF PROPERTY —UNNECESSARY FORCE—QUESTION OF FACT.

Question whether excessive force has been used by defendants in regaining possession of property momentarily interrupted is one of fact for trial court or jury, and, evidence sustaining finding, Supreme Court cannot interfere with conclusion reached.

Department 1.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Laura V. McLean against Guy V. Colf and others. From judgment for plaintiff, defendants appeal. Affirmed.

Spencer Thorpe and Haas & Dunnigan, all of Los Angeles, for appellants.

D. Z. Gardner, of Los Angeles, for respondent.

SLOSS, J. Action to recover damages for personal injuries resulting from an alleged

assault and battery by the defendants upon the plaintiff. The cause was tried without a jury; the court making its findings in favor of the plaintiff, and entering judgment in her favor for $300. The defendants appeal.

Their only contention is that the evidence fails to sustain the findings. It appears that the defendant Guy V. Colf, as contractor, had undertaken to construct a dwelling house for the plaintiff. A dispute arose concerning the completion of the contract, and the owner agreed with the contractor that, if the latter would do certain specified work, Mrs. McLean would consider the contract as completed. This understanding was embodied in a letter signed by Mrs. McLean and her husband, and addressed to Colf. On the following day Colf, with his codefendants, came to the house to do the work agreed upon. Mrs. McLean met them, and requested certain other changes in the place of those specified in her letter. To this the contractor assented. He proceeded to write a new agreement embodying the new terms. He laid the letter of the preceding day on a table, and was proceeding to write the new agreement, when the plaintiff took the letter and placed it inside her bodice, stating that she would keep it. Colf demanded its return, which was refused, and he thereupon attempted to take it from her by force. The plaintiff resisted, and Colf called his codefendants to his aid. The three men continued their efforts to take the paper from the plaintiff, she meanwhile resisting and screaming, until a neighbor appeared on the scene, whereupon the defendants desisted. According to the plaintiff's testimony, which was in some degree corroborated, the defendants treated her with considerable roughness, not to say brutality, inflicting bruises and swellings upon her person, and causing her pain from which she suffered for two weeks or more.

[1-4] The claim of the appellants that the paper was the property of the appellant Guy V. Colf; that the plaintiff, by seizing it, gained only a momentary custody, rather than the possession of it; and that said Colf had the right to use force to protect his possession, or to regain his momentarily interrupted possession, may be conceded. But the right to use force, particularly as against the person of another, is always limited by the condition that the force must be no more than is reasonably adequate and necessary to the occasion. 5 C. J. 631; 2 Am. & Eng. Encyc. (2d Ed.) 981; Chapell v. Schmidt, 104 Cal. 511, 38 Pac. 892. In this case the court made a finding:

"That the amount of force and violence used by the defendants in committing the assault and battery upon the plaintiff was unreasonable and excessive and unduly violent."

Without going into any further recital of the details of the occurrence, as testified to by plaintiff, it may be said that the evidence is ample to sustain this finding. Although Colf may have had a technical right to the paper, its ownership and possession were of little or no substantial value. The claim of the appellants that their failure to regain the paper conclusively establishes that they did not use more than the "necessary" force is without merit. Their want of success may have been due to a variety of causes other than their own moderation. The question whether excessive force has been used is peculiarly one of fact for the trial court or the jury, and, under the circumstances here shown, we cannot interfere with the conclusion reached.

The judgment is affirmed.

We concur: RICHARDS, Judge pro tem.; VICTOR E. SHAW, Judge pro tem.

---

179 Cal. 235

## REHER v. REED et al. (L. A. 4480.)

(Supreme Court of California. Nov. 12, 1918.)

1. WORK AND LABOR ⊂=28(5)—SPECIAL CONTRACT—SUFFICIENCY OF EVIDENCE.
In action for work and labor performed and money expended by plaintiff's firm for defendant's use, evidence *held* sufficient to sustain finding that there was no special contract between defendant and plaintiff's firm whereby firm agreed to cultivate tract of land.

2. WORK AND LABOR ⊂=28(4)—AMOUNT OWING PLAINTIFF—SUFFICIENCY OF EVIDENCE.
In action for work and labor performed and money expended by plaintiff's firm for defendant's use, evidence *held* to support finding there was $599.14 due and owing plaintiff as assignee of his firm.

3. APPEAL AND ERROR ⊂=1033(7)—HARMLESS ERROR—UNINTELLIGIBLE FINDINGS.
Defendant's contention that findings of trial court as to plaintiff's last three causes of action are indefinite and unintelligible cannot avail him on appeal, findings being in his own favor.

Department 1.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by C. C. Reher against C. C. Reher, S. C. Reher, and C. M. Reher, individually and as copartners doing business as Reher Brothers, and George H. Reed, wherein Reed filed cross-complaint against the Rehers individually and as copartners. From judgment for plaintiff, and an order denying his motion for new trial, defendant Reed appeals. Judgment and order affirmed.

H. P. Shaw, of Los Angeles, for appellant.

H. W. Brewer, of El Centro, and McPherrin & Nichols, of Imperial, for respondents.

RICHARDS, Judge pro tem. This is an appeal by the defendant and cross-complainant George H. Reed from a judgment in plaintiff's favor upon his complaint, and against the cross-complainant upon his cross-complaint. The plaintiff sets forth fourteen causes of action in the form of the common counts for work and labor performed and for

money expended by a partnership known as Reher Bros. for the defendant's use and benefit; the said causes of action having been assigned to the plaintiff. The defendant denies each of these alleged causes of action, and for answer and also by way of cross-complaint alleges the existence of a special contract between said partnership and himself by the terms of which the former agreed to level, plow, cultivate, disc harrow, and irrigate a certain tract of land in Imperial county, and alleges that the said partnership failed and neglected to carry out said contract, by reason of which he was damaged in the sum of $7,285, for which sum he prays judgment in his cross-complaint. The case was tried without a jury, and the trial court by its findings found that as to the first eleven causes of action the plaintiff's complaint was true, but found against the plaintiff upon his last three alleged causes of action. The court also found against the defendant's averment in his answer and cross-complaint as to the existence of any special contract between himself and said copartnership, and further found against the defendant's claim of damages. The plaintiff was accordingly awarded judgment for the sum of $599.14. The defendant moved for a new trial, which motion was denied, and from said judgment and from the order denying his motion for a new trial the defendant prosecutes this appeal.

[1, 2] The appellant's first contention is that the finding of the trial court that there was no special contract between the defendant and the plaintiff's assignor is contrary to the evidence in the case. This contention has no merit. The plaintiff, as one of the members of the said copartnership, testified fully as to the arrangement between the parties upon which the partnership performed the several sorts of services upon which the counts in his complaint were predicated. His testimony upon that subject is contradicted by the defendant in certain material respects, but if believed by the trial court was sufficient to support its findings in the plaintiff's favor. The claim of the appellant that the finding that there was $599.14 due and owing plaintiff is contrary to the evidence is supported by an argument which is more specious than sound. The plaintiff testified from memory as to the several payments which had been made by the defendant as the work progressed. One of these was of the sum of $400 which plaintiff stated he had received in December, 1908. The defendant produced canceled checks showing payment of $300 and $100 on January 9, 1909, and he claims that he is entitled to credit for these amounts and also for the $400 payment to which the plaintiff testified; but we think it may be fairly inferred that the payments cover the single credit of $400, particularly in view of the fact that the defendant produced no check showing any payment in the month of December.

[3] The appellant's further contention that the findings of the court as to the plaintiff's last three alleged causes of action are indefinite and unintelligible can be of no avail to him, for the reason that as to those three causes of action the findings were in his favor. As to the other contentions of the appellant with respect to alleged errors of the trial court in the admission and exclusion of evidence, none of them involve any legal principle or are supported by any authority or appear otherwise to have any semblance of merit.

Judgment and order affirmed.

We concur: SLOSS, J.; VICTOR E. SHAW, Judge pro tem.

---

38 Cal. App. 329

## LEWIS v. HALL et al. (Civ. 2526.)

(District Court of Appeal, First District, California. Oct. 1, 1918.)

1. PRINCIPAL AND AGENT ⟸148(2)—NOTICE OF CHANGE OF AGENT'S AUTHORITY TO SELL.
Purchasers of land from vendor's agent, knowing that vendor had reserved right to change scope of agency and that one-half of land purchased was in possession of tenant, were charged with notice of change in agent's contract, withdrawing authority to sell such land because of lease to the tenant.

2. VENDOR AND PURCHASER ⟸232(9)—LAND OCCUPIED BY TENANT—NOTICE TO PURCHASER.
Occupancy of land by tenant was notice to prospective purchaser of tenant's rights therein.

3. EQUITY ⟸57—MAXIMS OF EQUITY.
Where there has been no actual conveyance of land, the passing of title to crops growing upon land by means of a mere contract for such conveyance in the future is based upon the doctrine that equity treats a thing agreed to be done as actually performed.

4. EQUITY ⟸66—MAXIMS OF EQUITY.
An equitable principle will not be applied for the purpose of defeating equity.

5. VENDOR AND PURCHASER ⟸194—NONPERFORMANCE OF CONTRACT—TITLE TO CROPS.
Where vendors under contract for future conveyance of land remained in possession of land, purchasers who failed to perform contract, and who made no effort to perform, and no demand upon vendors for possession, were not entitled to a volunteer crop of barley growing on land at time of execution of contract.

6. CHATTEL MORTGAGES ⟸290—COMPENSATION OF RECEIVER—MORTGAGE FORECLOSURE ACTION.
Where plaintiff, in action to foreclose chattel mortgage, applied for receiver, receiver's compensation could be charged to plaintiff, where court found that the appointment of receiver was improvidently and erroneously made.

7. CHATTEL MORTGAGES ⟸290—RECEIVERS—COMPENSATION—PROCEEDINGS.
Where court, having found that appointment of receiver, upon motion of plaintiff, in chattel mortgage foreclosure action, was improvidently and erroneously made, settled receiver's account of hearing of which plaintiff had notice, and two days thereafter made order charging receiver's compensation to plaintiff, plaintiff had notice of the order so made; it be-

ing based upon the proceeding at which court settled receiver's account.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Mrs. Frank Kellner Lewis, executrix of the last will and testament of E. F. Kellner, deceased, against John H. Hall and others. From judgment for plaintiff against defendants Hall only, and against plaintiff for compensation to be paid receiver, plaintiff appeals. Affirmed.

Gallaher & Aten, of Fresno, and Childers & Bruce, of El Centro, for appellant

O'Brien & Spalding, of Los Angeles, for respondent.

LENNON, P. J. This was an action to foreclose a mortgage given by defendants John H. Hall, Howard H. Hall, and Emmett H. Hall upon a volunteer crop of barley growing upon land belonging to the defendant San Joaquin Valley Farm Lands Company (a corporation), hereinafter referred to as the Land Company, and for which land they held a contract of purchase. The defendants Hall confessed judgment in the sum of $2,754.20, the amount of the obligation to secure which the crop mortgage was given, for which sum, with interest, judgment was duly awarded against them; but as to the Land Company the court decreed that the plaintiff take nothing, and that the rights of said company in said crop so mortgaged were superior to those of the plaintiff, and denied to the plaintiff any relief by way of foreclosure. Pending the litigation a receiver was appointed upon the prayer of the plaintiff, and in its judgment the court ordered that the balance in his hands, amounting to the sum of $1,250.88, be paid to the Land Company. The court also, after final judgment, made an order that the compensation of said receiver, amounting to the sum of $400, be paid by the plaintiff. The appeal is by plaintiff from that part of the judgment denying her any relief against the Land Company, and awarding to the latter the balance in the receiver's hands, and is taken upon the judgment roll. Plaintiff also appeals from the order charging her with the payment of the receiver's fees, and this part of her appeal is based upon a bill of exceptions.

The facts, which are very fully found by the court and as to which there seems to be no dispute, are as follows: The San Joaquin Valley Farm Lands Company on January 15, 1915, was the owner of some 70,000 acres of land situated in the county of Fresno. It had its principal place of business in the city of Los Angeles, and on said date entered into a contract with Stine & Kendrick (a corporation), doing business in the city of San Francisco, by which Stine & Kendrick was employed to sell some 30,000 acres of said land in parcels of varying size and upon certain conditions, terms, and restrictions. On April 26, 1915, the Land Company executed to its said agent a power of attorney, authorizing said agent to make, execute, sign, and deliver contracts for the sale of the lands authorized to be sold by said agreement. This power of attorney made specific reference to the said contract of January 15, 1915, and to the provisions therein contained by which it could be modified, altered or terminated. The terms of this contract and also of said power of attorney were known to the defendants Hall. Included in said lands so authorized to be sold was a tract of some 640 acres, described as follows: The east one-half of section 32 and the west one-half of section 33 in township 15 south, range 17 east, M. D. B. & M. On December 17, 1915, the Land Company leased to one V. P. Snow one-half of this tract, namely, that part described as the west half of section 33, for a term of nine months from said date, and said Snow immediately took possession of said lands, and remained in their actual, open, and exclusive possession and occupancy until the filing of this suit. On December 22, 1915, the Land Company notified Stine & Kendrick of the execution and delivery of this lease, and instructed it to withdraw the land so leased from sale during the term of said lease. On December 27, 1915, said agent assented in writing to said withdrawal and notified the Land Company to that effect. The Hall brothers were never notified of any change or limitation of the authority of Stine & Kendrick to make contracts for the sale of lands included in the authorization of January 15, 1915, and did not know of such change or limitation until after the making and delivery of their crop mortgage hereinafter referred to; nor did they nor the plaintiff ever inquire of the Land Company whether that company had made any change in the authority of their said agent. On January 12, 1916, without the knowledge or consent of the Land Company, Stine & Kendrick, in the name of and for the Land Company, entered into a written agreement with the defendants Hall, by which agreement said agent and attorney in fact attempted to bind and obligate the Land Company to sell and convey to said defendants Hall the 640 acres hereinbefore described, for a price of $150 per acre, of which the sum of $19,200 was made payable two years from the date of the contract, and the remainder in eight equal annual installments thereafter, together with interest at the rate of 6 per cent. per annum on the unpaid purchase price, payable annually. Said contract also contained the following provisions:

"Third. That any crop heretofore planted upon said premises is hereby reserved by the owner, and the possession of such of said premises so planted shall not be delivered to nor taken by said purchaser until said crop shall have been harvested and removed from said premises; * * *

"Twenty-second. The purchaser agrees, forthwith after the execution hereof, to erect on said lands above described and fully pay for suitable buildings and other permanent improvements

costing not less than a sum equal to 10 per cent. of the total purchase price aforementioned, and likewise to immediately commence and continue in good faith the development of said lands and the whole thereof by planting thereon alfalfa, fruit, or other crops acceptable to the owner, and should the purchaser fail so to do, said purchaser shall be conclusively deemed to be in default hereunder, and the owner may exercise either of the options hereinabove granted, providing for the termination of this agreement or the specific enforcement of the same."

The contract in all respects as to form complied with the requirements of the Land Company. At the time of the making of this contract the land covered by it, except that part of it leased to Snow, was in the actual occupancy and possession of the Land Company, and so remained up to the time of the commencement of this action, and neither of said defendants Hall ever demanded or sought to take possession thereof. At the time of the execution of said contract to them they were insolvent, and so have been ever since, and they have at no time attempted to comply with their contract in any respect. At that time, also, there was growing upon said land a volunteer crop of barley, which had sprung up from grain lost by the Land Company in harvesting the previous crop. On April 5, 1915, and for a long time prior thereto the defendants Hall had been indebted to the plaintiff, as executrix of the estate of E. F. Kellner, deceased, in the sum of $2,754.20, represented in large part by a promissory note given by them, and the balance being upon an open account; and on said day they executed and delivered to the plaintiff, as such executrix, a promissory note in said sum, payable on demand, and bearing interest at the rate of 1 per cent. per month, and at the same time made and delivered to the plaintiff a mortgage upon the said crop of barley as security therefor. At the time of accepting this mortgage the plaintiff was aware that the only right or title of the defendants Hall, if any, to said crop, arose out of the contract for the purchase of the land above described, and she also knew that said defendants Hall had not taken, nor sought to take, possession of the land, and that it was in the actual and open occupancy of the Land Company and its tenant, and that the defendants Hall had done nothing whatever to in any way comply with their contract for the purchase of said land. This mortgage is the instrument sought to be foreclosed in this action.

Upon the foregoing findings of fact the trial court entered, among others, the following conclusions of law: That the defendants Hall acquired no title to the said crop, or right to sell or mortgage the same, and that the mortgage to the plaintiff was of no force or effect as against the Land Company; that the brothers Hall were in default under their contract with the Land Company; that the plaintiff took said mortgage subject to the superior right of the Land Company, as vendor under said contract, to disaffirm, cancel, or terminate the same on account of said default; and that the defendants Hall, at the time of the execution and delivery of said mortgage, had no right or power to incumber the crops growing upon said land. Judgment was accordingly entered that the plaintiff, as against the Land Company, take nothing by her action.

[1, 2] We are of the opinion that the judgment appealed from must be affirmed. Without deciding whether, as contended by the appellant, it was the duty of the Land Company to notify all persons having knowledge of their contract of agency with Stine & Kendrick of any modification therein, it appears to us that the defendants Hall were clearly put upon notice of such modification, and that they are to be charged with knowledge of such facts as a proper inquiry upon their part would have disclosed. Knowing that the Land Company had specifically reserved the right to change the scope of the agency of Stine & Kendrick, and that a tenant was openly in possession of one-half of the land for the purchase and immediate delivery of which they contracted, they made no inquiry of said tenant as to any rights which he claimed, which inquiry, if made, would have disclosed the fact that this part of the land had been withdrawn from sale; nor, irrespective of the open occupancy of such land by a tenant, did the defendants Hall make any inquiry of the Land Company as to whether they had exercised their reserved power of modification of their agent's authority. The authority of the agent to enter into this contract having been in fact withdrawn, the principal can be held to it only by showing some breach of duty on its part, and no omission on the part of the defendants Hall which prevents them from taking advantage of such breach. The fact that a vendor of land in the occupancy of his tenant, who contracts for its immediate delivery, thereby places himself under the obligation to terminate the tenancy, has no bearing upon the question of notice. The occupancy of the tenant was notice to a prospective purchaser of his rights, and a pursuance of the inquiry which such occupancy in the present case made necessary on the part of the defendants Hall would undoubtedly have disclosed the lack of authority on the part of Stine & Kendrick to enter into this contract.

[3-5] Quite apart from this question of notice the judgment of the court must be sustained upon the further ground that under the facts as disclosed by the findings, the title to the crop did not pass to the Hall brothers, and this, not by reason of any express reservation thereof, but because there are no facts existing in the case upon which a passage of title to the crop from the Land Company to the defendants Hall can be

predicated. It is true that the appellant in her brief cites authorities to the effect that a purchaser of real estate under a contract giving him the right to possession becomes the owner of crops growing thereon when the contract was entered into, unless there be an express reservation of such crops; but where there has been no actual conveyance of the land, the passing of title to crops growing upon the land by means of a mere contract for such conveyance in the future is based upon the equitable doctrine that equity treats a thing agreed to be done as actually performed (8 Ruling Case Law, 360; Speicher v. Lacy, 28 Okl. 541, 115 Pac. 271, 35 L. R. A. [N. S.] 1066; Dunn v. Yakish, 10 Okl. 388, 61 Pac. 926), and is a principle applied only for the purpose of doing equity between the parties. An equitable principle will not be applied for the purpose of defeating equity. In the present case the Hall brothers did nothing under their contract; they did not enter upon its performance, and never attempted to. They made no demand for possession of the land, and the Land Company, not having been informed of the existence of the contract, was not in a position to make a tender of possession. There is nothing to show that the defendants Hall ever intended to perform, and the only reasonable inference to be drawn from the facts is that they did not. To ask a court of equity under such circumstances to apply the equitable doctrine above referred to for the purpose of converting a mere agreement to convey into an actual conveyance, and by so doing take away a crop from its owner and give it to persons who have not raised a finger in its production, or taken or manifested an intention to take a single step under a contract by which they might have acquired it, is to invite a stern refusal. As it has been said of the statute of frauds that it will not be used for the purpose of aiding the commission of a fraud, so of a principle of equity, it will not be applied for the purpose of defeating equity. Sellers v. Solway Land Co., 35 Cal. App. 259, 160 Pac. 175. In that case the court declined to invoke the equitable principle of estoppel against the party in whose favor the equities of the case seemed to lean.

The respondent, in support of the judgment, argues very persuasively that, even if title to the crop passed to the Hall brothers, the subsequent exercise by the Land Company of its option to terminate the contract, coupled with its possession of the land at all times, defeated the lien, if any, of the chattel mortgage; but we think, in view of our conclusion on the points already discussed, that it is not necessary to consider and decide that question.

[6, 7] As to the plaintiff's appeal from the order charging her with the payment of the receiver's fees, it appears from the record that the appointment was made at the request of the plaintiff, and that the Land Company (who, as we have seen, was in possession of the land) had ample means and was able to respond to the plaintiff for any damages that might result to her from its possession or disposition of the crop. The court in its findings declared that the appointment of the receiver was improvidently and erroneously made. Under these circumstances it would have been manifestly unjust to charge the defendant's property with the compensation of the receiver, and, on the other hand, such expense could legitimately be imposed upon the plaintiff, at whose instance the receiver was appointed. Frick v. Fritz, 124 Iowa, 529, 100 N. W. 513; McAnrow v. Martin, 183 Ill. 467, 56 N. E. 168; Ephraim v. Pacific Bank, 129 Cal. 589, 62 Pac. 177.

Appellant's principal objection to this order is that it was made without notice to him; but the record, we think, does not bear out this contention. It shows that the receiver filed his report and account, praying that it be settled and his compensation fixed; that thereafter the Land Company filed objections to the account, and asked that the receiver's compensation be not paid from the funds in his possession, but that the court should order it to be paid by the plaintiff. A hearing was duly had upon this matter, of which the plaintiff had notice. Thereafter, and on December 5, 1916, the court made an order settling the account, but containing no direction as to the receiver's compensation. Two days later, however, and without any further proceedings, the court made the additional order of which the appellant is now complaining, and which fixed the receiver's compensation at the sum of $400, and made it payable by the plaintiff. While it would have been more usual to dispose of all the matters pertaining to the receiver's account in one formal order, we can perceive no error in covering the matter by two separate orders, divided by an interval of time of two days. The second order, equally with the first, was based upon the proceeding of which the plaintiff had notice.

For the reasons given, the judgment and order are affirmed.

We concur: BEASLY, Judge pro tem.; STURTEVANT, Judge pro tem.

38 Cal. App. 377

## WALKER v. SOUTHERN PAC. CO.

(Civ. 2633.)

(District Court of Appeal, Second District, California. Oct. 7, 1918. Rehearing Denied by Supreme Court Dec. 5, 1918.)

1. APPEAL AND ERROR ⊂⊃927(3) — PRESUMPTIONS—REVIEWING ORDER OF NONSUIT.
In reviewing the ruling of a court upon a motion for nonsuit, every inference which can be reasonably deduced from the testimony must be drawn in support of the ruling.

2. RAILROADS ⊂⊃330(1) — CROSSING ACCIDENTS—RELIANCE ON CARE OF TRAIN OPERATIVES.
A steam railway track over which trains are constantly operated is itself a warning of danger, and one approaching with intent to cross it must not rely upon want of negligence on the part of those operating train.

3. RAILROADS ⊂⊃327(1)—CROSSING ACCIDENT —CARE REQUIRED.
One crossing a railroad track has the duty to stop, look, and listen for the approach of a train.

4. RAILROADS ⊂⊃350(13) — CROSSING ACCIDENTS—QUESTIONS FOR JURY.
Whether one about to cross a railroad track who is struck by a train is guilty of contributory negligence is ordinarily for the jury.

5. RAILROADS ⊂⊃350(30) — CROSSING ACCIDENTS—QUESTIONS FOR JURY.
Whether plaintiff, whose automobile was overturned by step on locomotive while he was crossing ahead of the train, was guilty of contributory negligence, *held* for the jury.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by S. M. Walker against the Southern Pacific Company. Judgment for plaintiff and order denying motion for new trial, and defendant appeals. Affirmed.

Henry T. Gage, W. I. Foley, and W. I. Gilbert, all of Los Angeles, and C. F. Cable, of Tucson, Ariz., for appellant.

I. Henry Harris, Daniel M. Hunsaker, and Hunsaker & Harris, all of Los Angeles, for respondent.

SHAW, J. Action to recover damages caused by the alleged negligent operation of defendant's railway train, which collided with plaintiff's automobile at the crossing of a public highway, known as Mission road, in the city of Los Angeles.

Judgment went for plaintiff, from which, and an order denying its motion for a new trial, defendant has appealed.

That defendant, at the time of the accident, was guilty of negligence in operating its train not only at an excessive rate of speed, but contrary to the provisions of a city ordinance, and without warning by the use of either whistle or bell, admits of no controversy.

As a defense to the cause of action, however, defendant pleaded contributory negligence on the part of plaintiff, and, claiming that as a matter of law such contributory negligence was shown, it, at the close of plaintiff's evidence and based thereon, moved for a nonsuit, which motion was by the court denied. This ruling, claimed to be erroneous, constitutes the chief ground upon which defendant bases its claim for a reversal.

[1] It is settled law that, in reviewing the ruling of a court in passing upon a motion for nonsuit, every inference which can be reasonably deduced from the testimony must be resolved in support of the ruling. Applying this rule to the evidence touching the question of defendant's contributory negligence, it fairly appears therefrom that the train which collided with plaintiff's automobile was a nine-car passenger train, which at the time approached the crossing noiselessly, coasting downgrade in a westerly direction, at a speed of from 50 to 60 miles per hour; that at the point where plaintiff crossed the track the roadway upon which he was traveling was rough and bumpy, having been plowed up preparatory to paving it, and the grade thereof was some 20 to 25 inches below the defendant's railway track. Plaintiff was familiar with the track and its location and the frequency with which defendant operated trains over the same. In approaching the crossing he stopped his automobile at a point about 75 feet from the railway track, got out, and, hearing no bell or whistle, he looked easterly up the track, along which he had an unobstructed view for a distance of 800 to 1,000 feet; and it appearing that no train was in sight, and there being no warning to indicate the approach thereof, he got into his automobile and, traveling over the rough roadway up the slight grade proceeded to cross the track, which at the speed he traveled consumed some 12 or 15 seconds, during which time and while so proceeding he did not look further for the approach of a train. When he reached the track and was partially across the same, he was, by the blowing of the whistle, for the first time apprised of the presence of the train, coming from an easterly direction and then at a point distant about 100 to 120 feet from him. He had so nearly reached a point of safety that he escaped the engine, but the hind wheel of his automobile was caught by the step jutting out from the engine cab and turned over, as a result of which the injury and damage was sustained.

[2-5] It is quite true, as claimed by appellant, that a steam railway track over which trains are constantly operated is itself a warning of danger, and that one approaching with intent to cross the same may not rely upon want of negligence on the part of those engaged in operating the train. Notwithstanding their negligence, he is charged with notice of the hazard and risk which he assumes in crossing such track, and hence bound to exercise his faculties of sight and hearing in order to ascertain whether a train is approaching at a rate of speed and from a distance which should under the circum-

stances deter a prudent man exercising reasonable precautions for his safety from attempting to cross the same. Loftus v. Pacific Electric Ry. Co., 166 Cal. 464, 137 Pac. 34, and cases therein cited. It was plaintiff's duty to stop and look and listen for the approach of a train. This, as shown by the uncontradicted evidence, he did, at a point 75 feet from the track. The question of whether one is guilty of negligence is ordinarily one of fact to be determined by the jury, and even where the facts, as here, are undisputed, it is nevertheless a question to be determined by the jury, unless it can be said that reasonable minds can draw but one conclusion as to the issue. Considering the character of the vehicle which plaintiff was driving, that its top was up rendering it necessary for him to again stop and get out in order to make his observation, and that the roadway embraced in the 75 feet over which he must travel to reach the track was rough and in a condition which demanded his close attention, taken in connection with the fact that 12 or 15 seconds before he reached the track he had made observations along 1,000 feet thereof, upon which no train was in sight, and that, except for the excessive speed at which the train was being operated, the 12 or 15 seconds required therefor afforded him ample time to cross in safety, we cannot say as a matter of law the conclusion of the jury in determining that plaintiff, under all the circumstances, exercised reasonable precautions for his safety, was improper. Vance v. Atchison, etc., Ry. Co., 9 Cal. App. 20, 98 Pac. 41.

Conceding the court erred in permitting the plaintiff to propound certain questions to a witness called in rebuttal, no prejudice resulted therefrom, for the reason that the answers thereto were favorable to defendant; nor did plaintiff's efforts to impeach his own witness affect the substantial rights of defendant.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

---

38 Cal. App. 343

## ROGERS v. ATCHISON, T. & S. F. RY. CO. et al. (Civ. 2572.)

(District Court of Appeal, Second District, California. Oct. 3, 1918. Rehearing Denied by Supreme Court Dec. 2, 1918.)

RELEASE ⊜17(2) — RESCISSION — MISREPRESENTATION OF LEGAL EFFECT OF INSTRUMENT.

Where an employé in full possession of his faculties signed a release from personal injuries which he read and understood, or had every opportunity to read and understand, he cannot avoid the effect of his act by producing evidence that the master or the master's servants told him the release was not binding.

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst, Judge.

Action by Frank O. Rogers against the Atchison, Topeka & Santa Fé Railway Company and another. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Judgment and order reversed.

U. T. Clotfelter, M. W. Reed, Robert Brennan, and F. J. Heid, Jr., all of Los Angeles, for appellants.

George L. Greer, of Los Angeles, and Byron Waters and Grant Holcomb, both of San Bernardino, for respondent.

CONREY, P. J. Action to recover damages for personal injuries suffered by the plaintiff, caused by negligence of the defendants. The plaintiff at the time when the injuries were received by him was employed as a switchman on the railroad of the defendant corporation. Defendant Shortridge was foreman of a switching crew and engine of the defendant corporation. The defendants appeal from the judgment and from an order denying their motion for a new trial. We observe, however, that the verdict as shown in the transcript was against the railway company only; and we assume that the judgment (which is not shown in the transcript, but entry of which is recited in the notice of appeal) also is against the railway company alone.

In addition to other grounds of defense which we find it unnecessary to consider, the defendants pleaded that, for a good and valuable consideration paid to the plaintiff by the defendant corporation, the plaintiff executed to said corporation an agreement in writing releasing it from all liability arising from the personal injuries claimed to have been sustained by him on the occasion referred to in the complaint. The accident occurred on the 6th day of February, 1913. On April 28, 1913, plaintiff received from the railway company (hereinafter called the appellant) the sum of $56.42, and executed a release, which we will call the "first release." On September 15, 1913, plaintiff received from appellant the further sum of $350 and executed another document, which we will call the "second release." The releases are identical with each other in form. They refer specifically to the injury sustained by respondent while in the performance of his duties as a switchman for appellant on the 6th day of February, 1913, and purport to fully release, discharge, and satisfy all claims, demands, or causes of action arising from or growing out of said injuries. In each of the releases respondent, in his own handwriting, made the following statement above his signature: "I have read the above voucher, receipt and release and fully understand the same."

It is conceded, as it must be, that the first release upon its face purports to be a full

and complete release, and in that respect is identical with the second. To overcome the effect of the releases respondent gave testimony offered by him for the purpose of proving that both payments were for time lost after the accident and were calculated upon the basis of a percentage of the wages which respondent would have earned if the accident had not occurred. As a part of the same attempt to destroy the effect of the releases, respondent testified that his "job was at stake"; that he was assured by appellant's agent that the instruments which he signed were only receipts for wages or for lost time. The testimony thus received was admitted over objections of appellant, specifying, among other things, that the terms of a written contract could not thus be changed.

At the times when these settlements were made, the plaintiff had so far recovered from his injuries that he was able to and did voluntarily visit the office of appellant's claim agent, where both transactions were consummated, and he was in complete possession of his mental faculties. There is no evidence to the contrary. He admits that appellant's agents did not make any attempt to prevent him from reading the releases before they were signed by him.

We think that this case may very properly be determined upon the authority of Haviland v. Southern California Edison Co., 172 Cal. 601, 158 Pac. 328, where the Supreme Court has clearly stated the principles governing the case, and has pointed out the distinction between those cases in which releases of this kind may be set aside and those where such releases may not be set aside. It is true here, as it was true there, that—

"No case is cited, and we find none, which decides that where a party in full possession of his faculties signs an instrument which he has read and considered and whose terms and provisions he understands, he may avoid the effect of his act by producing evidence that the adverse party told him that the instrument was not binding."

Assuming it to be true that respondent in this case did not read the contracts which he signed, the legal situation is just the same, for he had a complete unimpeded opportunity to read the documents and to consider their effect.

The judgment and order are reversed.

We concur: JAMES, J.; SHAW, J.

---

(33 Cal. App. 338)

## SCHNEIDER v. OAKMAN CONSOL. MINING CO. (Civ. 2528.)

(District Court of Appeal, First District, California. Oct. 3, 1918. Rehearing Denied Nov. 2, 1918: Denied by Supreme Court Dec. 2, 1918.)

1. EVIDENCE ⊜354(10) — DOCUMENTARY EVIDENCE—BOOKS OF ACCOUNT.

In action on book account on assigned claim of mine manager for salary, books kept by manager and containing some inconsistencies were admissible where it appeared manager kept them himself, that entries were made practically contemporaneously with transactions, and that items were correctly entered.

2. EVIDENCE ⊜354(10) — DOCUMENTARY EVIDENCE—BOOKS OF ACCOUNT.

In action on book account on assigned claim of mine manager for salary, books kept by him were admissible, though his salary was entered up at $150 a month, instead of an entry being made of the items of work in each month; he having worked at salary of $150 a month.

3. MASTER AND SERVANT ⊜9 — SALARY OF SERVANT.

Where person hired at fixed salary for definite period continues after expiration of period in the same employment without new contract, presumption is that continued employment is at same salary.

4. EVIDENCE ⊜354(9) — DOCUMENTARY EVIDENCE—BOOKS OF ACCOUNT.

In action on assigned claim of mine manager for salary, item representing claim by manager against another company, assumed by defendant company by resolution, *held* properly included in books of manager made up to close entire account with defendant company, so that books were not inadmissible.

5. EVIDENCE ⊜354(9) — DOCUMENTARY EVIDENCE—BOOKS OF ACCOUNT.

In action on assigned claim of mine manager for salary, item due manager on original contract under which mine was purchased by company, having been part of entire transaction between manager and company, *held* properly included in account between them drawn up by manager two years later to close entire account, so that books were admissible.

6. ACCOUNT STATED ⊜19(3)—SUFFICIENCY OF EVIDENCE.

In action on assigned claim of mine manager for unpaid salary, count upon an account stated *held* sustained by the evidence.

7. EVIDENCE ⊜71—PRESUMPTION—DELIVERY OF MAIL.

There is a presumption that letter or document deposited in post office, properly directed to addressee, with proper postage prepaid, was delivered to addressee.

8. ACCOUNT STATED ⊜6(2) — RETENTION OF ACCOUNT.

Where account is rendered it becomes debtor's duty to make seasonable objections, and if he does not it becomes an "account stated," and foundation of an independent action.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Account Stated.]

9. ACCOUNT STATED ⊜6(2)—CLAIM FOR SALARY.

Where a mine manager presented his account for salary, etc., by mail to the company on or about August 1, 1914, and no objection was made thereto as late as December 28th, the officers of the company, on the contrary, promising suitable action, an "account stated" resulted.

10. LIMITATION OF ACTIONS ⊜197(3)—STATUTE OF LIMITATIONS — PROMISES TO PAY ITEMS.

In action on account stated for salary, etc., between mine manager and company, evidence *held* sufficient to sustain finding company kept alive two items of $1,500 and $458 against statute of limitations by repeated promises to pay.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by George W. Schneider against the Oakman Consolidated Mining Company.

From judgment for plaintiff, defendant appeals. Affirmed.

Theodore L. Breslauer, of San Francisco, for appellant.

Costello & Costello and Henry L. Corson, all of San Francisco, for respondent.

BEASLY, Judge pro tem. [1] This is an appeal by defendant from a judgment for plaintiff upon an assigned claim of one Frank Dillon. The defendant is a mining corporation, with its principal place of business in Massachusetts. On December 19, 1907, the defendant acquired a group of mines in Nevada county, Cal., from F. H. Oakman. On September 29, 1909, Dillon was elected mine manager, and from the 22d of November of that year he served as vice president of the company. On or about the 3d day of June, 1911, his salary was fixed at $150 per month, to continue to the 1st day of January, 1912. He was paid this salary in full to that date. He continued in the service of the company until the 1st day of August, 1914, without any new arrangement being made as to salary. It is claimed by the defendant that during the year 1913 he either performed no services, or that his services were materially different from those performed by him as manager during the period between his employment and the 1st day of January, 1913; but an examination of the evidence shows that he was busy about the affairs of the company during that time except a short period when he was absent on a vacation. While the mine was apparently not in operation, he kept it in condition to show to prospective purchasers, did the assessment work on the claims, and otherwise employed his time pretty fully about the mine. He did not charge the full price for his services during this period, however, but of this it seems to us the defendant has no right to complain. Schneider, upon the assignment of the claim to him, brought this action upon two counts, the first of which is for $4,219.49 upon an open book account, alleged to have accrued within four years before January 17, 1916, the date of filing the complaint, and the second upon an account alleged to have been stated between the parties on or about August 1, 1914, and, except as hereafter stated, the claim was composed of work done by Dillon as mine manager for the company. Dillon kept books, and one of the chief grounds upon which the appellant urges that this case should be reversed is that these books should not have been admitted in evidence because of the irregularities of Dillon's bookkeeping. It is true that there seem to be some inconsistencies in the books. Many such are pointed out by counsel, but from the evidence it appears that Dillon kept these books himself, that the entries, except of two or three items, were made practically contemporaneously with the transactions and on the dates that appear on the face of the books, that the items were correctly entered thereon, and it must be held that this was sufficient to justify their admission.

[2] It is contended that they should not have been admitted because the salary of Dillon was entered up at $150 per month instead of an entry being made of the separate items of work that he did during the month, but, as he was working at a salary of $150 per month, there seems to be nothing in this point.

[3] It is contended that there was no contract for salary beyond the 1st day of January, 1913, but it does not appear that there was any other contract for salary except the agreement for the specific period above mentioned ending on the last-named day; at least we are directed by counsel to no other agreement for salary. The rule of law in such cases is that, where a person, hired at a fixed salary, continues in the same employment without any new contract, the presumption is that the continued employment is at the same salary. Nicholson v. Patchin, 5 Cal. 475. The books were therefore admissible in evidence.

It is contended that these books do not prove the truth of the items therein contained. Conceding this to be true, the record contains much evidence by Dillon himself as to the verity of these items, and we think that the evidence amply sustains the findings of the court upon all questions as to the amount of salary due Dillon.

[4] The defendant objects to a certain item of $468 dated on the books as of August, 1914. This item was a claim by Dillon against another company, known as the Sunshine Company, which was assumed by defendant by a resolution adopted October 27, 1914. This, we think, is a sufficient admission, taken with the other evidence on this point, that the company did assume to pay this item, and therefore, as Dillon was making up a set of books for the purpose of closing his entire account with the defendant, the item was properly included in his books.

[5] A $1,500 item due Dillon on the original contract under which the mine was purchased was included in this book account. Defendant argues that this item, being due upon a "special contract," could not be charged against it in this account, but we see no reason why it was not properly so charged. It was a claim against the company on December 3, 1912. Oakman, the president of the company and its responsible directing officer, wrote Dillon telling him not to worry about this $1,500, and assuring him that it would be paid. It was somewhat irregular to enter it upon the books as late as August, 1914, but it made a part of the transaction between the parties and was properly included in the account between them. The

justice of the claim is not denied, and the only defense set up thereto is the statute of limitations, and that it was not properly included in the proofs to sustain the account. Had the entry been made as the first item of the account and entered at the date of Oakman's letter, no objection, it seems, could properly have been made to it. We are not favored with the date or terms of the original contract except by inference. Counsel has not seen fit to call our attention to the contract if it is included in the transcript, and we have been unable to find it, but it is claimed that at the time the item was entered in the books it was barred by subdivision 1 of section 339 of the Code of Civil Procedure, because founded upon a written agreement made outside of the state of California. We are not directed to the evidence that it was executed outside the state; at least we can find no citation to any such evidence, and we have been unable to find such evidence in the transcript. The history of the item, taking the statements of defendant's counsel unsupported by citations to the evidence, is that it was due January 1, 1911; it appears in evidence that on December 3, 1912, Oakman, the president, promised in writing that it would be paid; that again on January 23, 1913, Amstein, who upon Oakman's death had apparently assumed direction of the corporation's affairs in Massachusetts, wrote Dillon that "the matter will surely be taken care of in due time"; that on August 1, 1914, Dillon entered the item in his account before finally presenting it to the company. We are constrained to leave the matter as the trial court found it.

[6, 7] The count upon an account stated is also sustained by the evidence. Dillon testified that he deposited the account in the post office on or about August 1, 1914, properly directed to the defendant at its office in Massachusetts, and that he paid the proper postage thereon. It is therefore presumed that the letter with the account therein was delivered to the defendant; but it is not necessary to rely on this presumption, for on the 17th of August, 1914, Amstein wrote Dillon a letter which cannot be interpreted otherwise than as a promise to settle Dillon's book account, and on September 2, 1914, Amstein again wrote Dillon promising to bring about a settlement, and on September 15, 1914, the matter was brought before the directors, as shown by a letter from Amstein to Dillon written on the company's stationery, and in which the hope was held out to Dillon that the matter would soon be fixed up with him. On October 6, 1914, Amstein again wrote to Dillon asking him for the lowest figures that he would take in settlement of his claim, and on November 4 again wrote, saying that he had had the matter up before the directors, and assuring him that it would be fixed up soon, and as late as December 28, 1914, Perry, another officer of the company, wrote Dillon, saying that they had discovered that there were many obligations to be met, among them that of Dillon, and asking him for a statement of his account, together with different methods of settlement that might be satisfactory to him, and reminding him that the company was without funds, but promising that they would make desperate efforts to get the same. Nowhere in this correspondence is there any objection to Dillon's account.

[8] When an account is rendered to a debtor, it becomes his duty to make seasonable objections thereto, if any he have, and if he does not do so the account becomes an account stated and the foundation of an independent cause of action, which arises thereon whenever a reasonable time has elapsed without any objection being made thereto. It has been held that under certain circumstances failure to object for 6 months after the receipt of an account by the debtor is unreasonable (Crane v. Stansbury, 173 Cal. 631, 161 Pac. 7), and in Atkinson v. Golden Gate Tile Co., 21 Cal. App. 170, 131 Pac. 107, a space of 25 days which elapsed after rendition of the account without objection thereto being made on the part of the debtor established the account as an account stated.

[9] The facts of this case clearly sustain the allegations of the second count of the complaint. Auzerais v. Naglee, 74 Cal. 60, 15 Pac. 371; Hendy v. March, 75 Cal. 566, 17 Pac. 702; Mayberry v. Cook, 121 Cal. 588, 54 Pac. 95; Terry v. Sickles, 13 Cal. 427; Cowell v. Snyder, 171 Cal. 294, 152 Pac. 920.

[10] It is contended, however, that the two items above mentioned, $1,500 and $468, were barred by the statute of limitations before the presentation of the account in August, 1914. We think the evidence sufficient to sustain a finding that the company kept these items alive by repeated promises to pay the same from time to time, and that therefore they were never barred.

In this case the labor of the court has been rendered more difficult by the failure of counsel to indicate where the evidence supporting their various contentions might be found in the transcript or in the appendix to appellant's opening brief. We think the court may therefore be pardoned if any mistakes have been made in reciting the evidence. The writer has made a diligent effort to discover the facts as stated in the briefs, but in some instances has been unable to do so.

The judgment is affirmed.

We concur: LENNON, P. J.; STURTEVANT, Judge pro tem.

(38 Cal. App. 365)

LAKAS v. ARCHAMBAULT. (Civ. 1868.)

(District Court of Appeal, Third District, California. Oct. 4, 1918. Rehearing Denied by Supreme Court Dec. 2, 1918.)

1. HOMESTEAD ⊂⊃18—"HEAD OF FAMILY."
Defendant, who was the sole support of his aged grandmother, for some years the object of his care, was the "head of a family," within the meaning of Civ. Code, § 1261, when he made a declaration of homestead.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Head of a Family.]

2. HOMESTEAD ⊂⊃33—OCCUPANCY—ERECTION OF DWELLING HOUSE.
Defendant, who erected on his claimed homestead a one-room dwelling house, 20 by 10 feet, having sides of plain lumber, the cracks being battened, with four windows and two doors, the flooring being tongued and grooved, and there being a place for a stove, complied with the Homestead Act.

3. HOMESTEAD ⊂⊃1, 55—RIGHT OF DEBTOR —STATUTE.
Under the Homestead Act, defendant had right to defeat plaintiff creditor's attachment of land by impressing premises with homestead, purpose of statute being to enable debtor to establish refuge for himself and family, which, under section 1241, he may do at any time prior to lien being fixed by judgment.

4. HOMESTEAD ⊂⊃31—FORMS AND INTENTION.
Merely to go through forms necessary to establishment of homestead under the Homestead Act is not sufficient, for there must be present the element of good faith, and a present intention to make premises home of declarant and family.

5. HOMESTEAD ⊂⊃31—OCCUPANCY AND INTENTION—RESIDENCE.
Under the Homestead Act, time of occupancy prior to or after declaration of homestead is not only essential element in perfecting right; physical fact of occupancy and intention with which premises are occupied being limitations to be considered in determining residence.

6. EVIDENCE ⊂⊃589—ACCEPTANCE OF PARTY'S TESTIMONY.
In action to declare void homestead claimed by defendant, court was not bound to accept as conclusive defendant's testimony as to his intention in going on premises and erecting house, if other circumstances were inconsistent with intention testified to.

7. APPEAL AND ERROR ⊂⊃931(1)—REVIEW—EVIDENCE.
In viewing circumstances bearing on defendant's intention in going on premises claimed by him as homestead and erecting house, appellate court, in support of judgment, must give them interpretation accorded by trial court, if reasonable, though different interpretation favorable to defendant might also have been reasonably given them.

8. HOMESTEAD ⊂⊃57(3)—INTENTION TO OCCUPY—SUFFICIENCY OF EVIDENCE.
In action to declare void homestead claimed by defendant on 20 acres of land whereon he erected a one-room dwelling house and occupied it with his grandmother temporarily, evidence *held* to justify conclusion that defendant did not have intention when he went on premises permanently to occupy them as a home.

9. WITNESSES ⊂⊃321—IMPEACHMENT OF OWN WITNESS—SURPRISE.
Circumstances under which plaintiff's own witness had given certain testimony *held* to have brought case within rule permitting plaintiff to impeach witness on ground he was surprised by her answer.

10. HOMESTEAD ⊂⊃57(2)—INTENTION IN ESTABLISHING—DECLARATIONS OF PARTY.
In action to declare void homestead claimed by defendant, it was permissible to show by his own declarations what defendant's intention was in establishing a homestead.

11. APPEAL AND ERROR ⊂⊃1058(2)—HARMLESS ERROR—EVIDENCE.
In an action to declare void defendant's homestead, refusal to allow defendant to show that he had made some attempt to obtain a house or move to the premises *held* not prejudicial to defendant; he having testified as to his intention in building house he occupied.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by Speros Lakas against George L. Archambault. From judgment for plaintiff, defendant appeals. Affirmed.

Arthur L. Levinsky, of Stockton, for appellant.

Lafayette J. Smallpage, of Stockton, for respondent.

CHIPMAN, P. J. Action to have a homestead claimed by defendant on certain 20 acres of land declared void and invalid. The cause was tried by the court without a jury, and plaintiff had findings and judgment in his favor. Defendant appeals from the judgment.

The pleadings raised the single question whether or not the homestead sought to be vacated was valid.

For several years prior to the declaration of homestead by defendant, he had supported and maintained his grandmother, Mrs. Jack. They had lived together on a tract of land of about 57 acres, four miles distant from the city of Stockton, of which land the 20-acre tract in suit was a part. The house occupied by defendant at that time and other improvements were on a part of the larger tract, being 37 acres, which latter he sold some time prior to the declaration of homestead. Upon the sale of this 37 acres defendant with his grandmother moved to Stockton and took up his residence in one of the flats of a building under the management of his sister-in-law, the wife of his brother, C. C. Archambault, to whom defendant paid rent for his flat. His grandmother lived with him there and was supported by him. She was over 90 years of age, and feeble, sometimes bedridden for a considerable period, but "up and down," as described by witnesses. Defendant was a "meat cutter" by occupation. He moved into town, as he testified, because he "had bad luck, didn't make no money, and my health was bad, and I had a chance to work in town and to be where my work was." Defendant was engaged in the pursuit of his trade after moving to Stockton and up to the time he made the declaration of homestead and also thereafter. On April 22, 1915, plaintiff levied a writ of attachment against the said 20-acre

tract, and soon thereafter defendant commenced the construction of a dwelling house thereon, which was substantially completed by the 1st of May, and on the first Sunday in May, 1915, defendant with his grandmother moved to this house and occupied it for about five weeks, when they returned to the apartment formerly occupied by them in Stockton, and defendant continued the pursuit of his trade as meat cutter. During their stay in the house on the 20-acre tract, defendant went to town daily, except Sunday, to work at his trade as meat cutter, taking his morning and evening meals at this house and his luncheon in town. At the time he removed to the 20-acre tract, defendant took with him the furniture and housekeeping utensils with which he had been housekeeping in said flat and his own and his grandmother's wearing apparel. Three sacks of coal at one time and two sacks at another time and some wood were sent out for use in the cook stove. The house was a one-story building 20 feet long and 10 feet wide, consisting of one room in which the occupants lived. "The sides of the house were plain lumber, surfaced lumber, and the cracks were battened—battening, they call it. There are four windows in the house and two doors. The interior was plain boards and uprights that they were nailed to, and a roof. Tongue and grooved flooring and place for stove. No partition in it at all; just one room."

One Blankenship had a verbal cropping contract or lease of this land with defendant by which defendant was entitled to one-half of the crops, the lease embracing the entire 20 acres. Blankenship helped defendant to build the house, hauled the wood and coal to it, and some time after defendant moved back to his flat, occupied and cared for the house defendant had built on the premises. Blankenship had previously occupied a house situated on adjoining land, the 20-acre tract having no improvements on it.

It is contended by plaintiff that because of this existing lease or cropping contract defendant could not establish a homestead on the premises. We do not find it necessary to consider this point.

The foregoing facts are undisputed. Witness Kirkins, proprietor of a restaurant in Stockton where defendant occasionally took a meal, testified that about the time plaintiff sued out his attachment against defendant the latter told witness about it, and in the presence of defendant's brother there was some talk of securing plaintiff by giving him a mortgage on the premises involved. He was asked as to any further conversation, and replied:

"Well, then, when they leave I don't know nothing about it, except I remember now he tell me they are going to give him the mortgage. That is all I know about it. So next morning George Archambault come to the place again and eat the breakfast. I ask him how he get along. He tell me: 'I don't think I am going to give him any mortgage. I think I can beat it,' he says, 'without giving any mortgage.' That is all. Any time I see him I tell him, 'How you get along?' He says: 'I got pretty nice lawyer. I think he pull me through all right.' I tell nothing else. That is all. All we were talking about that I know. I always tell him, 'How you get along?' That is all. He tell me he think he get along all right, he think he going to beat the case—the note—whatever it is. Of course, Archambault a friend of mine, just as Lakas. I know Archambault more than I do Lakas. I am willing to tell the truth. That is all I can say. I don't know what they do after that. * * * Q. Do you remember any further conversation that took place at all? A. Oh, yes; I remember the time he told me he was going to make the application for the homestead. That he could do. I didn't know what homestead meant, myself, to tell you the truth. He says he make a homestead. I said: 'What you going to do? What homestead that mean?' He says: 'Well, I am going to move out and make a homestead and live there. So, if I live there 30 days,' he says, 'then they won't bother me—Lakas won't bother me with his note, I declare a homestead.' So right after—oh, about two weeks, come to a little place my brother used to own. I work there. I said, 'How you get along?' He said, 'I get along all right.' Because I had kind of trouble myself, and I ask him how he make his homestead. He says: 'Well, I make it. If you stay there 30 days, it will be just the same, you can declare a homestead.' I said, 'How you go out and live in it?' He said, 'I have bedsteads, couple quilts,' whatever it is, he said, 'that is all you need.' I said, 'If you live in the place, if a person live in the place, you think they can bother them?' He said: 'No, they can't bother them. You are all right.' That is about all we were talking about. Of course, my talking, I don't remember well different exactly. That is all he was talking. I always try to fix it up between Lakas and George. I was try very hard, telling them the best way do not get in trouble."

Plaintiff called defendant as his witness, who testified to many of the facts above narrated. He was asked if he paid rent for the flat he had rented from Mrs. Archambault for the month that he was out at his ranch, and answered that he did not. He was asked on cross-examination why he removed from the homestead, and answered:

"My grandmother was sick, you see. It was impossible for me to get anybody, and I didn't want to impose on good nature myself." He was asked who looked after her when she was sick. "A. Mrs. Yettner (a near neighbor) was there every day, and Bill Blankenship was there more or less, and that was all. * * * The Court: Q. You stated that your grandmother was ill? A. Yes, more or less. Q. She is in feeble health, is she? A. Yes, sir. Q. How long has she been in feeble health? A. Well, for the last three or four months she has been pretty bad. Q. Prior to that time, how was she? A. Had asthma, and short of breath, but she pulled through all right. Q. At the time she moved off the ranch back home, was her condition about the same as when you went out? A. No, it was a little worse. Being alone it bothered her."

Mrs. C. C. Archambault, defendant's sister-in-law, was called by plaintiff. She testified that when defendant moved to the ranch in May he took his grandmother out there in a surrey; that they had been living in a flat for which defendant paid witness rent.

She was asked if defendant paid her rent for the flat while he was on the ranch, and answered: "No, sir; he did not pay me rent for the rooms while he was absent." She was asked if she did not state to plaintiff that she had received rent from defendant for that time. Defendant objected on the ground that it was an attempt to impeach his own witness. The objection was overruled, and she answered: "I don't remember, sir, whether I made such a statement or not." She testified that she visited defendant every Sunday while out there, and occasionally during the week when Mrs. Jack was sick; that Mrs. Jack had not been bedridden continuously, but "was up and down" and had been in that condition "for a couple of years" and that "she got worse out there" and "had been going down rapidly."

W. T. Blankenship testified, as plaintiff's witness, that he built the house for defendant on the premises in question, and that he lived in a house near by but not on the homestead premises; that he had a lease or cropping contract of the land, as hereinabove stated. On cross-examination he testified that his lease did not give him the occupancy of the land and that he lived in defendant's house in order to take care of it. "He told me to stay there. He wanted the land leveled, and some trees set out. He said if I would stay there he would pay me for that."

Plaintiff testified in his own behalf. His attention was called to the conversation between him and Mrs. C. C. Archambault concerning the payment of rent by defendant while on his homestead. He testified, over objection, that Mrs. Archambault told him defendant did pay rent for his flat for that time.

At this point plaintiff rested, and defendant moved for a nonsuit "upon the ground that the only allegation of the complaint in this action was that the defendant did not live on the premises, and that his grandmother did not live with him, and that she is not dependent upon him for support." It was contended that the evidence submitted by plaintiff showed that they did live there. Defendant is in error in his statement. The complaint alleged that neither did the defendant nor his grandmother "use said premises as a home, or reside upon them or any part thereof." In ruling upon the motion for nonsuit, the court said:

"The question of intent is necessarily involved in the matter of the defendant living upon the premises, and that must necessarily be a question of fact to be determined, and therefore the motion for a nonsuit will be denied."

Defendant was called as a witness in his own behalf. He testified that when he moved to the premises and all the time he was there it was his intention to make the place his home; that he moved back to town because of his grandmother's health, which grew worse while on the premises; that he went to town to work daily, but returned at night; that while he was away his grandmother was alone except as neighbors might call; that he paid no rent for his flat while on these premises. He testified, on cross-examination:

"Q. When you built that house, you did not intend to make it any bigger, did you? A. Yes, some day I did, in case there was a change in my grandmother, immediately I would go out there to live, immediately. I came in on account of my grandmother, for her health and everything; her health was getting worse all the time. I intend to live over there in the near future."

His attention was called to the testimony of witness Kirkins. He denied having any such conversation as testified to by Kirkins.

Mrs. Mary Yettner testified that she lived "across the road" from the premises involved; that she visited Mrs. Jack daily and had been there "when the grandmother was starting a meal." She testified as to the condition of Mrs. Jack's health:

"The first one or two days she was there, she was able to be up, but after that she was up and down. Whenever she felt able she was up. And that was the reason I visited the place every day, because I knew the old lady was there alone, and on that account I went there every day to see how she was."

She testified that defendant was working for her husband and had been for two years past.

[1, 2] We have endeavored to set forth substantially all the evidence in the case which appeared to us to have any bearing upon the issues presented. We think the evidence sufficient to establish the fact that defendant, when he made his declaration of homestead, was the head of a family within the meaning of section 1261 of the Civil Code. He was the sole support of his aged grandmother, who had for some years been the object of his solicitude and care. Also, that he sufficiently complied with the statute in the erection of his dwelling house on the premises. It served the purpose of a shelter and comfortable abiding place for the time and was commensurate with defendant's means and financial abilities. When he occupied it, he took with him all his and his grandmother's personal belongings, their furniture and household and housekeeping utensils, and had a sufficient equipment for the reasonable enjoyment of the dwelling by persons in their walk in life.

The crux of the matter, however, is seen in the statement made by the learned trial judge in ruling upon the motion for a nonsuit, namely:

"The question of intent is necessarily involved in the matter of the defendant living upon the premises, and that must necessarily be a question of fact to be determined."

[3, 4] The defendant had a clear right to defeat his creditor's attachment by impressing the premises with the character of a homestead. The very purpose of the statute is to enable the debtor to establish a place of refuge for himself and family which the

creditor shall not invade; and this he may do at any time prior to a lien being fixed upon the premises by judgment obtained. Civ. Code, § 1241. But merely going through the forms necessary to the establishment of a homestead is not sufficient. There must be in these forms the element of good faith and a present intention to make the premises the residence, the home, and the abiding place of the declarant and his family.

In Tromans v. Mahlman, 92 Cal. 1, 8, 27 Pac. 1094, 1095, the court said:

"To effect its purpose, the statute has been liberally construed in some respects, but the requirement as to residence at the time the declaration is filed has been strictly construed. Thus this court has many times used and emphasized the word 'actually,' to show that the residence must be real, and not sham or pretended."

The same case was again before the court, reported in 111 Cal. 646, 44 Pac. 327. Said the court:

"The only respect in which it is claimed by the appellants that the evidence herein differed from that at the former trial to such an extent as to authorize a different conclusion is that Mrs. Mahlman testified that at the time she went to the premises on the 21st of August, 1883, it was her intention to remain there and occupy the house continuously, but that by reason of supervening circumstances she was compelled to return to San Francisco the next day after the declaration of homestead was filed. Whether she did in fact actually reside on the premises at the time the declaration was filed was a question of fact to be determined by the court from the evidence before it. The physical fact of her occupancy, as well as the intention with which she occupied the house, were both elements to be considered in determining actual residence, and the court was not bound to accept her statement that she intended to reside thereon as conclusive, if other facts to which she testified were inconsistent with such intention. Whatever inconsistency there was between these facts and her statement of her intention presented merely a conflict of evidence, on which the decision of the trial court was final. Its decision upon this conflict of evidence that she did not reside there is conclusive upon this court."

[5] In that case the time of occupancy was much shorter than in the present case. But, as we view the statute, the time of occupancy prior to or after the declaration is not the only essential element. The physical fact of the occupancy and the intention with which the premises are occupied "are both elements to be considered in determining the actual residence."

[6-8] The trial court found that defendant did not move to the premises in question with the intention to make the house there erected his home or residence. The defendant testified that such was his intention, but the court was not bound to accept his testimony as conclusive if the other facts and circumstances were inconsistent with such intention. In viewing these facts and circumstances we must, in support of the judgment, give them the interpretation given to them by the trial court if such interpretation is reasonable, even though a different interpretation, favorable to defendant, might also be reasonably given to them. The declaration of intention made by defendant to the witness Kirkins, considered with other facts and circumstances otherwise appearing, is susceptible of the construction that he moved to the premises for the sole purpose of defeating plaintiff's claim, and, while he had a right to do this, such right was dependent upon a bona fide intention to make the place his residence, his home. This intention was not expressed by him to Kirkins or any one else, and, disregarding the defendant's testimony as to his intention, as the court must have done, we cannot say the court was not justified in its conclusion.

[9] Error is assigned in permitting plaintiff to impeach Mrs. Archambault, who was his own witness. She had testified, in answer to plaintiff's question, that defendant did not pay rent for the flat he had been occupying while he lived on the premises in question. Plaintiff claimed that he was surprised by the answer. The circumstances under which the question arose brought it within the rule in such cases.

[10, 11] Error is claimed in permitting the witness Kirkins to testify as to the statements made to him by defendant, for the reason that defendant was called as a witness by plaintiff but "was not asked anything about any such conversation." It was permissible to show by his own declarations what defendant's intention was in establishing a homestead. Defendant was not prejudiced by the refusal of the court to allow him to show that he had made some attempt to obtain a house to move to the premises. He had testified as to his intent in building the house which he occupied. The facts sought would not have strengthened his testimony.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

179 Cal. 207

## CITY OF OAKLAND v. LARUE WHARF & WAREHOUSE CO. (S. F. 8562.)

(Supreme Court of California. Nov. 4, 1918.)

1. MUNICIPAL CORPORATIONS ⚷719(4)—POWERS—LEASE OF TIDELANDS.

A lease by a city of water front privileges drawn in conformity with St. 1911, p. 1254, transferring to the city title to the lands in question for harbor development purposes and expressly providing for such leases, *held* a valid exercise by the city of its powers and not inconsistent with the purposes of the grant to the city.

2. MUNICIPAL CORPORATIONS ⚷719(4)—POWERS—DELEGATION.

Under Oakland city charter, the board of public works may execute a lease of tidelands, title to which is vested in the city by statute.

In Bank. Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Suit by the City of Oakland against the Larue Wharf & Warehouse Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Paul C. Morf, De Lancey C. Smith, and John J. Earle, all of Oakland, for appellant.

Guy C. Earl, W. H. Spaulding, and Chaffee E. Hall, all of San Francisco, for respondent.

RICHARDS, Judge pro tem. This is an appeal by the plaintiff from a judgment in the defendant's favor in an action to quiet title to certain lands lying along the Estuary of San Antonio, which forms a portion of the southern boundary of the city of Oakland. The defendant, while admitting title in the plaintiff to said lands, claims a leasehold interest therein, which claim the trial court sustained. The facts of the case are practically undisputed, and the questions of law involved are those arising out of certain transactions between the plaintiff and the defendant in the course of which the latter's alleged leasehold interest in the premises is claimed to have been created.

Prior to May 1, 1911, the tidelands upon this estuary, including the premises in question, were the property of the state of California, although upon said 1st day of May, 1911, and for many years prior thereto, the defendant and its predecessors in interest had been in possession of said premises claiming to be the owners of the same under an instrument

designated as the "Stratton Patent" which the appellants herein claim to have been wholly void as a muniment of title. During these prior years the defendant and its predecessors had placed and maintained certain improvements upon the property consisting of a wharf over which some small amount of traffic moved, and a yacht clubhouse for the use of which rents in a small amount were collected. On May 1, 1911, the state of California, by an act of the Legislature of said date (St. 1911, p. 1254), transferred to the plaintiff herein all of its right, title, and interest in the lands lying along said estuary, including the premises in question, subject to certain conditions and trusts specified in said act, among which were the following provisions having an important bearing upon the instant case:

"That said lands shall be used by said city and its successors, only for the establishment, improvement and conduct of a harbor, and for the construction, maintenance and operation thereon of wharves, docks, piers, slips, quays and other utilities, structures and appliances necessary or convenient for the promotion and accommodation of commerce and navigation, and said city, or its successors, shall not, at any time, grant, convey, give or alien said lands, or any part thereof, to any individual, firm or corporation for any purposes whatever; provided, that said city or its successors, may grant franchises thereon, for limited periods, for wharves and other public uses and purposes, and may lease said lands, or any part thereof, for limited periods, for purposes consistent with the trusts upon which said lands are held by the state of California, and with the requirements of commerce or navigation at said harbor, for a term not exceeding twenty-five years, and on such other terms and conditions as said city may determine, including a right to renew such lease or leases for a further term not exceeding twenty-five years or to terminate the same on such terms, reservations and conditions as may be stipulated in such lease or leases, and said lease or leases may be for any and all purposes which shall not interfere with navigation or commerce, with reversion to the said city on the termination of such lease or leases of any and all improvements thereon, and on such other terms and conditions as the said city may determine, but for no purpose which will interfere with navigation or commerce; subject also to a reservation in all such leases or such wharfing out privileges of a street, or of such other reservation as the said city may determine for a belt line railroad where the same may be deemed necessary by the said city; and such other reservations as the city may require, and for sewer outlets, and for gas and oil mains, and for hydrants, and for electric cables and wires, and for such other conduits for municipal purposes, and for such public and municipal purposes and uses as may be deemed necessary by the said city; provided, however, that each person, firm or corporation or their heirs, successors or assigns now in possession of land or lands abutting on said lands, within the boundaries of the city of Oakland, lying and being southerly from the southern line of East Fourteenth street in said city of Oakland and easterly from the eastern limits of the former town of Oakland as hereinbefore firstly described, and lying and being westerly from the easterly boundary line of the city of Oakland as it existed in A. D. 1908, shall have a right to obtain a lease for a term of twenty-five years from said city of said land and wharfing out privileges therefrom with a right of renewal for a further term of twenty-five years pursuant to the provisions of this act and on such terms and conditions as said city may determine and specify, subject to the right of said city to terminate said lease at the end of the first twenty-five years, or refuse to renew the same, or to terminate the lease so renewed during the term of such renewed lease on such just and reasonable terms for compensation for improvements at the then value of said improvements as said city may determine and specify. Upon obtaining such lease and wharfing out privileges such person, firm or corporation, their heirs or assigns, shall quitclaim to said city any right they or any of them may claim or have to the said lands hereby granted."

In the month of June, 1911, the city of Oakland, through its counsel, in an attempted compliance with the foregoing provisions of the statute, passed an ordinance purporting to authorize the board of public works of said city to make and execute leases of the lands so conveyed by the state to said city, including the premises in question, to the parties in possession thereof; and thereafter and on June 28, 1911, the said board of public works by formal resolution authorized the making of the lease to the defendant under which it claims to have its leasehold interest in said premises. On June 30, 1911, said lease was executed by its signature, both by the defendant and by the members of the board of public works, individually and on behalf of the plaintiff, purporting to act under the authority conferred upon them so to do; and the said defendant, at the time of the execution and delivery of said lease, executed and delivered to the plaintiff a quitclaim deed to all of its right, title, and interest to the premises in question, except such as was created by said lease, since which time it has paid to said plaintiff the rents required by said lease to be by it paid, which the plaintiff has regularly received, and no part of which has ever been refunded to the defendant, nor has the plaintiff ever offered to reconvey to the defendant such interest in said premises, if any, as it acquired by the defendant's quitclaim deed to it. Since the execution of the lease to it by the plaintiff, the defendant has made, with the plaintiff's knowledge and consent, certain permanent improvements upon the premises covered by its said lease at an expense to it of approximately $6,000, no part of which has been refunded or offered to be refunded by the plaintiff, and has also maintained thereon the wharf previously erected, over which some small amount of traffic is conducted. Notwithstanding the foregoing admitted facts, the plaintiff has instituted this action to quiet its title to the premises; its contention being that the defendant's purported lease is utterly void and its attack upon its validity being based upon two grounds: First, that its requirements do not satisfy the requirements of the statute of 1911, which is the source of the authority of the plaintiff to make the same; and, second, that its execution was never legally authorized or effectuated by the municipal officials vested with authority to execute such a lease. The trial court found against the plaintiff's

contention as to both of these grounds, and rendered its judgment accordingly in the defendant's favor. Both of the foregoing grounds of the alleged invalidity of said lease are urged by the appellant upon this appeal.

As to the first of the foregoing reasons for the alleged invalidity of the lease in question, the contention of the appellant is this: That the purpose of the state of California in the enactment of the statute of 1911 by which the city of Oakland was granted the lands along the said estuary, including the premises in question, was to insure the development of a harbor through the use of the lands conveyed by said grant in such a manner as would tend to promote commerce and navigation, and that, this being so, whatever leases were contemplated or authorized by the terms of said act must be such as would effectuate said purpose, and hence must have contained provisions making the use and improvement of the lands by the lessees thereof along lines conducive to such purpose obligatory and not optional on the part of such lessees; and that, this not having been done in respect to the form and terms of the lease in question here, it is void as in violation of the spirit and purpose of the act authorizing its execution. We are unable to agree with the appellant's contention in the above regard to the extent of giving to the terms of the act of 1911 such an interpretation as would render a lease, couched in the language of the instrument under which the respondent claims a leasehold interest in the land in question, void. Reading the legislative act in its entirety, it is quite evident that, while it was doubtless the general and ultimate purpose of the state in granting these water-front lands to the city of Oakland to bring about the development of a harbor with its increased facilities for navigation, it was recognized that there were certain obstacles in the way of an immediate realization of these objects, consisting in the fact that there were various private parties in possession of these lands, some of whom, including the respondent herein, were claiming ownership in specific portions of said lands under muniments of title which, whether of some or of no value or validity, might furnish the bases of litigation more or less prolonged in character, which would probably interfere with the realization for an uncertain period of the purposes for which said grant was made. The act therefore embodied the provisions above quoted, which were plainly intended to enable the city of Oakland as the grantee of these lands to make compromises with such private persons as might be possessed of portions of the lands so conveyed to it under whatever claim of right, or title, by making such leases to such persons as would permit the continued occupation and use by them of the parts thereof occupied by them for the period of 25 or even 50 years, conditioned upon their surrender of whatever claim of title they were asserting in the premises to the city.

The only limitation upon the purposes for which these prospective lessees of the premises they had theretofore occupied was that they might "use the premises leased for any and all purposes which shall not interfere with navigation or commerce, but for no purpose which will interfere with navigation or commerce." It may not be doubted that if the occupants of such premises were at the time of the passage of said act or the making of said lease occupying and using the same for purposes which were inconsistent with the trust in which the state had held these tidelands under the terms of article 15 of the Constitution and subject to which the legislative grant to the city of Oakland was made, no lease of the same by or on behalf of said city would be valid in so far as it would undertake to authorize or permit the continued devotion of said lands to such inconsistent uses, nor could it be contended that if, after the making of such a lease as that in question here, the lessees should undertake to occupy or use said premises in such manner or for such purposes as would be inconsistent with the terms of said trust and with the development of commerce and navigation in said harbor, the state, and its successor in interest, the city of Oakland, would have the right to institute such proceedings as might be proper or necessary to compel a cessation of the use of said lands for such inconsistent purposes, even to the extent of an avoidance of said lease. It may, however, be proper to state in this connection that—

"When the plan or system of improvement or development adopted by the state for the promotion of navigation and commerce cuts off a part of these tidelands or submerged lands from the public channels, so that they are no longer usful for navigation, the state may thereupon sell and dispose of such excluded lands into private ownership or private uses, thereby destroying the public easement in such portion of the lands and giving them over to the grantee, free from public control and use." People v. Cal. Fish Co., 166 Cal. 576, 138 Pac. 79; Knudson v. Kearney, 171 Cal. 250, 152 Pac. 541.

But none of these conditions is presented by the record before us. The undisputed evidence shows that both before and since the execution of its lease the uses to which the respondent has been and is devoting such portions of the premises as are in use are such as are consistent with the general purposes for which the city of Oakland was given its grant of said lands and do not constitute an interference with, but rather to the extent of such use an aid to, navigation and commerce. It may be that such uses are limited, and that the term of said lease and of its possible extension seems unduly long; but as to the former we fail to find in the record before us facts sufficient to warrant a conclusion that a more extended utilization of these premises would be practicable or profitable in the present state of development of Oakland water front possibilities, or that

a lease which would have compelled a more extended use of the premises in the way of promoting navigation and commerce would have been accepted by the defendant, or that they would have surrendered their claims of ownership of the premises for a lease more drastic and compelling in its requirements as to the uses to which the property should be presently devoted. We are given no reason to doubt from the record before us that the defendant, as the development of the commercial and navigation uses of the harbor demand it, will so increase their uses of said property as to fully effectuate the purposes contemplated by the state in making its grant. With respect to the term of the lease, it is drawn in exact conformity with the provisions of the statute, and it is not for the courts to say that the lease is void because its term is too long.

The only case cited by the appellant which seems to bear remotely upon the question of the power of the city of Oakland to authorize the execution of the lease in question is the case of Weekes v. City of Galveston, 21 Tex. Civ. App. 102, 51 S. W. 544, wherein a lease by the city of Galveston of Pelican Island and its flats to private parties with no other limitation than that the property should not be used to the injury of the harbor was held to be invalid. The marked distinction, however, between that case and the case at bar, consists in the fact that in the legislative grant of Pelican Island to the city of Galveston no provision for the leasing thereof for any purpose was embodied, and hence the court very properly held that the grant to the city of the island in its harbor was for public purposes which would not be conserved by its unrestricted lease for private uses. In each of the recent California cases cited by appellant, viz. San Pedro, etc., Co. v. Hamilton, 161 Cal. 610, 119 Pac. 1073, 37 L. R. A. (N. S.) 686, and Koyer v. Miner, 172 Cal. 448, 156 Pac. 1023, this court upheld the leases in question, and in the former case expressly approved the policy of making such leases of water-front lands as would tend to interest private capital in the improvement of harbors; the case of Pacific Coast S. S. Co. v. Kimball, 114 Cal. 414, 46 Pac. 275, being cited as illustrative of the beneficent effects of this policy, although in that case the lease was of lands fronting on Monterey Bay for the construction and operation of a wharf for private use, and the theory of this latter case as expressed therein being that the lease therein upheld was promotive of commerce and navigation. It is also to be noted that in each of the cases of San Pedro, etc., R. R. Co. v. Hamilton, supra, and Koyer v. Miner, supra, the leases in question did not expressly specify or require that the lands so leased must be used for any particular purpose promotive of commerce and navigation. Both leases were nevertheless upheld, the court in each case holding that the state had power under the terms of the Constitution to make leases of tide and submerged lands "with proper restrictions of time and proper regard to public and quasi public use, * * * so that private enterprise and capital may build up the commerce of our seaboard cities."

[1] Our conclusion upon this branch of the case is that the lease in question having been drawn in precise conformity with the terms of the statute of 1911, which in its grant of these water-front lands to the city of Oakland expressly provided for the making of such leases, and having incorporated in it the express provision that the lands so leased might be used "for the purposes for which they were then being used, * * * but for no other purpose which will interfere with navigation or commerce," was a valid exercise of the powers thus given by the statute to the city of Oakland to make such leases in so far as its provisions are concerned.

The next contention of the appellant is that the lease is invalid because not executed by the proper officials of the city of Oakland having power to execute such leases. The lease in question was, as we have seen, executed by the board of public works of the city of Oakland and by the individual members thereof under and by virtue of an ordinance of the council of said city expressly authorizing and directing said board of public works to enter into and to execute said lease. The appellant, however, contends that the city council had no right to delegate to the board of public works the authority to make said lease and that the board of public works had no power to make the same. The argument of the appellant in support of this contention is that, under the terms of the charter of the city of Oakland of 1889 and the amendment thereto made in 1909, the legislative powers of the city are exclusively conferred upon the city council, and that the act of making leases of the lands of the city being legislative in character cannot be legally delegated to any other board or officer of the city. Without attempting to review all of the various provisions of the said charter of Oakland relating to the exercise of legislative powers by the several boards and officials of said city, it may be generally stated that the exercise of legislative functions, especially in the matter of making leases, is not conferred by its terms exclusively upon the city council. The board of library trustees of the city, for example, are expressly empowered "to rent" such buildings as may be needed for their uses under certain conditions. The park commissioners are also empowered to lease for a limited period buildings and park grounds under their control. Again, subdivision 47 of section 31 of said charter, having reference to the powers of the city council in the matter of making leases of municipal property, invests the city council with power "to regulate the custody, leasing and sale of all the

property of the municipality," and it would seem to be quite clear that under the terms of this subdivision the city council would have power to provide that as to the matter of the execution of such leases of the city property as it had properly determined should be made the city council might designate any appropriate board or officer of the city to perform the manual duty of signing and executing the instrument itself. It is also to be noted that by the amendment to the city charter made in 1909 the board of public works were given certain enlarged powers in relation to the water-front properties owned by the city. The amendment, so far as pertinent, reads as follows:

"The board of public works shall, subject to such ordinances as the council may from time to time adopt, have full power to regulate, control, operate and manage the use of the water front of the city of Oakland, and all wharves, docks, slips, warehouses, railroads and other improvements thereon; * * * to collect rents * * * due the city for the use of the water front, or any portion thereof or improvements thereon."

[2] While not undertaking to decide whether the last above-quoted provision of the city charter would of itself be sufficient to confer authority upon the board of public works to enter into and execute the lease in question, we are of the opinion that, taking into consideration the several foregoing provisions of the city charter of 1889 and the amendments thereto made in 1909 under which the lease in question herein was made, it was a proper exercise of the powers of the city council thereunder and under the terms of the statute of 1911 to have enacted the ordinance directing the making of said lease and authorizing the board of public works of said city to execute the same, and that said lease as thus executed in precise conformity with the terms of said statute and of such ordinance is in all respects valid, and was properly decided so to be by the judgment appealed from herein. This being so, the other alleged errors of law occurring at the trial become immaterial and do not merit separate consideration.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; WILBUR, J.; MELVIN, J.

38 Cal. App. 404

## LAPALLETERIC v. SHIMONOWSKY. (Civ. 2537.)

(District Court of Appeal, First District, California. Oct. 8, 1918.)

ADVERSE POSSESSION ⊂=66(1)—EXTENSION OF POSSESSION TO FENCE.

Where, for a time exceeding the period of limitations, adjoining landowners have regarded a fence as the true boundary line, and the defendant has used, improved, and paid taxes on the overlapping portion, plaintiff may not question the location of the boundary line.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by A. Lapalleteric against Betty Shimonowsky. Judgment for plaintiff, and defendant appeals. Reversed.

Frank W. Taft, of Willits, for appellant.
Chas. Kasch, of Ukiah, for respondent.

STURTEVANT, Judge pro tem. This is an action to quiet title. Judgment went for the plaintiff and defendant appealed under section 953a, Code of Civil Procedure.

The common grantor, L. R. Whited, owned a town lot in Willits, Mendocino county. While the owner, he put up a fence dividing the lot into what we shall term the north lot and the south lot. May 8, 1904, he conveyed the north lot to the husband of the defendant, now deceased. May 20, 1904, Whited conveyed the south lot to Frost, and by mesne conveyances that lot came into the ownership of the plaintiff. In the grants by Whited each lot was described by metes and bounds. That the fence was not on the true line was never suggested by any one till four or five months before plaintiff filed this action. At that time a survey was made, and a dispute arose in which plaintiff commenced to assert a claim that the fence line was 3 feet 2 inches over on his land.

From May 8, 1904, the defendant had possession of the land within the boundary fences, paid taxes thereon, gardened some berries thereon, rebuilt on the fence line a part of the fence, and built improvements on that land in such a place that the same are overlapped by the new survey. Under such facts the plaintiff may not now question the location of the boundary line. Sneed v. Osborn, 25 Cal. 619; Young v. Blakeman, 153 Cal. 477, 95 Pac. 888. Whatever question may have existed, when this case was on trial, as to the true limits of the rule in the Blakeman Case, all such questions have been brushed aside by the later case of Silva v. Azevedo, 173 Pac. 929.

The judgment is reversed.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

38 Cal. App. 409

## ALLEN v. SMITH et al. (Civ. 2531.)

(District Court of Appeal, First District, California. Oct. 11, 1918.)

GIFTS ⊂=30(3)—WILLS ⊂=90 — TESTAMENTARY PROVISION OR GIFT.

Where mother gave a key to a strong box to certain person, with directions to hand it to defendant, and while on her deathbed told defendant, "All that box contains is yours," whereupon defendant pulled the box out of its place and shoved it back again, but remained in the room until the death of the mother, receiving the key the next day from the third person, there was an executed gift of a deposit in the bank, evidenced by a bank book in the strong box, and not a testamentary disposition of the same.

Appeal from Superior Court, Alameda County; W. M. Conley, Judge.

Action by Uletta Allen, administratrix of the estate of Christian Whitford, deceased, against Fannie Smith and another. Judgment for defendants, and plaintiff appeals. Affirmed.

W. B. Rinehart, of Oakland, for appellant.

Eugene W. Roland, of Oakland, for respondent Smith.

De Ligne & Jones, of Sacramento, for respondent Sacramento Bank.

STURTEVANT, Judge pro tem. The plaintiff as administratrix of her mother's estate, brought this action against the defendants to recover certain moneys which she alleged to be the property of the estate. The defendants had judgment in the trial court, and the plaintiff appealed and has brought up the record under section 953a of the Code of Civil Procedure. The defendant Fannie Smith claims title to the moneys under an alleged gift from the plaintiff's intestate. If this claim is sustained, the judgment should be affirmed.

The defendant bank filed a disclaimer, and for the purpose of clarity we will treat the subject as though Fannie Smith is the only defendant. The evidence shows that plaintiff's intestate was the mother of the plaintiff, of the defendant, and of a brother, Richard; that on March 4, 1914, she had a savings bank account in the Sacramento Bank; that on that date she executed an assignment of $25 of her bank account to Uletta, another assignment of $25 of her bank account to Richard, and another assignment of all of the balance to Fannie; on November 22, 1914, she delivered all of the assignments to the defendant and she recorded them; shortly prior to May 4, 1915, the decedent had her bank book in her treasure box and the box was under her bed; at that time she delivered the key of the box to a niece, Mrs. Williams, and told her to hand it to Fannie Smith; this instruction was repeated to Fannie.

On May 4, 1915, Fannie went to the bedside of her sick mother; on the evening of that day her mother told Fannie that the box was under her bed; that Mrs. Williams had the key and had been told to turn it over to Fannie, and at the same time her mother told Fannie that "all that box contains is yours." At this same time the defendant pulled the box out of its place, then shoved it back again, but remained in the same room with the box till the death of her mother. Mrs. Williams handed to the defendant the box and the key on the day after the death of the mother and the defendant has retained possession of the same. These facts do not bring this case within the doctrine of Knight v. Tripp, 121 Cal. 674, 54 Pac. 267, as contended by the plaintiff, but they do show an executed gift. Civ. Code, §§ 1146–1150; Francoeur v. Beatty, 170 Cal. 740, 151 Pac. 123; Burkett v. Doty, 167 Pac. 518.

The judgment should be affirmed; and it is so ordered.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

---

38 Cal. App. 374

EASTERN OUTFITTING CO., Inc., v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 2514.)

(District Court of Appeal, First District, California. Oct. 5, 1918.)

1. Replevin ⊂⊃109—Claim and Delivery—Joint Rights and Liabilities—Statute.

When, in claim and delivery, judgment was entered against all defendants, it rested on implied finding all had become possessed of property, as alleged by plaintiff, and under such possession rights and liabilities of defendants were not several, but joint, under Civ. Code, § 1431.

2. Certiorari ⊂⊃47 — Supersedeas — Order Recalling Execution.

Where, in claim and delivery, judgment for property or value was awarded against all defendants, and one alone fully perfected appeal and filed required stay bond, appeal, under Code Civ. Proc. § 946, stayed all proceedings on judgment, and order recalling writ of execution thereon, which would disturb appealing defendant's possession was proper.

Petition for writ of review by the Eastern Outfitting Company, Incorporated, against the Superior Court of the City and County of San Francisco, State of California, and others. Writ denied.

Wm. Tomsky, of San Francisco, for petitioner.

Lloyd S. Ackerman, of San Francisco, for respondents.

STURTEVANT, Judge pro tem. This is an application for a writ of review to cancel an order recalling a writ of execution. The basic case was in claim and delivery. The plaintiffs alleged that "the defendants became possessed" of the property in controversy, which consisted of certain household furnishings. The defendants Myers, Gray, and Goldstein, admitted, by failure to deny, that allegation. January 24, 1918, the trial court awarded judgment against all of the defendants for the return of the property of the plaintiff or for $750, the value in case a delivery could not be made. Thereafter the defendant Goldstein duly and regularly appealed and furnished a bond in proper form as required by section 943, Code of Civil Procedure. The defendants Myers and Gray did not appeal. June 7, 1918, the plaintiff took out an execution, and, two days later, on the motion of the defendant Goldstein, the trial court made an order recalling the writ of execution. The plaintiff then commenced this proceeding.

[1, 2] When the trial court entered its judgment against all the defendants, such

judgment rested on the implied finding that all of the defendants had "become possessed" of the property in controversy. Under such possession the rights and liabilities of the defendants were joint and not several. Civ. Code, § 1431. The rights and liabilities of the defendant Goldstein extended to every jot and tittle of each article in controversy. If therefore a writ of execution should issue to take possession of said articles, the levy would disturb the possession of the defendant Goldstein at least in part. But, when he had fully perfected his appeal and had filed the stay bond required in such cases, the effect of the appeal was to stay all further proceedings in the trial court upon the judgment. Code Civ. Proc. § 946.

The writ is denied.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

---

38 Cal. App. 430

SMITH v. F. L. MOORE MOTOR TRUCK CO. et al. (Civ. 2573.)

(District Court of Appeal, Second District, California. Oct. 14, 1918.)

1. APPEAL AND ERROR ⟸995 — REVIEW — FINDINGS.

Appellate courts will not review evidence, where only disputed point in case rests wholly upon the determination of facts about which there was a very clear and unequivocal conflict in the evidence.

2. APPEAL AND ERROR ⟸994(3) — REVIEW — CREDIBILITY OF WITNESSES.

Whether oral testimony is inconsistent with acts of the witnesses is for the trial judge, who has the duty of resolving facts and reconciling the inconsistencies.

3. SALES ⟸391(5) — RESCISSION BY MUTUAL CONSENT—ENFORCEMENT OF CONTRACT.

Where contract of sale of a truck is rescinded by mutual consent of buyer and seller, and seller takes back truck and resells it, and buyer relinquishes everything received under contract, buyer is entitled to the restoration of money paid and return of promissory notes.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by T. D. Smith against the F. L. Moore Motor Truck Company, a corporation, and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Andrews, Toland & Andrews, A. V. Andrews, and M. D. Andrews, all of Los Angeles, for appellants.

Thomas K. Kase, of Los Angeles, for respondent.

JAMES, J. Appeal from a judgment entered in favor of plaintiff.

[1-3] The action was brought to enforce rescission of a contract for the purchase of an automobile truck. The making of the contract for the purchase of the truck and as to the terms thereof was not disputed by any evidence offered on either side. Plaintiff, together with T. J. Smith, his son, arranged for the purchase of a heavy truck from appellant Moore Motor Truck Company for a price in excess of $4,000. As part payment on the purchase price, the Smiths turned in an old truck at the agreed value of $1,400, paid $300 in cash, and gave notes for the balance of the purchase price. The truck was being manufactured and when ready was taken out for use upon several consecutive days, after which it was returned to the Moore Company and later sold by it. The old truck received from the Smiths was also sold by the same company. About the facts just recited there was no dispute. The disputed point in the case, as argued on the appeal, is whether there was a mutual rescission, or whether the Moore Company, to the obligations of which the Pacific Metal Products Company afterwards succeeded, in taking back the truck and reselling the same did so as the agent only of the Smiths. This proposition rests wholly upon the determination of facts other than those hereinbefore related and about which there was a very clear and unequivocal conflict in the evidence. As to such a case and a proposition so affected, it is hardly necessary to declare that the appellate courts have no function by way of review. The testimony offered by the Smiths was that the truck when sent out of the shop to them was sent out in charge of an operator employed by the manufacturer, the Moore Company, and that during the few days that it was used on work it was handled by the employé of the Moore Company; that defects of several kinds developed and the machine did not work satisfactorily; that, upon representation of the conditions to the manager of the company mentioned, he told them that he would take the truck back and return to them their property; that he stated that the truck as contracted for by them had not been injured by use, that it was new and that he could dispose of it, and that there would be no depreciation charge; that later, when they requested that there be restored to them the property and money which they had paid and their promissory notes, the demand was met by a refusal; whereupon this action was brought. It was shown in evidence that, after the alleged return of the truck to the manufacturer, one of the Smiths inserted an advertisement in a newspaper, offering the truck for sale over his own name, setting forth as a reason that illness compelled the sale. The insertion of this advertisement was admitted by the Smiths, but the explanation was offered that Mr. Moore requested that that be done to assist in the resale of the truck. We can find no ground to justify our interference with the judgment. The appellants' argument is that the acts of the Smiths were shown to be wholly inconsistent with their testimony; that their oral testimony, inconsistent with their acts, should not,

therefore, be believed, but should be counted of no effect. The trial judge had the duty of resolving the facts and reconciling the inconsistencies. His determination was that there had been a mutual rescission, expressing that conclusion in the following language:

"That thereafter and on or about the 20th day of September, 1913, said defendants abandoned, canceled, and annulled said written contracts as set forth in the answers of defendants and retained and kept their said Moore motor truck; that on or about the 20th day of September, 1913, said written contracts above referred to were abandoned by mutual consent by all parties thereto, and said contracts came to an end and terminated by the mutual failure to perform of all parties to said contracts."

The finding of the ultimate fact that there was a rescission by mutual consent is sufficient to support the judgment, regardless of any question as to whether the defects alleged to have developed in the machine were substantial or trivial. The manufacturer did take back the truck and resell it; hence the plaintiff relinquished all that he had received or was to receive under his contract and was entitled to enforce the agreement of rescission as against the other contracting party. The observations here made take into view, of course, only the evidence offered by the plaintiff, for upon the issues of fact we have only to determine as to whether there was sufficient proof made to entitle the court to find the facts as it did as to there having been an agreement of rescission made.

We finds no points urged as to errors committed by the trial court which seem to be deserving of particular consideration or discussion.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

---

38 Cal. App. 360

## WATERS v. CONSELHO SUPREME DA UNIAO PORTUGUEZA DO ESTADO DE CALIFORNIA et al. (Civ. 2540.)

(District Court of Appeal, First District, California. Oct. 4, 1918.)

1. INSURANCE ⇐782—FRATERNAL INSURANCE — CHANGE OF BENEFICIARY — INSANITY OF INSURED.

In wife's action to cancel certificate issued to another by fraternal society and to declare prior policy in her favor to be in effect, evidence *held* to show that her husband was permanently insane before he made change of beneficiary in question.

2. WITNESSES ⇐347—CREDIBILITY—ACTION INCONSISTENT WITH CLAIM OF PARTY.

In wife's action to cancel certificate issued by fraternal order and to declare prior policy in her favor in effect, on ground that when husband changed beneficiary he was insane, circumstances that wife dealt with husband three months before change of beneficiary in settlement of property rights on divorce, as if he were a sane man, affected only her credibility as witness.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by May L. Waters against Conselho Supreme Da Uniao Portugueza Do Estado De California and Rosa Rex. Judgment for plaintiff, and defendant Rex appeals. Affirmed.

L. Gonsalves, of Oakland, for appellant.

L. A. Kottinger and Milton Shepardson, both of Oakland, for respondent.

PER CURIAM. This was an action brought by respondent to cancel a certain certificate of insurance issued by a fraternal insurance society operating under the provisions of the Fraternal Act of 1911 (St. 1911, p. 1320), and declaring a prior policy to be in force and effect. The complaint alleges that respondent is the surviving wife of the insured, Antone E. Waters; that she acquired a vested right in said insurance policy by reason of certain agreements or understandings between herself and her husband at that time and by reason of her conduct thereafter with reference to the policy; that thereafter in 1913 the insured delivered up his policy to be canceled; that it was canceled, and a new policy—the one in suit designating the appellant as beneficiary—issued; that the issuance of the new policy, of which the appellant, a sister of the deceased, was made the beneficiary, was brought about through fraud and undue influence practiced upon deceased by appellant; and that at the time of the issuance of the new policy and consequent change of beneficiary deceased was of unsound mind and incapable of making a valid designation of beneficiary for that reason.

The court found each and all the allegations of the complaint to be true and supported by competent evidence, although it may be stated at the outset that there is no evidence in support of the allegations of fraud and undue influence.

The conclusion we have reached on the merits of the case renders unnecessary a determination of respondent's motion to dismiss the appeal; and for the same reason it will be unnecessary for us to consider the question whether or not the wife, having in accordance with an agreement with her husband paid the dues upon the policy as long as the fraternal society would accept them, with the understanding that she should be the beneficiary thereof, acquired a vested interest in the policy.

It is the contention of the appellant that the evidence in the case is insufficient to support the finding of mental incompetency. We are of the opinion that this contention is not maintainable, and that there is an abundance of evidence in the record that Waters was permanently insane prior to the time that he made the change of beneficiary in question.

The evidence shows that before the year

1907 Antone E. Waters was a shrewd business man, a carpenter by trade, a good mechanic, and was very bright and intelligent. In the year 1907 he suffered a fit of epilepsy. The epilepsy was caused by a cyst or tumor on the brain, and finally resulted in his death on December 21, 1914. Dr. Harris, the managing physician in charge of the county hospital where he died, stated it as his opinion that Waters was permanently insane as far back as January, 1912. The tumor was large and would necessarily result fatally, and would permanently impair his mental and reasoning faculties. It would result in epilepsy. The paroxysms would increase in frequency with the growth of the tumor, and correspondingly the brain cells would disintegrate, and mental degeneracy would gradually take place. The doctor stated that many medical writers agree that such a patient would never be mentally normal or sane after the first severe paroxysm; and he stated that the tumor disclosed by the autopsy held by him was about the size of a plum, and that it required several years to develop, and would cause blindness, and in his opinion a person with such a tumor would be mentally unbalanced for six years previous to his death. Waters was totally blind when he was admitted to the hospital on February 6, 1914, and at that time was mentally unbalanced, and in the opinion of the doctor on May 4, 1913, Waters was not competent to transact any business in an intelligent manner. The tumor affected the motor cells and the mentality, and would render Waters incompetent and unbalanced for several years. After Waters became the subject of epileptic attacks, intimate acquaintances testified that they were of the opinion that after the year 1907 he was insane. Apparently insanity was congenital with him; his mother being an inmate of the Napa State Hospital, an aunt being insane, and his brother Manuel simple-minded.

During the years 1907 and 1908, Waters was the subject of epileptic attacks. In 1907 he fell on the street, three teeth being knocked out. He would occasionally have two or three fits a day. At such times he would foam at the mouth and stiffen out, would fall to the ground, turn black in the face and have a glassy stare, his muscles would become rigid, and he had great difficulty in breathing; his face would sometimes take on a purple hue; and apparently he was in a bad condition. After he became subject to these fits, he would sit for long periods staring at the sidewalk. He would gaze at an object before him for hours and seemed as if in a trance. His wearing apparel became filthy; his habits of industry left him; he became slovenly in his person, which the doctor testified is a symptom of the disease. He would not permit his wearing apparel to be washed, though filthy. He became very bitter against his little girls, nine or ten years of age, and against his wife without cause. He would seldom speak to them, although he talked with others. After the first epileptic fit in 1907, Waters gradually became more slovenly in his habits, dress, and personal appearance, and his hatred towards his wife and children increased in intensity, until in 1912 his wife became afraid to longer live with him. He would swear at the children, and threw a shoe at and cut one of them. He threw a knife at his wife. He placed a powder on some grapes and melons intended for the family's use, but which being fed to the chickens killed them. He poured something in his wife's coffee which tasted like carbolic acid, and laughed when he saw her pour the coffee. He tried to burn his suit of clothes, and exhibited it to the public with a sign written on a slab attached to it reading. "This $18 suit on exhibit by Mrs. Waters bought over one and a half years ago." When his wife asked for money, which it appears he was able to furnish, he tried to throw her downstairs. He would not support his wife and children, and the former had to take in sewing for a living. At times, though the door was unlocked, he would sneak in the back way and climb over the roof of the house and let himself in through an upper window. At Benicia Waters made his appearance ragged, tattered, and torn. He shook like a leaf and had an unusual stare. In November, 1912, he talked in a rambling and incoherent way and had an unnatural laugh. His eyes became badly afflicted in 1910 and grew worse until in 1918 he became totally blind. Charles Taylor knew Waters intimately for years, and testified to his opinion that Waters was insane before May of 1913. He would hide in his children's playhouse or under the steps. He would leave his family for three months at a time without explanation. The witness Dana knew the deceased 15 years. He visited the witness three or four times and on those occasions acted as though he did not know him, and had a look in his face which caused Dana to form the opinion that he was crazy. Other testimony was to the effect that in the lodge room he acted as though he was drunk, waved his arms, and turned around, but had no odor of liquor about him. He did not seem to know how to get out of the lodge room when ready to leave. To another witness, Frank Joseph, he appeared to be insane at the time he was endeavoring to have the lodge change the policy. His agent was afraid of him. In the latter part of 1912 the witness Jerry Wade met Waters on the street where Waters was attracting a crowd by silently gazing at an upper window. Wade greeted him, and Waters replied: "Who are you talking to? I don't remember you." Wade stated who he was, and Waters replied, "You are the fellow I tried to buy the tannery from in Benicia"—which was

not the fact. Wade formed the opinion that he was insane.

It may be true that there is evidence in the record from which one might conclude that Waters was suffering only from a mental delusion which did not operate to produce the change of beneficiary attacked in this action, but it certainly cannot be said that there was no evidence that he was insane at that time. Two witnesses testified directly to that effect, and the same conclusion can reasonably be drawn from the testimony of eight other witnesses. We think it follows that the finding of the court upon this issue is sustained by the evidence.

[1, 2] Appellant appears to contend that because the wife of Waters in a divorce proceeding entered into an agreement with her husband by which their property rights were settled, at a time when according to her testimony and claim in this case he was permanently insane, she waived any rights she may have had under the policy of fraternal insurance. We think the insurance did not constitute a claim against Waters which was affected by the divorce settlement, but was one which had been arranged between them previously. However that may be, the question to be decided in this proceeding was as to the condition of Waters' mind when he procured the change of beneficiary, and the circumstance that the respondent dealt with him three months prior thereto in the settlement of their property rights as if he were a sane man affected only her credibility as a witness.

The judgment is affirmed.

---

38 Cal. App. 375

## ONELL v. CHAPPELL. (Civ. 2544.)

(District Court of Appeal, First District, California. Oct. 7, 1918.)

1. APPEAL AND ERROR ⊜907(2) — PRESUMPTIONS FAVORING TRIAL COURT — DOCTRINE OF RES IPSA LOQUITUR.
In action against automobile owner for injuries in collision with plaintiff's wagon, cases of collision to which doctrine of res ipsa loquitur would be applicable being conceivable, and evidence not being before appellate court, it must assume in favor of judgment for plaintiff that evidence showed facts warranting instruction applying doctrine.

2. APPEAL AND ERROR ⊜901 — BURDEN OF DUTY TO SHOW ERROR.
It is appellant's duty to show error.

3. NEGLIGENCE ⊜121(2)—RES IPSA LOQUITUR—BURDEN OF PROOF.
The fact that doctrine of res ipsa loquitur is applicable does not relieve plaintiff of ultimate burden to prove defendant's negligence, though it permits the jury to infer negligence and find on all evidence whether plaintiff has sustained burden.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action by Ernest Onell against Harvey Chappell. From judgment for plaintiff, defendant appeals. Affirmed.

Zabala & Sargent, of Salinas, for appellant.

Chas. B. Rosendale, of Salinas, for respondent.

LENNON, P. J. This was an action to recover damages for personal injuries resulting from a collision between defendant's automobile and a wagon of the plaintiff.

[1, 2] In this case the trial court applied the doctrine of res ipsa loquitur, and instructed the jury in effect that it is the law that—

"When a thing that caused the injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care."

The evidence taken at the trial is not before us, and we are unable to say from an examination of the record that the instruction was inapplicable to the facts of the case, as contended by appellant. As cases of collision between two vehicles when the doctrine of res ipsa loquitur would be applicable may be readily conceived, we must in the present case assume in favor of the judgment that the evidence showed a state of facts which warranted the giving of this instruction; it being the duty of appellant to show error. Such a case was Bauhofer v. Crawford, 16 Cal. App. 679, 117 Pac. 931, in which a collision occurred between a moving automobile and a wagon standing on the street. Under the circumstances there disclosed, it was held to be a case justifying the application of the rule mentioned. See, also, 1 White on Personal Injuries on Railroads, § 116; 29 Cyc. 592.

[3] Appellant also contends that certain instructions given by the court, to the effect that the burden of proof was upon the plaintiff, were inconsistent with and contradictory of the instruction embodying the rule of res ipsa loquitur; but the fact that the doctrine named is applicable to the case does not relieve the plaintiff of the ultimate burden of the issue (Cody v. Market St. Ry. Co., 148 Cal. 90, 82 Pac. 666; 29 Cyc. 599), although it permits the jury to infer negligence on the part of the defendant, and find on all the evidence whether plaintiff has sustained his burden of proof (Ross v. Double Shoals Cotton Co., 140 N. C. 115, 52 S. E. 121, 1 L. R. A. [N. S.] 298). We see nothing inconsistent in these instructions.

The judgment is affirmed.

We concur: BEASLY, Judge pro tem.; STURTEVANT, Judge pro tem.

38 Cal. App. 346

## FERERIRA v. SILVEY et al. (Civ. 1866.)

(District Court of Appeal, Third District, California. Oct. 3, 1918.)

1. MASTER AND SERVANT ⟹278(3)—INJURIES TO SERVANT—VICIOUS MULE—SUFFICIENCY OF EVIDENCE.

In action for personal injuries to farm hand when team he was driving, hitched to mower, ran away, testimony *held* to support findings implied by verdict for plaintiff that mule of team was of wild disposition, with propensity to run away, and that it was unsafe animal for farm.

2. MASTER AND SERVANT ⟹278(14)—VICIOUS MULE—KNOWLEDGE OF PROPENSITY—EVIDENCE.

In action by farm hand for injuries when team he was driving, hitched to mower, ran away, evidence *held* to support finding implied in verdict for plaintiff that defendant, when plaintiff was employed, was familiar with vicious nature of mule and its predilection for running away.

3. MASTER AND SERVANT ⟹288(5)—KNOWLEDGE OF PROPENSITY OF MULE—QUESTION FOR JURY.

In farm hand's action for injuries when team, including mule, ran away, whether plaintiff, before he was injured, knew of propensity of mule to run away, *held* for jury on conflicting evidence.

4. MASTER AND SERVANT ⟹205(5)—ASSURANCES AS TO GENTLE CHARACTER OF MULE—RIGHT TO ASSUME TRUTH.

A farm hand had the right to assume that repeated assurances of employer as to gentleness of mule and team were true, though lively actions of mule might have generated suspicion animal was not so gentle as not to require vigilant watching and handling.

5. MASTER AND SERVANT ⟹150(2)—INJURIES TO SERVANT—DUTY TO INFORM OF DISPOSITION OF MULE.

It was duty of owners to have given farm hand, on requiring him to use vicious or lively mule in employment to which they assigned him, any information they possessed regarding mule's disposition to act viciously or to run away.

6. PARTNERSHIP ⟹159 — KNOWLEDGE OF PARTNER—IMPUTATION TO FIRM.

Where one partner of firm owning ranch knew that mule had once run away, his knowledge was imputable to other partners, who, at time of employing farm hand, later injured by running away of mule, did not know of prior runaway.

7. MASTER AND SERVANT ⟹125(6)—DUTY OF EMPLOYING PARTNERS — KNOWLEDGE OF SAFETY OF INSTRUMENTALITIES.

It was a duty resting alike on all partners of firm owning ranch to know whether instrumentalities with which they required their servants to work were safe or unsafe.

8. MASTER AND SERVANT ⟹285(5)—ACCIDENT AS ACT OF GOD OR RESULT OF NEGLIGENCE—QUESTION FOR JURY.

In action for injuries to farm hand when team he was driving, hitched to a mower, ran away, frightened by hay blown close to their heads, whether accident was result solely of act of God, or cause wholly beyond human control, or direct result of vicious tendencies of team, or a mule in it, together with failure to inform plaintiff of danger, *held* for jury.

9. TRIAL ⟹139(1)—PRIMA FACIE CASE.

Where plaintiff has made out a prima facie case in support of averments of complaint, trial court has no legal right to take case from jury.

10. TRIAL ⟹260(8) — REFUSAL OF INSTRUCTION COVERED BY ORAL INSTRUCTIONS.

In action for injuries when driving team ran away, refusal of defendants' requested instruction, that element of negligence of having furnished defective breast strap had been eliminated, *held* not prejudicial to defendants; clear oral instruction to same effect having been given.

11. NEW TRIAL ⟹143(2)—IMPEACHMENT OF VERDICT BY JUROR.

A juror cannot impeach his own verdict for alleged misconduct, where evidence thereof is offered by party against whom verdict was given.

12. TRIAL ⟹307(4)—DELIBERATIONS OF JURY —SENDING WRITTEN INSTRUCTIONS.

Action of trial court, on request of jury, without directly informing counsel, in sending written instructions in to jury during deliberations, was irregular; there being no law expressly authorizing course; Code Civ. Proc. § 612, as to papers which may or may not be taken to jury room, not mentioning instructions.

13. APPEAL AND ERROR ⟹1170(6)—HARMLESS ERROR—IRREGULARITY IN SENDING INSTRUCTIONS TO JURY.

In servant's action for injuries, irregularity committed by trial judge on request of jury in sending in to them written instructions, also in omitting to send transcript of oral instruction, *held* not prejudicial to either party; injury not being presumed from irregularity under Const. art. 6, § 4½.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Percy T. Fererira against F. J. Silvey and others, individually and as copartners. From judgment for plaintiff, defendants appeal. Affirmed.

Welsh & Henry, of Sacramento, for appellants.

Hughes & Bradford and S. W. Cross, all of Sacramento, for respondent.

HART, J. Plaintiff brought the action to recover from defendants damages for personal injuries received by plaintiff by reason of a team belonging to defendants running away. Judgment, following the verdict of a jury, was entered in favor of plaintiff and against the defendants, individually and as copartners, for the sum of $5,000, from which judgment defendants prosecute this appeal.

Defendants are farmers, and, at the time of the injury complained of, were engaged in general farm work in Solano county. On the 25th of April, 1915, plaintiff was employed by them as a general ranch hand. At that time he was 28 years of age, in good physical condition and was earning $40 per month and board. On the 3d day of June, 1915, the defendant Frank Silvey directed plaintiff to cut hay and to use for that purpose a certain team composed of one horse and one mule. Plaintiff hitched the team to a mower, the mule being on the off or right side. The mower was a right-hand cut, the sickle-bar being on the right side. Plaintiff started cutting hay and on the first round the tongue of the mower fell down. He threw the sickle out of gear, tied the lines on the lever, went to the left, past the horse, and "grabbed

the mule by the halter," as he testified. At that time "the north wind blowed, it came out, a little piece of hay, the team jumped, started to run away." He said that the piece of hay was about the size of his hat. The mule forced him down on the bar, the sickle cut him in various places, and he was dragged for a distance of several hundred feet.

Dr. John L. White, who attended plaintiff, testified that—

"He had a comminuted fracture; that is, a fracture in two or more places. He also had two perforations about, just above the knee, and he had several abrasions on the leg below—between the knee and the ankle. * * * The bone had protruded the flesh before I saw him, on the inner side, I believe. * * * There is an overlapping of the bones of the leg, making the leg about 3½ inches shorter. * * * He will always have a shorter leg and will never have the same use of it that he once had. He will not be able to conduct himself as a laborer."

Appellants insist that the evidence does not show that the mule was of a wild and of a vicious nature or disposition.

The plaintiff testified that, soon after his employment by defendants, he said to defendant Silvey, "This team must be a lively team," to which Silvey replied, "This is a gentle team; he was like that because he don't work for four or five months." Plaintiff said:

He talked to defendant Silvey several times about the team. "Mr. Silvey says, 'Gentle team.' Q. What did you tell him at the time? A. I says, 'No look like to me.' Q. No look like to you? A. Because lively—lively team. Q. Why did you state to Mr. Silvey that it was a lively team? A. Because I saw them in the corral, jump, jump all the time, playing."

On another occasion when he hitched up the team he said:

" 'The horses, they jump lively.' I says: 'Mr. Silvey, look to me better be careful with this team.' He says, 'This is a gentle team.' "

The plaintiff said that he was never informed that the mule had run away.

On cross-examination he testified that he had been handling horses and mules about eight years and considered himself a first-class teamster; that he had driven the team in question four or five times; that some one helped him every time he took the mule out of the corral; that the mule looked to him wild —"lively mule"—and that he was "scared of him" because he saw him jump in the corral and kick the cows.

John Santos, called as a witness for the plaintiff, testified that he had a short time previously to the accident to the plaintiff worked for the defendants on their ranch near Dixon; that his employment required him to drive a team; that he drove a team of which the mule in question was one; that, on one occasion, while so employed and engaged in cutting grass "on the edge of the levee," the team he was driving, the said mule being one, suddenly started to run and ran a considerable distance. He said that the defendant Lewis, having learned of the "runaway," went to him (witness) and "started quarreling at me, growling at me," because the team ran away, and the witness thereupon quit working for the defendants.

[1, 2] The foregoing testimony is sufficient to support the implied findings of the jury that the mule in question was of a wild and vicious disposition, with a propensity for running away from the control of its driver, and that it was just such an animal of the horse variety which it would be unsafe to employ in the ordinary purposes of a farm. But it is further contended that, assuming that the mule was of a wild and vicious nature, the evidence does not show that defendants, or either of them, had knowledge of such wildness or viciousness. It is true that the evidence is slight upon that proposition, but, as above shown, there is some evidence tending to show that the defendant, Lewis, knew before he employed the plaintiff that the mule was given to running away, and we cannot say that the evidence referred to is not sufficient to support the implied finding that said Lewis, when the plaintiff was employed by the defendants, was thoroughly familiar with the vicious and dangerous nature of the mule and its predilection for running away or violently releasing itself from the control of its driver when being used for the ordinary farming purposes of the ranch of the defendants.

It is insisted, however, that the plaintiff was fully aware of the wild and unruly nature of the mule before the mishap here complained of occurred, and therefore himself assumed whatever risk attended the handling of the animal. To this proposition, the plaintiff makes a twofold reply, to wit: (1) That the doctrine of the assumption of risk is no longer a legal defense in this state in personal injury cases, the defense of the assumption of risk having been expressly abrogated by the Employers' Liability Act, popularly known as the "Roseberry Act," passed by the Legislature of 1911 (Stats. 1911, p. 796); (2) that the evidence is conflicting upon the question whether the plaintiff knew of the disposition of the mule to run away, from no special cause, and that therefore the finding of the jury thereon forecloses a review of the point by this court.

[3] The impression, at least to some extent has prevailed that the "Roseberry Act" and all its provisions, except such as might have been retained in the statute known as the "Workmen's Compensation Act," were repealed by the latter act, which was passed by the Legislature of 1913 (Stats. 1913, p. 279), it being generally supposed that the scheme as established by the Workmen's Compensation Act for the protection and compensation of servants suffering personal injuries in the course of their employment and while engaged therein was intended as a substitute for that embraced in the Roseberry Act. In Barrett v. Met. Cont. Co., 172 Cal. 116, 155 Pac. 645, which was decided on

February 15, 1916, the Supreme Court unqualifiedly declares that in such a case as this it is essential to a recovery that the plaintiff be ignorant of the viciousness of the animal until the injury had happened. But we do not deem it necessary in this case to pass upon the question, since counsel for the appellants have not raised the point that the provision of the Roseberry Act excluding assumption of risk as a defense in a personal injury case to which such a defense would under the facts be pertinent is now and was at the time the injuries complained of here occurred nonexistent, and, since, particularly, we agree with the respondent on the proposition that there is a conflict in the evidence upon the question whether the plaintiff, previously to the time he was injured through the running away of the mule, knew of the disposition of the mule to perform in that dangerous manner, and that therefore the question became one solely for the determination of the jury.

The plaintiff testified (and in this he was not contradicted) that he had altogether "hitched the mule up" and driven it five different times only, and, while (as he stated) he had observed that the mule was a very "lively" animal and had several times told Silvey, one of the defendants, that he believed the mule was inclined to be "lively," he was invariably assured by the said defendant that the team was perfectly gentle, and thus he was soothed into a feeling of security and safety in the handling of the team. The plaintiff was not told by the defendants or by any other person that the same mule had, prior to his employment by the defendants run away while being used or driven by the witness Santos, who had formerly worked for the defendants, performing services similar to those assigned to the plaintiff on the ranch of the defendants.

[4-7] The plaintiff had the right to assume that Silvey's repeated assurances of the gentleness of the mule and the team of which said mule was a part were well founded and true, notwithstanding that the actions of the mule coming under his observation might have generated in his mind some suspicion that the animal was not so gentle and tractable as not to require vigilant watching and handling when being used in the usual employments of the ranch. In this connection, it may be observed that it was, obviously, the duty of the defendants to have given the plaintiff, on requiring him to use the mule in question in the prosecution of the employment to which they assigned him, any information they possessed regarding the disposition of the mule to act viciously or to run away. As has been shown, Lewis knew that the mule, without any apparent cause, had run away on an occasion prior to the time at which the defendants employed the plaintiff, and here it may be parenthetically stated that if the other defendants, who were the partners of Lewis, both at the time the mule ran away from Santos and at the time of the employment of plaintiff, did not, in point of fact, know of the circumstance of the running away of the mule from Santos, then knowledge of that circumstance is to be imputed to them. Clowdis v. Fresno Flume & Irrigation Co., 118 Cal. 315, 50 Pac. 373, 62 Am. St. Rep. 238; Barrett v. Met. Contract. Co., 172 Cal. 116, 155 Pac. 645; Kittredge v. Elliott, 16 N. H. 77, 41 Am. Dec. 717; Harris v. Carstens Pkg. Co., 43 Wash. 647, 86 Pac. 1125, 6 L. R. A. (N. S.) 1164, 1169. It was, of course, a duty resting alike upon all the partners to know whether the instrumentalities with which they required their servants to perform services for them were safe or unsafe.

[8] The point next urged against the plaintiff's right to a recovery arises from the fact, above mentioned, that, just before the team started to run, a small bunch of hay was blown by the north wind near the team and close to their heads. It is contended that that circumstance caused the team to become frightened and to run. It is hence argued that, but for the happening of that circumstance, the team would not have become frightened and so would not have started to run, and that therefore the proximate cause of the injury to the plaintiff was directly imputable to that circumstance, which was beyond the control of human agency. In other words, the contention is that the accident and consequent injuries to the plaintiff were proximately caused by an "an act of God."

We have given above the testimony of the plaintiff as to the circumstance of the small bunch of hay being driven by the north wind, then prevailing, to a point in close proximity to the team, when it became frightened and started to run. It is not necessary to reproduce that testimony here, except to repeat that the plaintiff described the bunch of hay as being about the size of a man's hat, and said that the hay did not strike or touch either the mule or the horse. We cannot say, as a matter of law, that the cause of the "runaway" was entirely due to the blowing of the hay near the team, as indicated. That circumstance might have had something to do with starting the team. It, indeed, may be conceded that it did, and still it was for the jury to say whether that circumstance was the proximate cause of the accident and injury. Common experience justifies the observation that the average work horse or mule, having been thoroughly "broken" to the harness and the ordinary burdens cast upon horses, is so gentle in his relations with those using him for the purposes to which he has been educated—that is, is so bereft of nervousness or of an inclination to become nervous—that the mere blowing of hay or paper in front of or near him would have no effect upon him. In truth, it is commonly known that the blowing of a steam whistle or the noise of an automobile,

or, what is infinitely worse, the noise of a motorcycle, as it is ordinarily propelled through streets and over highways, does not disturb in the least the average work horse in these days. On the other hand, it is known that the slightest noise or disturbance of any character will often arouse to a high pitch the nervousness of a spirited or high-strung horse. Such an animal is generally looking for such trouble from natural fear and is ready to run or become unmanageable from the slightest causes, which would not disturb the average work horse. Such an animal is naturally wild in disposition and dangerous, and it is just such a horse that a master should never give over to his servant to use without first acquainting the servant with its dangerous disposition. In this case, the jury could well have concluded, and perhaps did conclude from the evidence, that the mule in question, although "broke" to the harness, was still of a mean, or nervous and spirited disposition, with an inclination to put into action such disposition from causes which may properly be regarded as of the most trivial nature when it is considered that the average work animal would pay no attention to them, and that the blowing of the bunch of hay to a point near where it was standing or moving only had the effect of startling it and arousing to action its wild and vicious disposition. Such a finding would not be inconsistent with the theory that the proximate cause of the plaintiff's injuries was the vicious disposition of the mule and the failure of the defendants, who knew of the propensity of that animal to runaway, to inform the plaintiff, who then had no knowledge thereof, of the mule's dangerous disposition when the animal was given into his hands as one of the instrumentalities through which he was required to perform his duties as a servant of the defendants.

The foregoing considerations clearly show, we think, that the question whether the accident was the result solely of an act of God or a cause wholly beyond human control or the direct result of the wild and vicious tendencies of the team or the mule in question, together with the failure of the defendants to invest the plaintiff with their knowledge of the dangerous characteristics of the animal when they required him to use the mule to carry out his contract of employment with them, was one peculiarly within the province of the jury to decide. Hence, as to that question, the verdict is conclusive upon this court.

[9] The next point made by the appellants is that the court erred in making the order denying their motion for a nonsuit on the close of the case for the plaintiff. The consideration of the evidence in the foregoing discussion necessarily answers this point adversely to the position of the defendants. It is not out of place to suggest, however, that no rule is better settled in this state than that, where the plaintiff has made out by the evidence a prima facie case in support of the averments of his complaint, the trial court has no legal right to take the case from the jury. Some of the leading cases upon this proposition are cited in Boyle v. Coast Improvement Co., 27 Cal. App. 714, 721, 722, 151 Pac. 25, in which also the rule is stated and applied. Obviously, a reading of the testimony, even as synoptically given herein, will convince any fair-minded person that the plaintiff more than made out a prima facie case of culpable negligence on the part of the defendants as the direct cause of the injuries sustained by him.

The court's action in giving and refusing certain instructions is next attacked. The only given instruction of which complaint is advanced reads as follows:

"The court instructs you as a matter of law that the owner of a dangerous mule or other animal, knowing the same to be dangerous to any one who might drive or use it, owes the duty of not permitting others to drive the same without informing any such other person or persons of the fact of the dangerousness of such animal; and this is true whatever may be the relation of such owner to such other person or persons. And in this case, if you believe from the preponderance of the testimony that the defendants knowingly permitted the plaintiff to use or drive any mule dangerous to be used or driven, without informing plaintiff of the dangerousness of the same, and the plaintiff, while endeavoring to use said mule, without fault or neglect upon his part, and without knowing the dangerousness of the same, is injured, then the defendants are liable to plaintiff for such damages as he may sustain by reason thereof."

The appellants declare that identically the same instruction was condemned as erroneous in Finney v. Curtis, 78 Cal. 498, 500, 501, 21 Pac. 120. But there is a dissimilarity between the two instructions as to a vital element. The instruction in the Finney Case made the defendant liable without reference to his knowledge of the vicious nature of the horse. The court said:

"The rule is well settled that the owner of an animal, not naturally vicious, is not liable for an injury done by such animal, unless it is affirmatively shown, not only that it was vicious, but that such owner had knowledge of the fact"—citing Shearman & Redfield on Negligence, §§ 1887, 1888, and Sutherland on Damages, § 53.

The instruction complained of in this case (above reproduced herein in its entirety) declares, as will be noted, that, to render the owner of a dangerous or vicious mule or animal liable for injury produced by such animal, such owner must have known, at the time he furnished such animal to another to be used or driven by him, of the dangerousness of such animal. Moreover, the court incorporated into its charge to the jury several instructions requested by the defendants themselves, in which the proposition that it was necessary, before the plaintiff would be entitled to prevail, to show that the defendants had previous knowledge of the vicious nature of the mule, was clearly

stated. The jury could not have misunderstood the law in that respect.

[10] It is claimed that the court erred by refusing to allow the defendants' proposed instruction in which it was declared that the element of negligence sought to be stated in the allegation of the complaint that the "harness on said team * * * was defective in that the breast strap or chain was not made for the purpose, but was a halter chain, substituted and used as a breast chain, and was unsuitable for such purpose, and it was known by said defendants, and each of them, that it was unsuitable for such purpose, and was used on said mule," etc., had been eliminated from the case as one of the alleged acts of negligence directly responsible for the plaintiff's injuries, and that the issue as to the alleged negligence of the defendants was thus reduced to the single proposition whether the mule was of a vicious nature and whether the defendants had knowledge of his dangerous characteristics before and at the time the mule was given over to the plaintiff to be used by him in his employment with the defendants and did not put the plaintiff in possession of knowledge of the dangerous disposition of the animal.

The plaintiff had testified that the breast strap broke and the tongue of the mower fell to the ground, and that he ran to the head of the mule and grasped the halter which was on the animal. The court admitted this evidence, not as addressed to an issue of negligence upon which the plaintiff relied for a recovery, but as bearing upon the question whether the plaintiff, in going to the head of the team and taking hold of the halter attached to the mule, was, all the circumstances considered, guilty of contributory negligence. The court, as above stated, refused to adopt the instruction of the defendants declaring that the plaintiff did not rely upon the alleged defectiveness of the harness as a basis for a recovery, but, orally, and in very plain, clear, and readily understandable language, instructed the jury to that effect. We think therefore that the rejection of the instruction preferred by the defendants cannot be held to have been prejudicial.

In this connection, we may remark that the general charge of the court was a fair and clear statement or exposition of the principles applicable to those cases of personal injury, like the one before us, where the master is charged with having failed to furnish his servant with reasonably safe instrumentalities with which to perform the service to which the latter is assigned, and by reason of such failure or omission on the part of the master the servant suffers personal injury in the course of his employment. We may further suggest that the instructions proceeded upon the theory that the doctrine of assumption of risk is still a legal defense in those personal injury cases where it is pertinent to the facts. Whether the court was right in that respect, we are not, as heretofore stated, prepared to say at this time; nor are we required to pass upon that question in this connection, since it is obvious that the theory upon which the instructions were framed in the particular referred to was not unfavorable to the defendants, nor, as the result of the trial shows, prejudicial to the plaintiff.

The next and last point arises from the circumstance that the judge of the court below, after the case had been given to the jury and the latter had been engaged in deliberation thereon for about an hour, sent the written instructions to the jury room at the request of the jury. This circumstance furnished one of the several grounds upon which the motion for a new trial was based and pressed before the trial court, and it was supported by the affidavits of counsel for the defendants, a deputy county clerk, the deputy sheriff under whose charge the jury were placed upon the submission of the case, and several of the jurors. All the jurors but one (Juror Cutshall) deposed that before they called for the instructions they had taken a ballot upon the question whether the plaintiff or the defendants were entitled to a verdict, and that they thereby unanimously agreed to a verdict in an undetermined amount of damages in favor of the plaintiff; that, before the question of the amount of damages to which the plaintiff was entitled was considered by them, it was suggested by one of the jurors that they send out and secure the instructions which the court had read to them. They thereupon requested the deputy sheriff, in whose charge they were, to see the judge and ask him to send them the instructions he had read to them. Cutshall deposed that a difference of opinion arose between the jurors upon the question whether the defendants could be held liable for the alleged negligence in furnishing the plaintiff with defective harness. The instruction given by the court upon that proposition, it will be remembered, was orally given, or not in writing. The attorneys for the defendant each deposed that the instructions were sent to the jury without his knowledge or consent. J. R. Hughes, one of the attorneys for the plaintiff, deposed that he was in conversation with Martin I. Welsh, one of the attorneys for the defendants, in the rotunda of the courthouse, near the entrance to department 2 of the superior court, when the deputy sheriff having charge of the jury passed them and stated, in reply to a question by Welsh as to what the jury were doing, that the jury had asked for the instructions and that he was on his way to communicate the request by the jury for the instructions to the judge; that thereafter affiant and Welsh went into the courtroom of department 2 and there continued their conversation, when the said deputy

sheriff appeared in said courtroom, and affiant, in the immediate presence and hearing of said Welsh, asked said deputy, "What has become of the jury?" and said deputy replied, "Oh, the judge has sent the instructions in to them."

[11] It is a well-established principle, founded in public policy, that a juror cannot impeach his own verdict for alleged misconduct, where the evidence of such misconduct is, as here, offered by the party against whom the verdict was given. See People v. Chin Non, 146 Cal. 561, 80 Pac. 681, and cases therein cited. It follows therefore that the affidavits of any juror in this case as to the considerations governing or influencing him or his fellow jurors in arriving at a verdict cannot be reviewed. But, for the moment and for the purposes of the discussion only, waiving this proposition and considering the affidavits, it is to be observed that, as above stated, all the jurors, save and except Juror Cutshall, declared in their affidavits that it had been unanimously agreed that the plaintiff was entitled to a verdict under the evidence, without then voting upon or deciding the question of the amount thereof, before the instructions were sent for or any suggestion made that they be secured and brought to them. Therefore, if the affidavits were properly reviewable, it was within the discretion of the trial court to hold, upon the showing thus made, that the jurors unanimously agreed upon a verdict, irrespective of the amount, before the suggestion to send for the instructions was made or the instructions sent for, and that the charge was not sent for as a result of a controversy arising among the jurors upon the question whether they were authorized to consider the defectiveness of the harness, as alleged in the complaint, as one of the grounds upon which the plaintiff relied for a recovery.

[12, 13] As to the matter of sending the instructions to the jury, it is to be said that there is no law expressly authorizing such a course to be pursued in civil cases. Section 612 of the Code of Civil Procedure specifically states what papers or documents may and may not be taken to the jury room by the jury; but that section does not say that the instructions given may be so taken, nor does it say that they may not be taken by the jury. The section neither expressly includes the instructions within the papers or documents which may be taken nor expressly includes them within those which are expressly excluded. In criminal cases, the court, by express authority of section 1137 of the Penal Code, may allow the jury to take the given instructions with them. Of course, there can be no doubt that, in civil cases, the court may, upon the express consent of both parties to the litigation, permit the jury to take with them to the jury room the instructions which have been read to them. There was, it is true, no express stipulation or consent by the attorneys in this case that the jury might be given the instructions; but, upon the conflicting showing upon the question whether the attorneys for the defendants did know that the jury had made a request for the instructions and that the judge had complied with the request, the court below was justified in finding, or at least amply supported in its finding, that the attorneys on both sides had knowledge of those facts and an opportunity to register an objection to the giving of the instructions to the jury, if they had so willed. It is, however, very certain that, at all events, it cannot justly be said that, in point of fact, prejudice to either party could have followed from the fact that the jurors were given an opportunity to read, and that they did in fact read, the instructions which had been read to them by the court. It is to be conceded that the manner in which they were given the instructions was irregular, but it was only an irregularity, from which injury will not be presumed (Const. art. 6, § 4½; Vallejo, etc., R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238), and there is no affirmative showing that the defendants were prejudiced by the proceeding complained of. What we here say is equally applicable to the complaint that the court omitted to send to the jury with the other instructions the reporter's transcription of the oral instruction above referred to. They made no special request for said instruction, and, obviously, if they examined those sent to them by the judge, they knew that there was no copy or report of the oral instruction sent to them.

We have now disposed of all the points urged for a reversal. The evidence, it may be admitted, is slight and not altogether satisfactory upon the question of the proximate cause of plaintiff's injuries; but, as above declared, there is some evidence that the proximate cause was the vicious nature of the mule, of which fact the defendants knew and the plaintiff did not, and under the rule governing reviewing courts on the question of the sufficiency or insufficiency of the evidence to support a verdict or findings, we do not feel at liberty to hold in this case that the verdict was without legal justification or is not sufficiently supported to preclude us from so declaring. It is true, as is to be expected, that the defendants presented testimony tending to show that both the mule and the horse were perfectly gentle; but an appellate court cannot resolve conflicts in the evidence, but is only concerned with the question, so far as the evidence is concerned, whether there is to be found therein proof sufficient to support the verdict or findings.

The judgment appealed from is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

38 Cal. App. 380

## SANTA FÉ LAND IMPROVEMENT CO. v. CITY OF SAN DIEGO. (Civ. 2651.)

(District Court of Appeal, Second District, California. Oct. 7, 1918.)

1. MUNICIPAL CORPORATIONS ⟸719(4) — WHARF FRANCHISE—GRANT—BOARD OF HARBOR COMMISSIONERS—RATIFICATION BY CITY —CONDITIONS.

Under Pol. Code, § 2606, providing that no wharf franchise in city shall be valid until confirmed by ordinance, power to grant such franchise was in state board of harbor commissioners, and city could only ratify and confirm, or reject, and could not ratify on condition.

2. MUNICIPAL CORPORATIONS ⟸719(4) — WHARF FRANCHISE — GRANT BY HARBOR COMMISSIONERS — CONDITIONAL CONFIRMATION BY CITY.

Under Pol. Code, § 2606, where state board of harbor commissioners granted wharf franchise in city, which did not reject franchise, but confirmed it, attempting by ordinance to prescribe conditions, confirmation must be deemed absolute and unconditioned.

3. MUNICIPAL CORPORATIONS ⟸719(4) — WHARF FRANCHISE—GRANT—CONDITIONS.

Under St. 1911, p. 1357, as necessary incident of state's grant or transfer to city of San Diego of authority vested in board of harbor commissioners, there was transferred right to city, as substituted for board, to take advantage of any condition reserved in wharf franchise for benefit of state.

4. MUNICIPAL CORPORATIONS ⟸719(4)—TERMINATION OF WHARF FRANCHISE—PAYMENT OF VALUE.

Under Pol. Code, § 2606, and terms of wharf franchise granted by state board of harbor commissioners, city of San Diego, to which, by St. 1911, p. 1357, state had transferred authority of board of harbor commissioners, had right to terminate franchise and take possession of ground on payment of value of wharf independent of the privilege.

5. MUNICIPAL CORPORATIONS ⟸719(4)—TERMINATION OF WHARF FRANCHISE—ARBITRATORS.

Where city of San Diego, after declaring termination of wharf franchise, neglected to have arbitrators appointed, pursuant to Pol. Code, § 2606, under which it was acting, by virtue of St. 1911, p. 1357, to fix compensation for wharf structure, owner had right to possession in place where it was located.

6. MUNICIPAL CORPORATIONS ⟸719(4) — INTERFERENCE WITH WHARF—TERMINATION OF FRANCHISE—FAILURE TO APPOINT ARBITRATORS.

In view of Code Civ. Proc. § 526, and Civ. Code, § 3422, where city of San Diego, after canceling wharf franchise under powers of state board of harbor commissioners, prescribed by Pol. Code, § 2606, transferred to it by St. 1911, p. 1357, did not appoint arbitrators to fix value of structure, but invaded owner's possession, latter was not entitled to injunction.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by the Santa Fé Land Improvement Company against the City of San Diego. From a judgment denying injunctive relief, plaintiff appeals. Affirmed.

E. W. Camp, U. T. Clotfelter, M. W. Reed, and Robert Brennan, all of Los Angeles, for appellant.

T. B. Cosgrove, City Atty., of San Diego, for respondent.

JAMES, J. Appeal from a judgment denying to plaintiff injunctive relief.

In August of 1905, the control of the bay of San Diego was vested in a board of state harbor commissioners especially appointed for the bay by that name. The authority of such commissioners was as defined in certain sections of the Political Code. The right was given to such commissioners to grant permits to private persons to build and maintain wharves. Pursuant to such authority, on the 1st day of August, 1905, the harbor commissioners passed a resolution granting to William Jorres and G. W. Jorres the right for a period of 20 years to maintain "a wharf already constructed in the bay of San Diego" at a place designated and particularly described in the resolution granting the permit. The resolution provided for an annual rental to be paid for the privilege, and also contained a condition satisfying the terms of the statute, which provides that in the case of a wharf permit or franchise grant the commissioners shall reserve the right to terminate the same and purchase the wharf, the provision in terms being as follows:

"That if at any time the said commissioners shall desire to terminate any franchise and to purchase any wharf, pier, marine ways, dry dock, or shipyard, and the purchase price thereof cannot be agreed upon, then the owner of said franchise shall select two disinterested persons, and the said commissioners two disinterested persons, who shall ascertain and fix the value thereof, and if three of said four persons cannot agree, then they shall appoint a fifth competent disinterested person, and any three of said five persons may fix the value thereof, and upon the payment or tender thereof by the commissioners they shall be entitled to the possession thereof, and the title thereto shall vest in the state of California, and all franchises to build, construct, or maintain any wharf, pier, marine ways, dry dock, or shipyard, shall contain this provision therein; provided, that in fixing such value the franchise or privilege shall not be considered as of any value." Section 2606, Pol. Code.

The wharf permit or franchise, in the course of time, passed by assignment into the hands of the plaintiff, which held the same at the time of the acts complained of and thereafter. The franchise, as granted, described the wharf site as extending from the shore of the bay past the government bulkhead line and to the official pierhead line. However, while the resolution granting the franchise recited that the wharf was already constructed, it appears that the wharf existed only upon a portion of the site, and that during the years following the wharf became in disrepair and the outer end thereof continued to decay and fall into the bay until, at the time of the commission of the acts complained of and the commencement of this action, the structure extended from the shore for only a distance of about 625 feet

and lay wholly between the shore line and the government bulkhead line. The city of San Diego, as a work of public improvement, had proceeded to fill in the shallow water of the bay, up to within 75 feet of the bulkhead line, in order to reclaim the ground, and proposed also to extend one of the city streets through, over, and across this fill, to the official bulkhead line, which extension would include all of the existing wharf structure of the plaintiff, except two very small portions, which existed by way of lateral projections. The work of filling had progressed up to a point where the earth was being filled both under and over a portion of the wharf structure. Thereupon the plaintiff proceeded to have its workmen commence the raising of the wharf structure above the level of the fill. The city, by its employés, interfered and prevented this latter work from being done, whereupon this suit was brought for an injunction to restrain and prevent such interference. More particular reference will be made hereinafter to the record of official action taken by the city of San Diego and to the time thereof.

[1, 2] The lands upon and over which the fill was being made were tide lands, the right to the use of which the city claimed by virtue of an act of the Legislature approved May 1, 1911. Stats. 1911, p. 1357. The city's position also has been and is that by the act mentioned all of the authority theretofore vested in the board of harbor commissioners for the bay of San Diego, as an agency of the state, was transferred in its entirety to the city As a result of the last assumption, the city maintains that the condition, which under the statute became a term of the franchise grant, to wit, the condition giving the commissioners the option to terminate the privilege by paying for the wharf, has descended to it, and that its action finds full justification in the facts as disclosed by the record. Going behind all of this, the city claims, also, that when it confirmed the grant of the franchise it did so by ordinance and upon certain conditions, which the franchise holder never fulfilled. To understand this latter position, something must be said as to the terms of the statute, in addition to that recited. Section 2606 of the Political Code contains, among other things, this provision:

"Provided, no franchise granted within or bordering upon the corporate limits of any city shall be valid until the same shall be ratified and confirmed by an ordinance of such city."

The franchise granted to the assignors of plaintiff was confirmed by the city by ordinance, certain conditions being added, however, such as limiting the time within which the wharf structure should be built and providing that the city should have the right to vacate the confirmation at its pleasure. We do not agree with respondent that the conditions attached to the ordinance of confirmation were of effect. The granting power was in the board of harbor commissioners; the city could ratify and confirm or reject; its power was not to ratify upon condition, for the law vested in the harbor commissioners the right to prescribe the conditions under which the wharf privilege should be enjoyed. The city did not elect to reject the franchise, but confirmed it, and, having done that, we think its confirmation must be deemed to have been absolute and stripped of all conditions; that the latter were void for want of jurisdiction. This position is sustained in its principle by California cases which define the extent of the power of the state over tide and harbor lands. See People v. California Fish Co., 166 Cal. 576, 138 Pac. 79; People v. Williams, 64 Cal. 498, 2 Pac. 393; Payne v. English, 79 Cal. 540, 21 Pac. 952. This power was one inherent in the state, and subject to control and definition by general statute, and was not a municipal affair. See, also, Galveston & W. Ry. Co. v. City of Galveston, 90 Tex. 398, 39 S. W. 96, 36 L. R. A. 33. A similar condition was presented in that case, where the court said:

"In order to sustain the claim that the city of Galveston had the right to couple with its consent for the railroad company to use its streets any conditions or terms that it might deem proper, we must invest that municipal corporation with such legislative authority over the subject as would make its action the source from which the railroad company derives its right to build on the streets, or we must conclude that the city had as full power to contract as a private person has, and that the ordinance in question constituted a contract between it and the railroad company."

The source of the power here involved was the state, to which, under the constitution, has been reserved the right to hold and control those lands and waters for purposes of navigation, fishery, etc. See California cases cited. The cases cited recognize the right in the state to delegate its power over the lands to other agencies; such delegation being consistent all the while with the paramount rights impressed upon the same for the public benefit. We think, then, that the inquiry must be to determine how far the state has delegated to the city its power over the tide and submerged lands in the bay of San Diego. And we find upon examination of the act of the Legislature no apparent reason for concluding that the power and control over the lands, harbor and wharf facilities is not as complete as it was possible for the state to make it. The act in its preamble recites as follows:

"Whereas, the state has not the general power of alienation of such lands but may, when the interests of commerce, navigation and fishing require it, convey to municipalities limited and defined areas of such lands with the power to govern, control, improve and develop the same in the interests of all the inhabitants of the state; and whereas, the conveyance to the city of San Diego of the lands hereinafter described, together with the right to govern, control, improve and develop the same will result in great advantage and benefit to all the inhabitants of the state, it is provided. * * *"

The act then proceeds to describe all lands between the line of high tide and the pierhead line in the bay, etc.—provides that the city shall have the right to make improvements, betterments and structures useful and needful for the development of commerce, navigation and fishing, including wharves, docks, piers, etc. The right is given to take tolls and to lease wharves constructed by the city. In general, as we read it, the act purports to give to the city complete charge of the tide and submerged lands, at least to the pierhead lines, which would be the outermost limit to which wharves could be legally constructed in the harbor under federal permission. The act did not specifically give the city authority to grant franchises, although at a later date this subject was particularly covered by amendment. Stats. 1915, p. 1323.

[3, 4] We think that, as a necessary incident of the grant or transfer to the city, there was transferred the right to the municipality, as substituted for the board of harbor commissioners, to take advantage of any condition reserved in the franchise for the benefit of the state. Assuming the correctness of this position, it at once appears that the city had the right to terminate the wharf franchise of the plaintiff and take possession of the ground upon payment of the value of the wharf only. As we construe the statute and the terms of the franchise granted in accordance therewith, upon the determination being made by the proper authority that the franchise should terminate, the right granted becomes at an end and there is left only the matter of adjustment of compensation between the franchise-holder and the representative of the state. This adjustment is provided to be made by arbitrators and it is provided that when the award is made by such arbitrators, if not accepted upon tender of the compensation fixed, the state shall be entitled to the possession of the ground and wharf.

[5, 6] We now are confronted with two remaining questions: (1) Did the city by appropriate action terminate the franchise and do all that was required of it in the way of awarding compensation to the wharf owner? (2) Assuming that such action was not taken and that the city was proceeding to take possession of the wharf and interfere with the ownership of the plaintiff therein, was the plaintiff entitled to an injunction, or should it be left to its action at law for damages which, it must be conceded, could be easily and reasonably ascertained? We find, first, that this action was commenced on January 28, 1915, by the filing of the complaint. Prior thereto, and in the year 1913, a resolution was adopted by the city council of San Diego declaring that it was the desire of said council to purchase the wharf upon the ground covered by the Jorres franchise, and appointing an agent to ascertain and negotiate the price, the same to be agreed upon. On January 26, 1915, two days before the filing of the complaint in this action, an ordinance was adopted forfeiting the franchise rights granted to the assignors of plaintiff, and another ordinance was adopted on the same day attempting to repeal the original ordinance confirming the franchise grant. On the day of the filing of the complaint another ordinance was adopted to open and extend F street in the city of San Diego over and across the wharf of the plaintiff; on February 3, 1915, a resolution was adopted terminating the wharf franchise and providing for the purchase of the wharf and appointing two appraisers; on February 8, 1915, another resolution was adopted declaring the intention of the council to be bound by the decision of arbitrators, and demanding that the plaintiff appoint arbitrators on its behalf. By the answer in the case it was shown that notice was given to the plaintiff of the appointment of the arbitrators on behalf of the city, and the various acts taken by the municipality as noted above were referred to. It does not appear that any further steps were taken under the resolution of August 13, 1913, by the city. It may well be said, then, we think, that while the city had declared in effect the franchise to be terminated at a date long prior to the commission of the acts complained of, it had not proceeded to have its arbitrators appointed in order to fix the compensation which the plaintiff was entitled to have fixed before possession was relinquished of the wharf structure. This being true, then at the time of the commission of the acts complained of the plaintiff still held the right to the possession of the wharf in the place where it was located, and we would be inclined to hold that the offer of the city to appoint arbitrators, made after the commencement of the action, would not debar the plaintiff from its right to relief if, under the facts, an injunction appeared to be the proper remedy.

We are, therefore, brought to the second proposition before noted, that being whether, where it appears that the wharf franchise has been terminated, leaving only the matter of the ascertainment of the value of the wharf structure to be made, the conditions were such as to warrant the court in restraining interference with the possession of the plaintiff. We think this must be answered in the negative, in consonance with the well-known equitable rule which finds expression in section 526 of the Code of Civil Procedure and section 3422 of the Civil Code. The court by its findings determined fully all of the facts which we have made note of, and including a finding as to the conditions imposed by the ordinance confirming the franchise grant on the part of the city. It may be that the court gave greater weight to those conditions than to other facts found (if so, erroneously, under our view); but it does remain true that there are facts disclosed by the findings which, in view of what

has last been stated, afford sufficient support for the judgment denying an injunction.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

---

38 Cal. App. 399

NEWHALL v. HUNSAKER et al. (Civ. 1884.)

(District Court of Appeal, Third District, California. Oct. 8, 1918.)

1. CORPORATIONS ⟸93—SALE OF STOCK FOR DELINQUENT ASSESSMENT—"DEFECT OR IRREGULARITY."

Under Civ. Code, § 341, sale of corporate stock by directors for delinquent assessment must be at public auction to highest bidder for cash; and where bidder gave note, which was paid before stockholder instituted action to recover stock, there was a "defect or irregularity" in the sale, within section 347.

2. CORPORATIONS ⟸99(1) — ISSUANCE OF STOCK FOR "PROPERTY"—NOTE—STATUTE.

A promissory note is "property," and included within Civ. Code, § 359, providing no corporation shall issue stocks, except for money paid, labor done, or "property" actually received.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Property.]

3. CORPORATIONS ⟸93—FORFEITURE OF STOCK — FAILURE TO PAY ASSESSMENT — STRICT COMPLIANCE WITH STATUTE.

To deprive owner of corporate stock of his rights therein for delinquency in meeting assessment, case being one of forfeiture, there must be a strict compliance with requirements of controlling statute.

4. CORPORATIONS ⟸93 — FORFEITURE OF STOCK—DELINQUENCY—ACTION FOR RECOVERY—ESTOPPEL.

Corporate stockholder, deprived of his stock for delinquent assessment, the sale being defective or irregular, within Civ. Code, § 347, because bidder gave note, and not cash, as required by section 341, could make tender of assessment and bring suit for recovery of stock within time prescribed in former section, not being estopped.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Mrs. M. E. Newhall against I. B. Hunsaker and others. Judgment for plaintiff, and defendants appeal. Affirmed.

E. I. Feemster and Power & McFadzean, all of Visalia, for appellants.

F. E. Cook, of Fresno, G. W. Zartman, of Tulare, and Lamberson, Burke & Lamberson, of Visalia, for respondent.

BURNETT, J. The action was brought under section 347 of the Civil Code to recover 25 shares of the Tulare County Power Company, which were sold for a delinquent assessment. The stock was sold for $225, and the corporation, instead of requiring that the assessment be paid in money, accepted the promissory note of the bidder for the amount of the bid. The assessment sale was made and the note received on the 27th of March, 1915, and the note was paid the following August. Plaintiff did not question the validity of the sale until September 15th, and she did not learn before that time of the manner in which the corporation had attempted to dispose of the stock. It is stated by appellants that there is only one question in the case, and that is:

"Did the acceptance of the note by the corporation for the delinquent bid and the payment of the same before proceedings taken by plaintiff under section 347, Civil Code, make a valid sale of the stock to defendant Hunsaker?"

Said section provides:

"No action must be sustained to recover stock sold for delinquent assessments, upon the ground of irregularity in the assessment, irregularity or defect of the notice of sale, or defect or irregularity in the sale, unless the party seeking to maintain such action first pays or tenders to the corporation, or the party holding the stock sold, the sum for which the same was sold, together with all subsequent assessments which may have been paid thereon and interest on such sums from the time they were paid; and no such action must be sustained unless the same is commenced by the filing of a complaint and the issuing of a summons thereon within six months after such sale was made."

[1] As to this section, however, we may say that plaintiff made such tender, and the complaint was filed and the summons issued, within the six months therein provided. As to this there can be no doubt. The question is therefore, not whether plaintiff has pursued the proper remedy, but rather whether ther was such "defect or irregularity in the sale" as to make it voidable within said period at the instance of plaintiff. To determine that question we must consider the force and effect of section 341 of said Code, providing:

"On the day, at the place and at the time appointed in the notice of sale, the secretary must, unless otherwise ordered by the directors, sell or cause to be sold at public auction, to the highest bidder for cash, so many shares of each parcel of the described stock as may be necessary to pay the assessment and charges thereon, according to the terms of sale."

It is admitted that there was a violation of this provision of the statute, inasmuch as the stock was not sold for cash, but for a promissory note. If a violation of the statute in this important particular does not constitute a defect, or at least an irregularity, in the sale, it is difficult to conceive what would constitute such infirmity. Such section, we think, is plain enough. The bid must be upon a cash basis, and the purchaser must be ready and able to pay in money the amount of his offer at the time his bid is accepted. There is reason enough in the rule, but we need not discuss it. It should be sufficient for us to know that the Legislature has so provided. If it had been intended that the note of the purchaser might be accepted for the bid, it is fair to assume that such contingency would not have been excluded. It is true that the corporation might lose nothing by the acceptance of the note, but it is not a question of the solvency of the purchaser, but whether the sale has been conducted as

the statute requires. The Legislature has seen fit to provide that the sale shall be made for money, and not for its equivalent, or what may be converted into cash.

[2] Nor is the rule the same as in the case of subscriptions for stock. In the latter case the law provides (section 359, Civ. Code) as follows:

"No corporation shall issue stocks or bonds except for money paid, labor done or property actually received."

A promissory note is property, and therefore it is included within said provisions. This circumstance must be considered in viewing the cases cited by appellants. Besides, the case of Pacific Trust Co. v. Dorsey, 72 Cal. 55, 12 Pac. 49, and of Quartz Glass & Mfg. Co. v. Joy, 27 Cal. App. 523, 150 Pac. 648, upon which appellants rely, involved the validity of the notes given in payment for the stock. The contention was that the note in each instance was void as against public policy, but it was held that such construction "would sanction fraud and unfair dealing." It is not claimed here that the note given by Hunsaker was void, nor is it necessary to hold that the corporation could repudiate the transaction and treat the sale as a nullity. The proper position, as we view it, is that, in view of said section 341 of the Code, the sale was irregular, and therefore voidable, at the instance of the delinquent owner of the stock if he proceeded as provided in said section 347.

[3] Of course, the general principle as to the necessity for a strict compliance with the requirements of the statute in order to deprive the owner of his stock is recognized by the authorities.

In Ruck v. Caledonia Silver M. Co., 6 Cal. App. 356, 92 Pac. 194, the validity of the assessment was involved, and it was held that the courts have no power to dispense with any of the conditions that are provided by the Legislature as precedent to forfeiture. Therein is quoted with approval the following declaration of Justice Sharswood in Germantown Pass. R. Co. v. Fitler, 60 Pa. 130, 100 Am. Dec. 546:

"We must look to the charter for the power of the directors to forfeit the stock. No doubt the power given must be strictly pursued, and if any restrictions or limitations there provided have been disregarded, the alleged act of forfeiture must be declared invalid."

In 1 Cook on Corporations, § 129, it is said:

"The general method of forfeiting stock for nonpayment of calls is usually presented in detail by the statute authorizing forfeiture. In the earlier cases there may be observed some tendency to hold that a substantial, in distinction from a strict, compliance with the requirements of the statute is all that is necessary to a valid forfeiture. But in the later cases, English and American, it is plainly declared and may be taken as a settled rule that the validity of the forfeiture and sale of the stock of a subscriber in arrears depends upon a strict and formal compliance with the requirements of the enabling statute."

The foregoing refers specifically to a forfeiture for the nonpayment of the subscription, but the same strictness should manifestly be required in the sale for a delinquent assessment.

In 10 Cyc. 502, it is said:

"In respect of the mode of sale the governing statute must be strictly pursued."

However, as before indicated, it is not necessary to hold that the sale herein was void; but it is important to bear in mind that the situation is governed by the general rule of construction that prevails in cases of forfeiture.

[4] Appellants also contend for the application of the doctrine of estoppel. The principle upon which they rely is stated in 4 Thompson on Corporations (2d Ed.) § 3571, as follows:

"The right of a stockholder to invoke the aid of equity in case of invalid or illegal forfeiture may be waived by acquiescence or delay, and, as in analogous cases, he must act promptly in order to obtain relief. The doctrine has been applied where stock was unlawfully forfeited and sold with the stockholder's knowledge, at a time when such stock was of little value, but afterwards, by some change of circumstances and the diligence of the other stockholders, it became valuable, and the original holder then attempted to recover it by a suit in equity."

Among the cases cited by said author are Sayre v. Citizens' Gaslight Co., 69 Cal. 207, 7 Pac. 437, 10 Pac. 408, and Hayward v. National Bank, 96 U. S. 611, 24 L. Ed. 855. In the former it is said:

"If he [the owner] had the right to repudiate the sale of stock upon the ground that it was not assessable, or for any other cause, was it not incumbent upon him to act with diligence? Could he acquiesce in the sale [of stock] as long as the stock of the company was of but little value, but when, by the exertions of others, the consolidation of the company with a rival one imparted to the stock of the combined properties more value, come into a court of equity and claim an equivalent of the stock of the new company? We think not."

In the Hayward Case the Supreme Court of the United States declared:

"If Hayward was defrauded of his stock—if the title did not pass from him or the bank because of the peculiar relations which the purchasers held to him and the property; if he had the right originally upon any ground to repudiate the sale and reclaim the stock—it was incumbent upon him, by every condition of fairness, to act with diligence, and before any material change in the circumstances and in the value of the stock had intervened."

These authorities, however, are not in point, for the reason that the Legislature has prescribed the time within which a defective or irregular sale may be avoided. There is no more reason to deny effect to this than to any other statute of limitations. It confers a right or privilege upon the owner of the stock, and, it may be added, the purchaser at an irregular sale is presumed to take with knowledge of this right of the owner within six months to redeem his stock. There can be, therefore, nothing inequitable in the enforcement of the rule.

The purchaser knew that the defective or irregular sale was inoperative to confer an

indefeasible title to the stock as against the owner, who might make tender of the assessment and bring suit for its recovery within the time prescribed in section 347. Burham v. S. F. Fuse Mfg. Co., 76 Cal. 26, 17 Pac. 939.

Moreover, it would seem that the purchaser was himself guilty of some degree of laches, as he did not pay the note until about five months after the sale. If the property had depreciated in value, would he have paid his note at all? We do not know, but, at any rate, it is not unfair to assume that he was unwilling to pay it until assured that he would suffer no loss. Again, there is no evidence in the record that the property when redeemed was of any greater value than what was repaid by the owner. There is some assertion to the contrary in the brief of appellants, but the evidence does not disclose it. All that the record shows is that there was quite a sum of money to be distributed to the stockholders, but it is silent as to the amount to be appropriated to each share. Therefore we may assume that appellant Hunsaker lost nothing by the redemption, and, not being damaged, he is in no position to invoke the doctrine of estoppel; and, of course, it is no concern of the Power Company whether plaintiff was entitled to redeem.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

---

38 Cal. App. 388

## SMITH v. SMITH et al. (Civ. 1873.)

(District Court of Appeal, Third District, California. Oct. 7, 1918.)

1. PARENT AND CHILD ⟸11 — ACTION BETWEEN—PRESUMPTIONS.

The presumption specified by Code Civ. Proc. § 1963, subds. 7, 8, that money paid to one by another was due to the latter, and that a thing delivered by one to another belonged to the latter, applies where a child sues his parents for money turned over to them during his minority.

2. PLEADING ⟸434 — DEFECTIVE ANSWER — AIDER BY JUDGMENT.

In an action to recover money given to another, plaintiff alleging an express contract to return, an answer, after judgment, will be held sufficient, although it did not squarely meet the issue tendered by the complaint upon an implied promise to repay, where such issue was gone into fully on the trial.

3. PARENT AND CHILD ⟸11—MONEY PAID TO PARENT BY MINOR—PROMISE TO RETURN—SUFFICIENCY OF EVIDENCE.

In an action by child against parents to recover money paid to parents during minority, evidence *held* to sustain a finding that parents had not expressly or impliedly agreed to return the same.

4. PARENT AND CHILD ⟸11—EARNINGS OF CHILD—PRESUMPTION.

In an action by child against parents for return of money paid to parents while a minor, burden rested upon child to show that he was duly emancipated during the period of his minority, under Civ. Code, §§ 197, 211.

5. PARENT AND CHILD ⟸11 — ACTION BETWEEN—FINDINGS—EMANCIPATION.

In action by child to recover money paid to his parent during minority, a finding upon whether plaintiff was emancipated was not necessary to support a judgment for defendant, where there was no evidence tending to show emancipation, in view of Civ. Code, §§ 197, 211.

Appeal from Superior Court, Sacramento County; Chas. O. Busick, Judge.

Action by Clifford H. Smith against Albert W. Smith and another. Judgment for defendants, and plaintiff appeals. Affirmed.

E. B. Mering and M. J. Gillespie, both of San Francisco, and Eugene Aram, of Sacramento, for appellant.

Wachhorst & Wachhorst and Jay L. Henry, of Sacramento, for respondents.

HART, J. The plaintiff, who is the son of the defendants, brought this action for the purpose of recovering the sum of $5,600, alleged to have been turned over by him in small amounts from time to time during the period of his minority and for a period of time thereafter to the defendants.

The complaint alleges:

That "in the year 1906, the plaintiff * * * and the defendants * * * entered into an agreement wherein it was agreed between them that the plaintiff should engage in various occupations and that the wages and salary earned by him should be turned over to the defendants and should be by said defendants invested in the name of said defendants and said sums of money and the income therefrom should be safely kept and preserved by said defendants and all of said sums should be upon demand of the said plaintiff turned over to said plaintiff; that pursuant to said agreement said plaintiff engaged in various occupations, beginning with the year 1906, and continued in said occupations till the year 1913; that during said time all of the moneys earned by said plaintiff were turned over to said defendants; that pursuant to said agreement said defendants received all of said sums and agreed to hold said sums according to said agreement; that said defendants under said agreement received the sum of $5,600."

It is alleged that "within two years last past" the plaintiff demanded of the defendants the return of said moneys, together with the income derived therefrom, but that the latter refused and still refuse to turn over said moneys or any part thereof to plaintiff. It should, perhaps, be stated that, while the evidence shows that the plaintiff is the son of the defendants, the complaint does not disclose the relationship existing between the parties.

The defendants by their answer deny the making of any such agreement as is declared upon by the plaintiff, or that any agreement of any kind was entered into by and between the plaintiff and the defendants by or under which the latter ever received any money or moneys from the plaintiff to be by them invested for the plaintiff and to be returned to him upon his demand for the return thereof; deny that "pursuant to such or any agreement said plaintiff engaged in various or any occupations, beginning with the year 1906,

or at any other time, or at all, and continued or continued in said or any occupations until the year 1913, or any other time or at all; deny that during said or any time, or at all, all or any of the moneys earned by said plaintiff was turned over to said defendants, or either of them, pursuant to such or any agreement, and deny that said defendants, or either of them, received all of said or any sums, and agreed to hold said or any sums according to said or any agreement; deny that said defendants, or either of them, under said agreement, received from said plaintiff, or from any one in his behalf, the said sum of $5,600, or any sum or sums." It is then denied that any demand was made by the plaintiff upon the defendants for the return of any money or moneys alleged in the complaint to have been turned over by him under the agreement pleaded in his pleading, and then follow several special defenses, among which is that of the minority of the plaintiff during the greater portion of the period referred to in the complaint and the support of the plaintiff by the defendants during said period, and that the defendants were legally entitled to the former's earnings during his minority.

The court found that no such agreement as is set out in the complaint was ever made or entered into between the plaintiff and the defendants, and that the plaintiff never at any time turned over any money or moneys to the defendants under an agreement between the parties that such money or moneys, with the income therefrom, would, upon the demand of the plaintiff, be turned over to him by the defendants. The court further found that no demand was ever made by the plaintiff upon the defendants for the return of any money or moneys delivered by him into the possession of the defendants. But no finding was made upon the question whether the plaintiff, during his minority, was or was not emancipated from parental control by the defendants.

Judgment passed for the defendants, and this appeal is by the plaintiff from said judgment.

[1, 2] The proposition first invoked by the appellant is that the answer, although denying the making of the agreement pleaded by the plaintiff, is, nevertheless, pregnant with an admission by the defendants of the receipt of the wages or moneys earned by the plaintiff during the period of time mentioned in the complaint. This proposition is founded upon the denial that the defendants received such moneys or earnings "under such agreement"—that is, the agreement set out in the complaint—from which, it is said, the necessary implication is that they did, as a matter of fact, receive the earnings of the plaintiff and that they still retain the same, thus raising an implied agreement or promise on their part to return the same to the plaintiff.

It cannot be doubted that there is some force in the suggestion that the denials of the answer are of a character to warrant the inference that the plaintiff did turn over to the defendants, and that the latter received and still retain, the earnings of the former acquired during the period of time mentioned in the complaint; but the answer directly and squarely denies that either under the agreement pleaded in the complaint or any agreement whatsoever the defendants promised to return to the plaintiff whatever of his earnings he might have turned over to the defendants, and we think this is sufficient to meet the question of fact submitted by the complaint that the defendants agreed to return to the plaintiff such of the latter's earnings as he might have delivered into the possession of the former. It does not necessarily follow, from the mere fact that a party has delivered money or property of any kind to another, that the latter has agreed to return the same to the former. Indeed, in the absence of any showing to the contrary, the presumption is that money paid by one to another was due to the latter and that a thing delivered by one to another belonged to the latter. Code Civ. Proc. § 1963, subds. 7 and 8.

But, even assuming that the answer is pregnant with an admission that the defendants received the earnings of the plaintiff during the period of time stated in the complaint, and that upon such admission at least an implied promise to return the same to the plaintiff arises, there is still another answer to the point thus made in the propositions that the case was tried, so far as plaintiff was concerned, entirely upon the theory that, as alleged in the complaint, there was an express agreement upon the part of the defendants to return such earnings to the plaintiff upon a demand by him for the same, and, so far as the defendants were concerned, upon the theory that no such agreement as is set out in the complaint was ever made or entered into between the parties, and that whatever of his earnings or moneys the plaintiff turned over to his parents were either so turned over under the legal right of the defendants to receive and retain such moneys of plaintiff as he acquired during his minority, or that the same, after having been received by the defendants, were returned to the plaintiff. It follows, therefore, that, notwithstanding the failure of the answer, if such failure there is, directly and squarely to meet the issue proposed by the complaint upon the question of the alleged indebtedness of the defendants to the plaintiff, the trial of that issue was, without objection, gone into as fully and effectually as though a proper joinder thereof had been effected by the pleadings. Noakes v. City of Los Angeles (Sup.) 175 Pac. 409; Boyle v. Coast Improvement Co., 27 Cal. App. 714, 151 Pac. 25; Slaughter v. Goldberg, Bower & Co., 26 Cal. App. 318, 147 Pac. 90.

[3] The next point urged is that the evi-

dence is insufficient to support the decision, but an examination of the evidence has readily convinced us that the point is without merit.

As above stated, the testimony discloses that the plaintiff is the son of the defendants, and, while, on his direct examination, he testified that for many years pending his minority and for a few years thereafter he was engaged in employments from which he derived during his minority small and after his majority larger earnings, which he immediately turned over to his parents, giving the details thereof from a bill of particulars which he had previously prepared and served on the defendants, he, however, on his cross-examination, gave testimony from which it is reasonably inferable that so much of his earnings as he derived during his minority were delivered to and received by the defendants under the authority of the latter to claim and receive the same by virtue of the provisions of section 197 of the Civil Code, although receiving some of them back, and so much thereof, if any, as he turned over to his parents after he attained his majority constituted a gift to the latter.

On direct, he testified, in substance, as follows:

"I was born August 20, 1890. I lived with my father and mother in Sacramento. I completed my studies in the grammar school; that was all the schooling I had. I quit school in June, 1906, when I was 16 years of age, and started to work in July. At that time I had a conversation with my parents. I wanted to put my money in the bank. They said they were buying the home place and they would try—see a good chance to buy property where it would increase in value; if I would give them my money they would invest it. The money should be returned to me when I got married; they would see I had a home. I says that I wanted a little start when I got married. They told me not to worry about that; they each told me that. I worked first for J. N. Larkin, a printer. I answered an ad in the paper that Mr. Larkin wanted a boy to learn the pressman's trade. I went down and got the job. The arrangement was that I should start in for $3 a week and they would increase my wages. My wages were increased very rapidly. When I got paid, I took the money home and gave it to my mother; my father knew I was giving it to her. He said to take care of my money; they saved that, would take care of it for me. I quit working for Mr. Larkin May 30, 1912, and went to work for P. N. Schmidt."

A bill of particulars introduced in evidence showed that, up to August 20, 1911, when plaintiff became of age, he had received the sum of $3,585.24, and thereafter, until May 30, 1913, he received $1,381.08, a total of $4,966.32, which was turned over to his parents. The bill of particulars also contains items for painting buildings, carpenter work, etc., amounting to $445. Plaintiff testified that he milked two cows for his parents, took care of a horse, irrigated, gardened, and did all the general work around the property. Defendants were purchasing their home on installments. Witness said:

"In about 1911 I got rather discouraged. I wanted to put some money in the bank. They discouraged me, told me the property would increase in value; it would be more profitable to let them go on as they were than to put it in the bank. I left home about May, 1913. Before leaving, I asked my mother to return me my money. She said she would not, I was not to have anything back as—since I married the woman I did. I married in November, 1914. My father and mother were present at the time I made the demand. I was living in San Francisco, and came to Sacramento especially to see them. They both refused to give me the money."

On cross-examination, plaintiff testified that he boarded at home, that his clothing was furnished him by his parents, that they gave him some spending money, paid a doctor's bill for him, and gave him money for excursions; that on one occasion his mother sent him a check for $25, and that she purchased for him for $350 a printing business in San Francisco. He stated that he had never asked his mother for a loan, whereupon a portion of a letter written by him to her was shown him, which contained the statement:

"And I asked you for only a loan, to pay back every cent and interest, and I don't get it. It may be hard to get the money, but you could get it if you tried very hard, and I think I have been help enough, so you can do that much."

In explanation of the portion of the letter not produced, witness said:

"I went up there and told them I wanted to get $500. They told me that they were pretty—they had quite a bit of bills to pay, and they could not raise the money at that time, so they could not give it to me. So I told them, I says 'If you can borrow it, if you can't raise it, if you borrow it, I will pay you interest, so it don't go hard on you at this time.' That is, the first part of the letter goes on to tell about that. Q. You were going to borrow it from them, were you, from your parents? A. In the same words. * * * I told my mother that I always gave her money to save for me, to invest for me; naturally, I had some coming."

Other witnesses were introduced by the plaintiff to support his claim, but an analysis of their testimony will show that in effect it amounts to no more than this: That the mother of the plaintiff had frequently referred to their son as a "good boy," that he always gave her his wages, and that she and her husband, the father of plaintiff, intended to buy the latter a lot, or that everything they had would go to their two boys—the plaintiff and his brother. For instance, the plaintiff's witness, W. H. Larkin, for whom the plaintiff had worked as a printer during his minority, testified that the defendant Mrs. Smith had at one time said to him that "she had two boys, and that everything they had would go to them." Of course, such testimony has little force in proof of the alleged fact that the defendants agreed expressly or otherwise to return to the plaintiff the moneys he turned over to them. Particularly is this true in view of his admission that he boarded at home, that his parents provided him with all his clothing, paid his doctor's bill and gave him "spending money" and "money for excursions."

But, conceding that there was enough in the testimony of the plaintiff to warrant findings and judgment in his favor, still, on the other hand, the testimony of the defendants is amply sufficient to support the findings as made by the trial court.

The defendant Mrs. Jennie Smith, mother of the plaintiff, testified that she never had any conversation with the plaintiff when he first went to work, or at any other time, about his wages; that she never at any time entered into an agreement or understanding with the plaintiff that he was to turn over his wages to her, and that she would return the same to him upon his demand therefor, or when he was married; that the plaintiff generally did as he pleased with his wages, and gave her such portions thereof as pleased him; that she always placed the money so given her in the "bureau drawer"; that he was at liberty to take it out and use it whenever he pleased, and that he not only did take back the money he gave her, but that she often gave him more than he turned over to her; that he had never, until some time in the month of October, 1913, claimed that she had any money belonging to him. Mrs. Smith further testified that, after the plaintiff reached the age of 21 years, she never received a cent of his wages or money derived by him from any source. She said that the plaintiff asked her and her husband for the loan of $500 after he attained his majority, and that she told him that they did not have the money with which to make such loan. It was then for the first time that the plaintiff asked for a return to him of such moneys as he had turned over to the defendants during his minority.

The defendant Albert W. Smith corroborated the testimony of his wife in all substantial and vital particulars.

Ralph W. Smith, brother of the plaintiff, testified that he was present at a conversation between the plaintiff and his father and mother, on the 17th day of October, 1913, which was two years after the plaintiff had arrived at his majority, and that on that occasion the plaintiff besought his parents for a loan of a sum of money sufficient to start him in the printing business; that the plaintiff did not then say or claim that the defendants were indebted to him; that, on the contrary, his father in said conversation said to the plaintiff that he was under no obligation to him, whereupon the plaintiff replied:

"I know you are not, Pa, under no obligation to me; I only want it as a loan; I will pay it back as a loan."

It would, of course, be idle to argue that the foregoing testimony does not afford sufficient support to the decision that there was no agreement that the defendants would return such portions of the plaintiff's wages to him as he had turned over to the defendants, and that (as is at least to be implied from the findings) the plaintiff did not, after attaining his majority, deliver into the possession of the defendants any of his earnings, or any money whatsoever, or, if he did, that the same were intended as a gift.

But it is said that the court's failure to find whether the plaintiff was or was not emancipated by his parents during his minority is fatal to the judgment. Under the state of the record, as it is presented here, we do not think so.

[4, 5] The plaintiff, it appears, became of age on the 20th day of August, 1911; he having been born on the 20th day of August, 1890. He first started to work and to earn wages on a small scale in the year 1906, when he was but 16 years of age. All the earnings acquired by him in that period of time he claims to have turned over to his parents, the defendants here.

There is, under the law, no abstract or implied right in a minor to claim a return of earnings acquired by him and turned over to his parents during his minority. The plaintiff here was under the legal control of his parents, and they were entitled to his services and earnings during the whole of the period of his minority (Civ. Code, § 197), unless he was emancipated therefrom and so invested with the right to his own services and the fruits thereof by some legally recognized act of emancipation by the parents (Civ. Code, § 211). The burden rested upon the plaintiff in this case to show that he was duly emancipated by his parents during the period of his minority. There is no evidence, save possibly that of the plaintiff himself to the effect that his parents received the earnings he derived from his employments during his minority and agreed to return the same to him on his demand for a return thereof, tending in the slightest degree to show that the defendants relinquished their right of controlling the plaintiff and of receiving his earnings during his minority, and in the absence of such a showing the presumption is, we think, that no such relinquishment took place and that all of the plaintiff's earnings, acquired by him during his minority, legally belonged to his parents, the defendants herein.

Therefore the finding of the court that no such an agreement as is relied upon by the plaintiff was ever made or entered into by and between the parties to this action is itself conclusive against him upon the claim that he was or is entitled to a return of such moneys as he might have turned over to his parents during his minority. In other words, there having been introduced no testimony showing or tending to show that the defendants, while the plaintiff was still in his minority, relinquished their legal right to control him and to receive the benefit of his services and his earnings, there was no necessity for finding upon the question whether the plaintiff was or was not emancipated from the control of his parents by the act of the latter; the

presumption being, until the contrary is shown that there was no such emancipation and that the parents were legally entitled to claim, receive, and retain all the wages earned by him during his minority.

Among the specifications of error set forth by the plaintiff are these: (1) That there is no evidence to sustain the finding "that plaintiff did not engage in various occupations between 1906, and 1913; (2) that plaintiff did not turn over to defendants his wages; (3) that plaintiff did not demand the return of the wages."

It is argued in the briefs with much earnestness that the foregoing findings are absolutely without any support from the evidence. But there were no such findings, as the first and second, in the order in which they are above given, made by the court below. What the court did find was that the plaintiff did not enter upon various occupations under an agreement of any character with the defendants that the wages he derived from his employment should be turned over to the defendants and returned by them to him upon his demand for the same, and that defendants did not receive any of plaintiff's wages under any agreement to return the same to him. These findings fall far short of saying that the defendants under no circumstances received the wages earned by the plaintiff. As to the finding referred to above as the third specification of error, there is, as we have already shown, evidence to support it.

Several of the rulings of the court touching the admissibility of certain evidence are attacked. We have carefully examined and and considered the specifications thus relied upon and are not impressed with their importance. Conceding that some of them were, strictly speaking, erroneous, yet it is clear to our minds that the evidence thereby excluded or allowed, if opposite rulings thereon had been made, could not have exerted any material or important influence on the final result of the trial.

We think the judgment should be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

---

38 Cal. App. 405

KEOHANE v. KEOHANE et al. (Civ. 2538.)

(District Court of Appeal, First District, California. Oct. 10, 1918.)

1. DIVORCE ⟸275—LEGAL DIFFICULTIES.
Where husband, because he apprehended that wife was to sue for divorce, conveyed land to his brother to secure him in the repayment of moneys advanced by him, the conveyance was not fraudulent.

2. QUIETING TITLE ⟸51 — RELIEF — CONDITIONS PRECEDENT.
In an action by an administrator to quiet title to land which defendants claimed had been sold by plaintiff's intestate to their intestate, a decree for plaintiff on ground that deed was not delivered to defendants' intestate, and that plaintiff's intestate had regained title by adverse possession, should be made contingent upon repayment of money paid by defendants' intestate.

3. APPEAL AND ERROR ⟸1071(6)—PREJUDICIAL ERROR—FINDINGS.
In an action by an administrator to quiet title to land conveyed by deceased, a decree for plaintiff, based upon findings that deed was not delivered and that deceased had regained title by adverse possession, will be reversed, where there was no finding on issue of failure of consideration; there being evidence that deceased had been paid $1,000 on purchase price.

4. WITNESSES ⟸205—PRIVILEGE OF COMMUNICATION—ATTORNEY AND CLIENT.
An attorney may testify as to what was said by his client and by him to another concerning the purpose of a conveyance by the client to the other, the statements testified to have been made with the express intention that they be communicated to the grantee.

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Action by Patrick Keohane, as administrator of the estate of Batholomew Keohane, sometimes called Bart Keohane, deceased, against Bessie Keohane and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with directions.

Milton Newmark, of San Francisco, for appellants.

T. H. De Lap, of Richmond, and F. J. Kierce, of San Francisco (Walter Christie, of San Francisco, of counsel), for respondent.

LENNON, P. J. In an action brought by plaintiff, as administrator of the estate of a deceased grantor, against defendants, as heirs at law of a deceased grantee, to set aside a deed and to quiet title, judgment went in favor of the plaintiff. Defendants appeal from the judgment.

Bart Keohane, while vested with the title and in possession of certain real property, located at Stege, Cal., made, in 1908, a deed thereto in favor of his brother, John Keohane, who was then residing at San Francisco. John died intestate in 1913. Bart died intestate in 1915. Thereafter the administrator of the estate of Bart commenced the present action against the widow and minor children of John as his heirs at law to quiet title to said property. The complaint alleged nondelivery of the deed, lack of consideration, and title to the property by adverse possession, which allegations were denied in the answer. The trial court found in favor of the plaintiff on the issues of adverse possession and nondelivery of the deed, but failed to find on the issue of lack of consideration.

From the evidence it appears in part that in the month of June, 1908, Bart Keohane was apprehensive that his wife might institute a suit against him for divorce whch might involve the real property in controversy in the present action, and desiring to secure his brother, John, who had theretofore loaned him some money, from the possible

consequences of such litigation, Bart made the deed in question. Thereafter, and until the time of his death, he remained in possession of the property and conducted a business thereon. A few months after the purported deed was made, Bart borrowed the sum of $1,800 and gave therefor his promissory note secured by a mortgage on this property executed by himself and John and their respective wives. Bart repaid this loan with the interest thereon. He at all times paid the taxes levied upon the property, and also all premiums for fire insurance thereon. After making the deed above mentioned, he caused extensive improvements to be made to the property, and alterations thereto, and paid the entire cost thereof.

The contention of the defendants in the court below was that John Keohane, through whom they claim, bought this property from Bart, paying therefor the sum of $1,000; and their principal contention upon this appeal is that the court erred in failing to find upon the issue of consideration for the deed thus made. They also contend that, if the court should find against this defense, then the evidence shows that the conveyance was made for the purpose of defeating the rights of the grantor's wife, and that therefore the court, as a court of equity, will not lend its aid to the plaintiff to quiet the title of the estate represented by him.

[1] Dealing with the last point first, the evidence is, not to the effect claimed by appellants, but only goes so far as to show that the legal difficulties apprehended by the grantor were merely the occasion of his doing what in any event he had the right and even the duty to do, namely, secure his brother in the repayment of moneys advanced by him. In saying this we do not mean to intimate that the evidence establishes that Bart Keohane was in fact indebted to his brother; but the evidence of this indebtedness came from the same witness who testified as to the anticipated legal difficulties which threatened to arise between Bart Keohane and his wife, and stands on the same plane of credibility. The evidence therefore, not establishing that the conveyance was fraudulent, the court was not required upon this ground to deny to the plaintiff the relief sought.

[2, 3] We are, however, clearly of the opinion that the court below should have found on the issue of consideration made by the pleadings; for, if John Keohane in fact paid to Bart the sum of $1,000 for a conveyance of this property, then notwithstanding the other findings in favor of the plaintiff, to the effect that the deed was not delivered, and that the plaintiff's intestate had regained title by adverse possession, the plaintiff would not be entitled to a decree quieting title unless the court should also find that this sum of $1,000 had been repaid, or, if not repaid, the decree quieting title should be made contingent upon its repayment. "A party seeking to quiet his title to the realty or remove a cloud thereon will as a condition precedent to the relief be compelled to do equity." 32 Cyc. 1379, citing among other cases Tripp v. Duane, 74 Cal. 85, 15 Pac. 439. "A court of equity setting aside a judicial sale under a void execution as a cloud on title should decree that the purchase money be refunded." 32 Cyc. 1383. And the doctrine is also well established that failure to find upon a material issue is under certain circumstances ground for reversal. Math v. Crescent Hill Gold Mines Co., 31 Cal. App. 636, 161 Pac. 140.

[4] There is no merit in the point that the court committed error in allowing Bart Keohane's attorney to testify as to what was said by his client to him, and by him to John Keohane, concerning the purpose of the conveyance. It appears in the record that all that Bart told the attorney was told him with the express intention that it be communicated to John so that the latter might know why the deed was being executed, and was, therefore, not privileged. Ferguson v. McBean, 91 Cal. 63, 27 Pac. 518, 14 L. R. A. 65; 40 Cyc. 2363, 2375. An attorney who acts as a conduit through which a conveyance is made may testify as to the circumstances attending its execution. Foster v. Wilkinson, 37 Hun, 242; Rosseau v. Bleau, 131 N. Y. 183, 30 N. E. 52, 27 Am. St. Rep. 578.

For the reasons given, the judgment is reversed, and the cause remanded to the trial court for the purpose of finding upon the issue of consideration, and thereupon to enter its judgment upon the findings as they shall then stand.

We concur: BEASLY, Judge pro tem.; STURTEVANT, Judge pro tem.

179 Cal. 288

STEDMAN v. STEDMAN. (L. A. 4459.)

(Supreme Court of California. Nov. 19, 1918.)

1. DIVORCE ⊜184(7)—QUESTIONS FOR COURT —CREDIBILITY OF WITNESSES.

A trial court in a divorce action is the exclusive judge of the credibility of witnesses and is no more required to believe two witnesses than one.

2. EVIDENCE ⊜75 — SUPPRESSION OF EVIDENCE—PRESUMPTIONS.

In a divorce suit where the corroboration of the parties, who were both willing that a decree be entered, was weak, and it appeared that stronger evidence was possible, the court was bound to presume that such evidence would be unfavorable and was for that reason suppressed in view of Code Civ. Proc. § 1963, subds. 5, 6, and section 2061, subds. 6, 7, relating to presumptions and weight of evidence.

Department 2.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by John C. Stedman against Lillie Stedman for divorce. From a judgment denying divorce after default, plaintiff appeals. Affirmed.

Wm. T. Blakely, of Los Angeles, for appellant.

Respondent in pro. per.

WILBUR, J. Plaintiff appeals from a judgment denying him a divorce after default of the defendant. Respondent files no brief. The complaint charges desertion after 40 years of married life, and the defendant, appearing as a witness in pursuance of a rule of court requiring her to be subpœnaed, testified circumstantially to her desertion of the plaintiff; that on January 24, 1914, she had left the house and had taken a large part of the furniture; that she intended to desert the plaintiff; and that she desired that plaintiff be granted a decree. The plaintiff also testified to the circumstances of the separation. Both witnesses, if believed, established desertion. The testimony of both, however, was insufficient without corroboration to entitle the plaintiff to a decree. Civ. Code, § 130. Three witnesses were called by the plaintiff in corroboration, and one testified that he called at plaintiff's house two days after

the alleged desertion and that it looked "pretty vacant." A neighbor testified that he saw defendant moving some furniture out of the house. A son of the parties testified that, in response to a telephone from a neighbor, he went to the home of plaintiff and found him alone and ill, the house scantily furnished; that he took his father, the plaintiff, home with him; and that the plaintiff and defendant had not lived together from that time (more that a year before the complaint was filed). It appeared from the testimony of the plaintiff that the youngest son and the daughter of the parties were living in the house at the time of the separation, were present at the time of the separation, heard what transpired between them, and went away with the defendant. It further appears from the transcript that another divorce action had been tried between the same parties, before the judge who tried this action, and that a decree had been denied two days before the alleged desertion upon which this complaint was based. The files in the former suit were introduced in evidence, but are not set forth in the clerk's transcript as required by law. Findings of fact were filed by the court, deciding that defendant did not desert or abandon the plaintiff without fault on his part or at all. "On the contrary, he did not want to live with her any more than she wanted to live with him." According to the transcript, at the close of the case the judge said:

"I do not think the evidence is sufficient here to warrant a decree. In the first place, the circumstances are not shown, and the only two witnesses who could tell anything are not here. It is easy enough to get them here, and they are not brought. It was a simple fact about the way the people lived before there was a suit pending and both of them hung onto the same house and both of them wanted to live in the same house, although they were fighting and scrapping at (all) the time, and the situation was such that she would not speak to him. Now, I passed on that, and decided in that other case that up to that time there was no desertion, and I do not think the fact that people have been living the way they lived, occupying separate parts of the house, proves desertion."

Notwithstanding the statement of the court that he was influenced in his decision by the failure to produce the evidence of two witnesses to the separation whose attendance could be readily secured, and the other witnesses testified to the mere fact of separation, no offer was made to secure the attendance of such witnesses.

This case illustrates the difficulty presented by our present divorce laws, which throw upon the trial court the duty of protecting the public interest by preventing divorce and also the duty of weighing the testimony as a judge. The whole matrimonial difficulties of this couple, who should have been celebrating the fortieth anniversary of their wedding instead of seeking a divorce, had been tried out in an adversary proceeding, but two days before this alleged desertion occurred, and the same judge is now confronted by the parties seeking a new divorce on a new ground.

[1, 2] Unless we are prepared to hold that testimony barely sufficient, when taken at its face value, requires the court, in the absence of conflicting testimony, to grant a divorce, the judgment must be affirmed. The trial court is the exclusive judge of the credibility of witnesses, and is no more required to believe two witnesses than one, and we are to assume that the court did disbelieve these witnesses, particularly in view of the fact that their testimony alone is made by law insufficient, and weak corroboration was offered where stronger evidence was possible. The court was bound to presume under the circumstances that their testimony would be unfavorable and was for that reason suppressed. Code Civ. Proc. § 1963, subds. 5 and 6; section 2061, subds. 6 and 7.

Judgment affirmed.

We concur: MELVIN, J.; LORIGAN, J.

---

179 Cal. 263

## FOSTLER et al. v. CITY OF LOS ANGELES et al. (L. A. 4535.)

(Supreme Court of California. Nov. 18, 1918.)

1. MUNICIPAL CORPORATIONS ⇐34—ANNEXATION OF TERRITORY—NOTICE OF ELECTION.
Publication of notice on May 2d, 9th, 16th, 23d, and 29th complied with statute relating to annexations of territory to cities, which provides that notice of election be published "at least once a week for a period of four successive weeks next preceding the date upon which the election is to be held."

2. MUNICIPAL CORPORATIONS ⇐34—ANNEXATION OF TERRITORY—NOTICE OF ELECTION—LISTING OF BONDS ASSUMED.
A notice of election by a municipal corporation on the question of annexation of territory, in listing bonds to be assumed by the voters in the annexed territory, need not state the nature and purposes of the bonds in detail, and a list, "Waterworks bonds issued 1905; waterworks bonds authorized June 12, 1907, in the sum of $23,000,000," etc., was sufficient.

Department 2.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Jacob J. Fostler and another against the City of Los Angeles, a municipal corporation, and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Ward Chapman and Hickcox & Crenshaw, all of Los Angeles, for appellants.

Albert Lee Stephens, City Atty., and Charles S. Burnell, Asst. City Atty., both of Los Angeles, for respondents.

WILBUR, J. [1] This is an appeal by the plaintiffs from a judgment on demurrer denying an injunction claimed by the plaintiffs

to restrain the defendants from levying taxes and exercising jurisdiction within the certain annexed territory known as the Palms. The action was based upon alleged irregularities in the election. The statute under which the annexation election was held required that the notice should be published "at least once a week for a period of four successive weeks next preceding the date upon which the election is to be held." The notice was published May 2d, 9th, 16th, 23d, and 29th. The election was held June 1st. The notice was published once a week for five weeks, and the last date of publication was within one week of the date of the election. This was sufficient. The case of Williams v. Sacramento County, 58 Cal. 237, decides nothing to the contrary. That case was construed upon section 3447 of the Political Code requiring that a similar notice "be published for four weeks next preceding the hearing thereof." There notice was published May 12th, 13th, 15th, 19th, 20th, 22d, 23d, 26th, 27th and 28th, and June 4th and 12th. The hearing was June 17th. The court there stated that there were two intervals of more than seven consecutive days in the four weeks next preceding the day of the hearing in which there was no publication of the petition, referring, perhaps, to the intervals between May 27th and June 4th and between June 4th and 12th. It is perhaps assumed in that case that the publication should have begun on the 20th, thus the next weekly publication is the 27th, and the next should have been the 3d, and the next the 10th of June, the seventh day before the hearing. It is, however, immaterial how the court there arrived at its conclusion that there were two intervals of eight days. On any theory, there was an eight-day interval from the 4th to the 12th days of June.

[2] It is next contended that the notice failed to set out with sufficient detail the purpose of the various bonds issued which were to be assumed by the voters in the annexed territory. The reference thereto is contained in the notice and in the figures following, to wit:

"Waterworks bonds issued 1905.

"Waterworks bonds authorized June 12, 1907, in the sum of $23,000,000.

"Electric plant bonds issued in 1912 for $3,500,000.

"Harbor improvement bonds issued 1910, for the sum of $3,000,000.

"Waterworks bonds authorized April 15, 1913, for $1,500,000.

"Harbor improvement bonds in the sum of $2,500,000, authorized April 15, 1913."

The purpose of this statute requiring such a vote was to put plainly before the voters of the district the amount of obligations which would be assumed by them in coming into the municipality.

It is not necessary to state the nature and purposes of the bonds with the details which might have been required in an election upon the question of the issuance of the bonds. The notice is, therefore, sufficient.

Respondents claim that the demurrer to the complaint should have been sustained for the reason that the proper way to test the validity of an annexation election and circumstances detailed where an election has been held and the results so ascertained as to constitute the annexed territory as part of the city is by quo warranto.

In view of the fact that the complaint is without merit, it is unnecessary to determine that question.

Judgment affirmed.

We concur: MELVIN, J.; LORIGAN, J.

---

179 Cal. 275

TADGE v. BYRNES et al. (L. A. 4514.)

(Supreme Court of California. Nov. 19, 1918.)

ATTORNEY AND CLIENT ⊂=16—PRIVILEGE FROM SERVICE OF PROCESS—ATTENDANCE AT COURT.

A nonresident attorney within the state for the purpose of advising and assisting in the trial of an action therein, in which he is not an attorney of record, is not exempt from service of civil process.

Department 2.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Henry Tadge against Edward Byrnes, impleaded with others. From an order refusing to quash service of summons on defendant Byrnes, he appeals. Affirmed.

Waldo, Root & Dysert, of Los Angeles, for appellant.

Frank Birkhauser, of Brawley, for respondent.

WILBUR, J. This is an appeal from an order of the superior court refusing to quash the service of summons upon defendant Edward Byrnes. The motion to quash was based upon the proposition that the defendant Edward Byrnes was in California for the purpose of assisting as an attorney at law in connection with two cases then pending in the United States District Court for the Southern District of California, Southern Division. It is not alleged or claimed that defendant Byrnes was an attorney of record in the cases pending in the United States District Court, or entitled to practice, in that court, but he alleges in his affidavit that he came from his home and residence in the city of Chicago, Ill., to the city of Los Angeles for the sole purpose of assisting as counsel in the preparation for argument of numerous demurrers and motions to strike out parts of the complaints in the said two actions and for the purpose of attending before Hon. Benjamin F. Bledsoe, one of the judges of the said court upon the argument of said various motions and demurrers, which after several adjournments were set for hear-

ing on Monday, the 24th day of May, 1915; that on the 22d day of May, 1915, while said Edward Byrnes was temporarily sojourning in the city of Los Angeles for the sole purpose of assisting in the preparation and the argument of said motion and demurrers on the part of the plaintiff, said Edward Byrnes was served with a summons to appear and answer the complaint in this action. It is true there are cases holding that attorneys coming into a jurisdiction for the sole purpose of appearing in court to represent their clients are exempt from the service of civil process while so engaged, and there are cases holding quite to the contrary. There are none, so far as called to our attention or discovered by investigation, going so far as to hold that an attorney who is not an attorney of record and does not become such is entitled to such privilege.

In view of the situation presented by the affidavits in this case we find it unnecessary to determine the right of an attorney of record to protection from the service of civil process.

Order affirmed.

We concur: MELVIN, J.; LORIGAN, J.

---

(179 Cal. 298)

## LINDLEY et ux. v. KNOWLTON.
(L. A. 4442.)

(Supreme Court of California. Nov. 19, 1918.)

1. TRIAL ⊜260(8)—INSTRUCTIONS—REFUSAL OF REQUESTS.
In action for damages, when plaintiff's wife and children were attacked by escaped chimpanzee, where court instructed that plaintiff could recover if the attack was the proximate cause of the wife's ill health, and that the jury should consider the wife's previous physical condition, refusal of requested instructions that no recovery could be had unless the fright was accompanied by personal and bodily injury, which must be physiological, and that no recovery could be had for fright produced by apprehended danger to the children, was not erroneous.

2. DAMAGES ⊜52—FRIGHT—CHIMPANZEE—FEAR FOR CHILDREN.
Where action for damages by attack of chimpanzee was based on theory that plaintiff's wife suffered personal physical disorders, proximately arising from the attack, plaintiff could recover, though the injury and the fright were not concurrent, but the physical ill-effect followed the fright.

3. DAMAGES ⊜216(4) — INSTRUCTIONS — FRIGHT—CHIMPANZEE—FEAR FOR CHILDREN.
Where plaintiff's wife and two children were attacked by escaped chimpanzee, and the wife fought the beast off, and the complaint was drawn on the theory of both fright and personal injuries, it was fairly inferable that the wife had fear for herself, as well as for the children, so that refusal of instructions that there could be no recovery for fear of injury to a third person was not erroneous.

Department 2.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by O. P. Lindley and wife against E. W. Knowlton. Judgment for plaintiffs, and defendant appeals. Affirmed.

Frank H. Snyder, Whitney E. Smith, and Arthur M. Hadley, all of Los Angeles, for appellant.

Gordon Boller, W. N. Goodwin, and Hunsaker & Britt, all of Los Angeles, for respondents.

MELVIN, J. O. P. Lindley and his wife, Lillian S. Lindley, sued defendant for damages on account of personal injuries, alleged to have been sustained by Mrs. Lindley because of fright occasioned by the appearance and acts of a chimpanzee owned by Knowlton. The complaint contained allegations that the animal was so negligently kept by defendant that it escaped from restraint and entered the dwelling house of plaintiffs, where Mrs. Lindley and her two little children were at the time; that it attacked the two children successively, choking one of them severely; that the mother successfully, though with great effort, contended with the chimpanzee, rescuing her children from it, although the beast weighed about 165 pounds; and that in consequence of the said animal entering the house and seizing the children Mrs. Lindley was greatly frightened, shocked, and made sick in body and mind. It was averred that as a consequence her nervous system was disordered; she was rendered hysterical and caused to suffer pain and mental anguish; and that she was confined to her bed for many months as a result of the permanent injuries to her physical health and mind and nervous system. The proof offered tended to sustain these allegations. A verdict was given in favor of plaintiffs for $2,000, judgment was entered accordingly, and defendant appeals from said judgment.

Appellant contends that the court erred in refusing to give certain instructions involving the following propositions: (1) No recovery may be had unless the fright occasioned by defendant was accompanied by some personal and bodily injury; (2) the injury must be a physiological one; and (3) no recovery may be had on account of fright produced by apprehended danger or peril to a third person.

[1] The court did tell the jurors that no verdict might be given for plaintiffs unless Mrs. Lindley received injuries which were the natural consequences of fright caused as alleged in the complaint. They were told that unless the evidence showed, by a preponderance thereof, that the occurrence recited in the complaint had taken place and was "the efficient, proximate, and producing cause of the injuries complained of or of the conditions of ill health, if any, on the part of the plaintiff, Lillian S. Lindley, or some of said conditions or injuries," their verdict must be for the defendant. Another instruc-

tion was to the effect that they might consider Mrs. Lindley's previous physical condition in determining whether the results of which she complained were or were not the consequences of general ill health. The instructions were full and fair, and the refusal to give those offered by defendant was not error.

[2] Conceding the full force of appellant's first contention that no damages may be given for mere fright, we are of the opinion that the court sufficiently covered this matter in the instructions to which we have alluded. The complaint was not drawn upon the theory that the lady had merely suffered the mental discomfort of fear, but was based upon a claim of damages for permanent, physical disorders proximately arising from the occurrences set forth in the pleading; and the court carefully instructed the jury that no verdict for plaintiffs should be returned unless under the issues of the case both the fright and the alleged physical consequences thereof were proven by a preponderance of the evidence. The law upon the subject of fright and its consequences has been long settled in California, and settled in a way which disposes of appellant's contention that the physical injury for which damages may be given must accompany the fright. In Sloane v. Southern California Ry. Co., 111 Cal. 668, in the opinion prepared by Mr. Justice Harrison, quotation is made (page 681, 44 Pac. 320, 32 L. R. A. 193) from Bell v. Great Northern Ry. Co., L. R. 26 Ir. 428, a case in which the contention was made that the jury should be told that unless fright was accompanied by physical injury, even though there might be nervous shock occasioned by the fright, such damages would be too remote. The quotation adopted by this court from the opinion in the Bell Case was as follows:

"It is admitted that as the negligence caused fright, if the fright contemporaneously caused physical injury, the damage would not be too remote. The distinction insisted upon is one of time only. The proposition is that, although, if an act of negligence produces such an effect upon particular structures of the body as at the moment to afford palpable evidence of physical injury, the relation of proximate cause and effect exists between such negligence and the injury, yet such relation cannot in law exist in the case of a similar act producing upon the same structures an effect which, at a subsequent time—say a week, a fortnight, or a month—must result without any intervening cause in the same physical injury. As well might it be said that a death caused by poison is not to be attributed to the person who administered it, because the mortal effect is not produced contemporaneously with its administration."

And the whole matter is admirably epitomized in the language of Mr. Justice Harrison in the Sloane Case:

"Whatever may be the influence by which the nervous system is affected, its action under that influence is entirely distinct from the mental process which is set in motion by the brain. The nerves and nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and destroyed from causes primarily acting upon the mind. If these nerves or the entire nervous system is thus affected, there is a physical injury thereby produced, and, if the primal cause of this injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect through some action upon the mind."

The rule which appellant seeks to invoke is only applicable in cases in which fright alone is made the gravamen of action. Easton v. United Trade School Contracting Co., 173 Cal. 199, 159 Pac. 597, L. R. A. 1917A, 394. In the case at bar physical detriment was pleaded and there was evidence tending strongly to sustain the allegations of the complaint.

[3] The above quoted and cited authorities fully uphold the action of the court in refusing to give the proffered instructions in two of the classes indicated by defendant. It remains for us to examine the contention that the court should have informed the jury that no recovery may be had on account of fright produced by apprehended danger or peril to a third person. Appellant insists that the authorities are uniform in upholding this rule. But there is excellent authority to the contrary. Hill v. Kimball, 76 Tex. 210. 13 S. W. 59, 7 L. R. A. 618; Wilkinson v. Downton, L. R. 1897, 2 Q. B. 57; Cohn v. Ansonia Realty Co., 162 App. Div. 791, 148 N. Y. Supp. 39. It is not necessary, however, to discuss any conflict of authority on this subject, because in this case, as in Easton v. United Trade School Contracting Co., supra, fear for another was not the only cause of injury. While, of course, Mrs. Lindley was greatly and perhaps chiefly concerned for her children, for whom she fought so valiantly and successfully, there is nothing in the testimony to indicate that she was not concerned for her own safety. All of the circumstances connected with the unexpected appearance of the animal, its attacks upon her children, and her own conflict with the chimpanzee, make it impossible that she should have been devoid of fear for herself. Therefore, under the authority last cited, the court was fully justified in refusing to give the requested instruction on the subject of fears for another person.

No other questions are discussed in the brief of appellant, and we find no others in the record meriting analysis.

The judgment is affirmed.

We concur: WILBUR, J.; LORIGAN, J.

(179 Cal. 266)

## FRIEDMAN et al. v. SOUTHERN CALIFORNIA TRUST CO. et al.
(L. A. No. 4571.)

(Supreme Court of California. Nov. 18, 1918.)

1. APPEAL AND ERROR ⟸2—ORDERS APPEALABLE—DENIAL OF NEW TRIAL—STATUTES.
In view of Code Civ. Proc. § 963, amended 1915, where the notice of appeal from an order denying new trial was not filed until the law permitting such appeals was no longer in effect, the appeal must be dismissed.

2. BOUNDARIES ⟸37(5)—EVIDENCE—SUFFICIENCY—AGREEMENT.
Evidence *held* to warrant the finding that defendant did not believe the dividing line between land defendant bought and plaintiff's land was irregular, embracing the tract in question, where defendant's deed called for a straight line.

3. BOUNDARIES ⟸47(2)—EVIDENCE—ESTOPPEL—MISTAKE IN POINTING OUT BOUNDARY.
The party asserting an estoppel to deny boundaries as pointed out by vendor must have been deceived by and relied upon the representation.

4. BOUNDARIES ⟸46(1)—ESTABLISHMENTS—AGREED BOUNDARIES—APPLICABILITY.
The doctrine of agreed boundaries can be invoked only where adjoining owners, uncertain of the actual position of the boundary described in their deeds, agree upon its true location, and is inapplicable, where the court finds a party claiming such agreement did not rely thereon.

5. ADVERSE POSSESSION ⟸86—PAYMENT OF TAXES.
Where defendant claimed land beyond the boundary in his deed by adverse possession, but paid taxes only upon that described in the deed, the claim of adverse possession *held* ineffectual.

6. EJECTMENT ⟸64—PLEADING—COMPLAINT—DESCRIPTION OF LAND.
Under Code Civ. Proc. § 455, the complaint and findings in an action to recover possession of land should so describe the land in possession of defendant as to enable an officer, upon execution, to identify it.

7. APPEAL AND ERROR ⟸1170(3, 10)—REVERSAL—LACK OF PREJUDICE—PLEADING AND FINDINGS.
Where complaint and findings in action to recover land were defective, in not describing the part in defendant's possession, and defendant asserted a right to the whole disputed tract, the right to which was adjudged to plaintiff, the defect must be disregarded, as not being prejudicial, in view of Code Civ. Proc. § 475, and Const. art. 6, § 4½.

Department One.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Libby Friedman and husband against the Southern California Trust Company, a corporation, and others. From a judgment for plaintiffs, and the denial of a motion for a new trial, defendants appeal. Appeal from order denying new trial dismissed. Judgment affirmed.

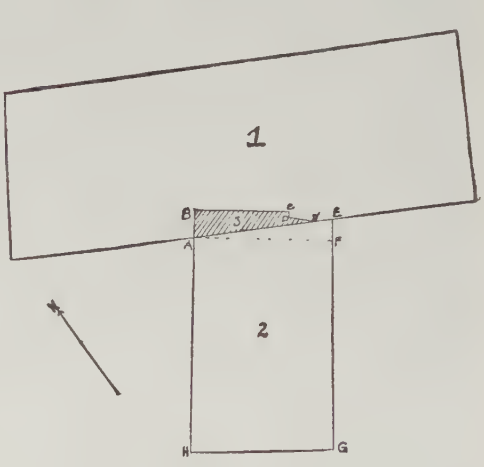
Wheeler & Sweet, of Los Angeles (Henry O. Wackerbarth, of Los Angeles, of counsel), for appellants.

Edwin A. Meserve and Shirley E. Meserve, both of Los Angeles (J. D. Taggart, of Los Angeles, of counsel), for respondents.

SLOSS, J. [1] Action to recover possession of a parcel of land in the city of Los Angeles, with damages for its withholding. The plaintiffs had judgment for restitution of the premises, without damages. The defendants appeal from the judgment. They also attempt to present an appeal from the order denying their motion for a new trial; but, when their notice was filed, the law no longer permitted appeals from such orders. Code Civ. Proc. § 963, amended 1915.

The plaintiffs are husband and wife. The wife (Libby) is the sole party in interest, and we shall refer to her as "the plaintiff" or "the respondent." So, too, Southern California Trust Company may be designated as "the defendant" or "the appellant," since all other defendants and appellants claim merely as its tenants.

The plaintiff and the defendant are owners of adjacent parcels of land. The location of their holdings and of the land in controversy may be illustrated by the following diagram, which reproduces in a rough way, but with sufficient accuracy for our purpose, a plat offered in evidence:




Plaintiff is the owner of tract 1; defendant, of tract 2. The land in dispute is tract 3, represented on the diagram by shading, and inclosed by lines connecting the points A, B, C, D, and D'. All of the land shown belonged at one time to I. I. Dehail, and passed from him by mesne conveyances to S. S. Federman. Federman conveyed parcel 2 to A. J. Brown, who subsequently conveyed it to the defendant. The plaintiff was the wife of Federman, and, upon his death, succeeded to his title to parcel 1, which was, in due course, distributed to her. The deed from Federman to Brown, and that from Brown to the defendant, described parcel 2 so as to make its northerly boundary the line A, E. The description in these deeds did not include any part of tract 3, all of which is embraced within the boundaries of tract 1,

retained by Federman and passing from him to his widow, the plaintiff. The plaintiffs, accordingly, had a clear record title to the land here in controversy.

Conceding this, the defendant asserts ownership of the disputed premises by adverse possession, by estoppel, and by virtue of the doctrine of agreed boundary. These claims may be considered together, as all three rest upon the same state of facts, shown or claimed to have been shown by the defendant.

On its southerly line (H, G), tract 2 fronts on First street. That tract is occupied by a brick building, which covers the entire width of the parcel from its street frontage to the dotted line (A, F). Attached to the rear of this structure is a wooden porch with stairways, which covers the part of the lot not covered by the brick building, and extends, so far, at least, as the stairways are concerned, over a part of tract 3, to the line D, D'. A high board fence had been built along the lines A, B, C. The line C, D runs along the easterly side of an oil tank, which lay within the corner C. The space back of the building, thus inclosed by the fence and the tank, was floored with brick or cement, and in it there stood a toilet, which was used (but probably not to the exclusion of those in possession of tract 1) by the tenants occupying the brick building. These conditions had existed from the time of Dehail's ownership of the entire property, and continued at the time this action was tried. The defendant claims, and alleged by answer and cross-complaint, that when Federman sold tract 2 to Brown he represented to his grantee that the fence line (A, B, C) marked the boundary line dividing tracts 1 and 2; that Brown bought on the faith of this representation; that Brown in selling to the defendant had made the same statement; and that the defendant believed the fence to be the dividing line, and would not, except for such belief, have purchased the property. It was further alleged that the defendant had at all times occupied the disputed premises and paid all taxes assessed thereon.

The findings of the court were against these defenses. It was found that plaintiff was the owner and entitled to the possession of tract 1; that Federman did not, at the time he sold tract 2 to Brown, represent to said Brown that the board fence marked the boundary line between the property conveyed and that retained by Federman; that when Brown conveyed to the defendant he did not represent to said defendant that said board fence was on the dividing line between the parcels; and that it was not true that defendant believed that said fence was the division line between said parcels, and would not have purchased said property if it had not so believed. There is a further finding that the defendants have not, nor have any of them, since the date of the conveyance from Federman to Brown, paid all taxes which have been assessed upon said parcel 3.

[2] These findings are assailed as unsupported by the evidence. It is argued that evidence tending to show the making of the representations relied on by the defendants stands without contradiction in the record. On the other hand, the plaintiff contends that she introduced evidence which had the effect, at least, of raising a substantial conflict. A discussion of this point of difference would be of little importance, since we are satisfied that the evidence fully sustains a further finding which is fatal to the attempted defenses. This finding is the one which declares that the defendant, Southern California Trust Company, did not at the time of its purchase believe that the fence marked the division line between parcels 1 and 2. It is true that an officer of the defendant who represented it in the purchase, gave testimony to the effect that he did so believe, and that he would not have purchased the property unless he had so believed. The plaintiff was not in a position to offer evidence directly contradicting these declarations of the witness. But facts were shown which warranted the court in drawing the inference embodied in its finding. Thus it appeared that under the description of tract 2 in the deed from Brown to the defendant, together with the recorded map referred to in said deed, the northerly boundary of said tract was a straight line, something over 50 feet in length, running between points A and E, as shown on the foregoing diagram. If, as might reasonably be supposed, the defendant had knowledge of the description of the land which it was contracting to purchase, it was aware that the boundary line dividing its land from that of the plaintiff was a straight line, connecting the side lines of tract 2. But the line marked by the board fence and the oil tank, which it claims to have believed to be the boundary of its property, was not a straight line. It ran from B to C, a distance of some 35 feet, to the oil tank above mentioned, then turned southerly, at a right angle, a distance of several feet. This divergence from the line indicated by the deed was apparent upon a mere inspection of the premises. The court below was certainly justified in concluding that a purchaser could not have believed that a straight line of over 50 feet was marked on the ground by a line running straight for only 35 feet, then continuing for several feet in a jog or right angle, and finally ending quite a distance short of the apparent width of the lot. It must therefore be held that the evidence warranted the finding that the defendant did not believe the dividing line to be the line of the fence.

[3] If this finding be upheld, all of the defendant's claims must fall. That a grantor may be estopped from showing the true line of property conveyed by him, where he has

misled the grantee into the belief that the line is located elsewhere, is not to be questioned. 5 Cyc. 936; Rippey v. Harrison, 66 Wash. 109, 119 Pac. 178. But it is of the essence of an estoppel that the party asserting it shall have been deceived by and relied upon the representation. Boggs v. Merced M. Co., 14 Cal. 279, 367; Nilson v. Sarment, 153 Cal. 524, 531, 96 Pac. 315, 126 Am. St. Rep. 91.

[4] So, too, the fact, as found by the court, that the defendant did not believe the line of the fence to be the real boundary, is fatal to the application of the rule of agreed boundaries. That rule is a familiar one, and has been discussed by this court in a number of cases, of which we may cite a few: Sneed v. Osborn, 25 Cal. 619; Young v. Blakeman, 153 Cal. 477, 483, 95 Pac. 888; Price v. De Reyes, 161 Cal. 484, 119 Pac. 893; Grants Pass, etc., Co. v. Brown, 168 Cal. 456, 143 Pac. 754; Silva v. Azevedo, 173 Pac. 929. But the doctrine can be invoked only where adjoining owners, being uncertain of the actual position of the boundary described in their deeds, agree upon its true location. "A formal agreement to fix a boundary line is not valid, indeed is void, if the parties know, or one of them knows, that the agreed line is not the true line." Clapp v. Churchill, 164 Cal. 741, 745, 130 Pac. 1061, 1062. The validity of such an agreement rests upon the belief and understanding of both parties that they are establishing the true boundary line between their properties. Otherwise their agreement amounts simply to an attempt to convey real property without the formalities required by law for such a grant.

[5] The plea of adverse possession is ineffectual for the same reason. Concededly, the defendant paid no taxes except those assessed upon the land described by its deed. Its claim that by reason of the representations and agreements of the parties the description in the deed should be regarded as extending to the fence, is but an attempt, in another form, to invoke the rule of agreed boundaries, and this, as we have seen, cannot be done.

[6, 7] An attack made by the appellant upon one other finding requires brief notice. The description of plaintiff's property (tract 1), as it appears in the complaint, differs in phraseology from the description in the findings and judgment. The findings declare that the property therein described is the same property as that described in the plaintiff's complaint. The evidence fully supports this finding; indeed, the transcript shows that the identity of the two descriptions was virtually accepted by both parties as established at the trial.

In view of the conclusions already stated, a consideration of attacks made on other findings could have no material bearing upon the result.

The complaint and the findings are both open to criticism in that they declare that the defendants are in possession of "a part" of the property claimed (tract 3), without specifying the particular part so occupied. "In an action for the recovery of real property, it must be described in the complaint with such certainty as to enable an officer, upon execution, to identify it." Code Civ. Proc. § 455. But the defect was not one affecting the substantial rights of the parties. The defendant in its pleadings asserted a right to the possession of the whole tract in dispute. The record shows that the plaintiff was entitled to the entire parcel, and the judgment awarded it to her. No damages were allowed to the plaintiff. The defendant could not have been prejudiced in any way by the failure of the complaint or the findings to specify the exact land occupied. It was perfectly apparent at the trial that the matter to be litigated and adjudicated was the ownership and the right of possession of the whole of tract 3, and the defect in plaintiff's allegation and in the finding must, therefore, under section 475 of the Code of Civil Procedure, no less than under section 4½ of article 6 of the Constitution, be disregarded.

There are no other points requiring notice.

The appeal from the order denying a new trial is dismissed.

The judgment is affirmed.

We concur: RICHARDS, Judge pro tem.; VICTOR E. SHAW, Judge pro tem.

---

179 Cal. 277

## SECURITY INV. CO. v. GIFFORD et al.

(L. A. 4606.)

(Supreme Court of California. Nov. 19, 1918.)

1. VENUE ⟸52(3)—CHANGE OF VENUE—CONVENIENCE OF WITNESSES—EXPERTS.
The convenience of experts should not be considered in determining the question of convenience of witnesses upon application for change of venue, except where the experts have a personal knowledge of the facts upon which their testimony is to be based.

2. VENUE ⟸52(2)—CHANGE OF VENUE—CONVENIENCE OF WITNESSES—EMPLOYÉ.
The convenience of a party's employés should have no consideration upon application for change of venue for convenience of witnesses.

3. VENUE ⟸52(1)—CHANGE OF VENUE—DISCRETION OF COURT—ABUSE OF DISCRETION.
The denial of change of venue from San Diego to Butte county, a distance of 659 miles (Pol. Code, §§ 154, 186), and a transfer to Fresno, 255 miles from Butte county (Pol. Code, §§ 154, 160), where eleven witnesses to relevant and material matters resided, who could not be compelled to attend (Code Civ. Proc. § 1986), thus compelling use of their depositions, while defendant's witnesses were employés or experts, *held* an abuse of discretion.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Department 2.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by the Security Investment Company against Charles M. Gifford and another, copartners doing business as C. M. Gifford & Son. From an order denying plaintiff's motion for change of venue to Butte county for convenience of witnesses, and transferring the case to Fresno county, it appeals. Reversed.

Brittain & Kuhl, of San Francisco, and Andrews & Wright, of San Diego, for appellant.

Eugene Daney and Fred O'Farrell, both of San Diego, for respondents.

WILBUR, J. [1-3] Plaintiff moved for a change of venue from San Diego county to Butte county on the ground of the convenience of witnesses. The court denied the motion and transferred the case to Fresno county. The distance from Butte county to San Diego is 659 miles. Pol. Code, §§ 154, 186. The distance from Butte county to Fresno is 255 miles. Pol. Code, §§ 154, 160. The question presented is whether or not the court abused its discretionary power in denying the motion. Clanton v. Ruffner, 78 Cal. 268, 20 Pac. 676. The controversy between the parties grows out of a contract entered into between them in August, 1910, whereby the defendants agreed to purchase the olives grown by the plaintiff upon its land located at Palermo, Butte county, Cal. The main question in the case is as to whether or not certain olives alleged to have been delivered by the plaintiff to the defendants were of such a quality as to require their acceptance by the defendants. A dispute also exists as to whether or not there was an actual delivery of olives under the contract. The parties in their briefs do not agree as to the proper construction of the pleadings as to the issues raised thereby. We do not undertake to determine that controversy, nor to critically analyze the pleadings and issues. We have, however, sufficiently stated the general nature of the controversy to show the character of evidence necessary to establish the contention of the parties. If the pleadings for any reason do not present the real controversy they can, of course, be amended to do so. Plaintiff, in its affidavit used on the motion, named eleven witnesses residing in Butte county, within five miles of Oroville, the county seat, whose testimony is deemed relevant and material. If the case is tried in either Fresno or San Diego county it will be necessary to take the depositions of these witnesses, as they cannot be compelled to attend upon the trial. Code Civ. Proc. § 1986. Plaintiff has demanded a jury and desires to present its witnesses before the jury. Defendants, in opposition to plaintiff's motion, filed an affidavit in which they name their witnesses and state the testimony expected from each. Eleven of these witnesses are expert witnesses, having no knowledge of the facts in the case. The only other witness of defendants residing in San Diego county is Mabel Spencer, an employé of defendants, who, it is said, will testify "as to all disputes between the parties." Neither the convenience of experts nor of employés should be considered in determining the question of the convenience of witnesses, except where the experts also have personal knowledge of the facts upon which their testimony is to be based. Bushnell v. Durant, 83 Hun. 32, 31 N. Y. Supp. 608; Quinn v. Brooklyn Heights R. Co., 88 App. Div. 57, 84 N. Y. Supp. 738; Groff v. Rome Metallic Bedstead Co., 98 App. Div. 152, 90 N. Y. Supp. 691. The effect of the order was to require the plaintiff to present its case to a jury by depositions, an expensive and unsatisfactory mode of trial, while Butte county was the place where most of the witnesses lived and the facts in controversy arose. Plaintiff's motion should have been granted.

Order reversed.

We concur: MELVIN, J.; LORIGAN, J.

---

179 Cal. 272

ROSE v. DE WITT et al. (L. A. 4546.)

(Supreme Court of California. Nov. 19, 1918.)

1. APPEAL AND ERROR ⟸837(1) — MATTERS REVIEWABLE—STATEMENTS OF JUDGE.

In an action for damages, statements by trial judge concerning his belief as to actual damage, made during progress of case, are of little or no value to the Supreme Court in determining whether his final conclusion as to the amount, as embodied in his findings and judgment, is correct.

2. DAMAGES ⟸130(4)—INADEQUATE DAMAGES—DISCRETION OF COURT.

Where some witnesses testified that the damage was $1,000 and others testified that there was no damage at all, award by the court of $200 was not inadequate.

Department 1.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Margarett R. Rose against C. F. De Witt and others. From a judgment for only part of the relief demanded, plaintiff appeals. Affirmed.

Jones & Evans and Shepard, Alm & Sevenson, all of Los Angeles, for appellant.

Edwin A. Meserve and Shirley E. Meserve, both of Los Angeles, for respondents.

RICHARDS, Judge pro tem. This is an appeal from a judgment in favor of the plaintiff, but for an amount less than that to which she deemed herself entitled. The plaintiff was the owner of lot 12, block D, of the Harvard Heights tract in the city of Los Angeles, upon which was a residence which

she occupied as her home. The defendant was the owner of lots 13 and 14 in the same tract, which immediately adjoined the said property of the plaintiff. There were certain building restrictions imposed upon the erection of structures in the tract which forbade the erection upon any of the lots within it of any structures other than first-class private residences of at least two stories in height, and which also provided that such residences should be located not less than 20 feet from the property line along the street. About two months before the commencement of this action the defendants commenced the erection of a flat building upon their said lots in alleged violation of these building restrictions as to the height and quality of the buildings, whereupon the plaintiff commenced this action, in which, in her original complaint, she sought to enjoin the further prosecution of work upon said building. She presently, however, filed an amended complaint, changing the nature of her action to one for damages for the alleged depreciation in value of her own property by reason of the erection of the defendants' said structure in violation of said building restriction, fixing her damage thereby at the sum of $1,000. The defendants, having by their answer already denied all of the averments of the plaintiff's original complaint, it was stipulated that their said answer should stand as a denial of the averments of her amended complaint. In their said answer, in addition to its denials, the defendants set up affirmatively that the plaintiff had herself violated the said building restrictions in respect to the distance which her own structure stood with relation to the property line; and they further averred that for a long time prior to the commencement of actual work in the construction of their said building the plaintiff had known what its character and outlines were to be, and had made no objection thereto, but, on the contrary, had by her acts and conduct led said defendants to believe that no objection would be made by her to said structure, and that, having stood by and seen the said defendants prepare for and begin the erection of their said building without objection, she was estopped to claim that it was in violation of said building restrictions, or that she or her property would be in any way injured or damaged thereby. The cause proceeded to trial upon the issues thus framed. Upon the question of the damage to the plaintiff's property the plaintiff and her witnesses testified that it would be damaged in the amount claimed. On the other hand, the defendants and their witnesses testified that no damage had been or would be sustained by plaintiff through the erection of the defendants' structure. The fact that said structure was in some respects in violation of the aforesaid building restrictions seems to have been established, but there was also some quite direct evidence that the plaintiff's building was, as to its distance from the property line, in violation of said restrictions. At the conclusion of the trial the trial judge made some remarks upon the state of the evidence as to these several matters, but later filed his findings and decision, in which he awarded the plaintiff damages in the sum of $200. Judgment was entered accordingly, and it is from this judgment that the plaintiff appeals.

[1, 2] Her sole contention is that too small an amount of damages has been awarded to her. In making this contention she relies mainly upon the remarks made by the court at the conclusion of the trial as indicating that he considered the amount of actual damage to her property to be much larger than that which he finally awarded to her. But statements by the trial judge of the character made during the progress of the case are of little or no value to this court in determining whether its final conclusion as embodied in its findings and judgment is correct. Upon the evidence in this case the court might well have found that the plaintiff had suffered no damage whatever, for it was so testified by several witnesses; or the court might have found that the plaintiff's damage amounted to the full sum of $1,000, which she claimed and to which certain of her witnesses had testified. Between these two limits the court had discretion, in view of the conflicting evidence, to determine as to the plaintiff's actual damage, and there is nothing before us to indicate that he abused that discretion. With his conclusions and judgment, therefore, we cannot interfere. It may be stated incidentally that the respondent has filed no brief upon this appeal, and that we have thus been without the aid to which we were entitled in the examination of the record upon appeal. Notwithstanding this, we have carefully examined the record before us, and have arrived at the conclusion that there is no merit in this appeal.

Judgment affirmed.

We concur: SLOSS, J.; VICTOR E. SHAW, Judge pro tem.

---

179 Cal. 262

## In re STREET'S ESTATE.

## STREET et al. v. UPTON.

(L. A. 5587.)

(Supreme Court of California. Nov. 18, 1918.)

WILLS ⊂=386—CONTEST—QUESTION OF FACT.

The question of undue influence in a will contest is peculiarly one of fact for the trial court.

Department 2.

Appeal from Superior Court, Los Angeles County; James C. Rivis, Judge.

Proceeding by Julia Street Upton against Webster E. Street and others to probate the

will of Mary E. Street, deceased. From an order dismissing the contest and probating the will, contestants appeal. Affirmed.

Bernard Potter, Lynden Bowring, and J. O. Downing, all of Los Angeles, for appellants.

N. P. Moerdyke, George R. Davis, and James E. Shelton, all of Los Angeles, for respondent.

WILBUR, J. This is an appeal from an order dismissing a will contest and probating a will. The will was contested upon the ground that the same was procured by undue influence. The court tried the case without a jury, and determined the issues adversely to the contestant, and found that there was no undue influence. Appellant attacks this finding, claiming that under the undisputed evidence there was a clear case of undue influence as a matter of law.

With this contention we cannot agree. The testatrix was of sound mind, and the question of whether or not the influence brought to bear upon her was so overpowering as to constitute undue influence was peculiarly a question of fact to be determined by the trial court. No case has been called to our attention in which the judgment of a trial court to the effect that there was no undue influence has been overturned by an appellate court upon the theory that undue influence was established as a matter of law. It is unnecessary to detail the evidence presented for our consideration. It is sufficient to say that there was abundant evidence to justify the conclusion of the trial court that at the time the will was executed the testatrix was not acting under the undue influence of the respondent Julia Street Upton.

Judgment affirmed.

We concur: MELVIN, J.; LORIGAN, J.

---

179 Cal. 279

SHUKEN et ux v. COHEN et al. (L. A. 4496.)

(Supreme Court of California. Nov. 19, 1918.)

1. APPEAL AND ERROR ⊂=193(1) — RESERVATION OF GROUNDS OF REVIEW—OBJECTION TO PLEADING.

Defendant, who did not demur to complaint, nor specify error on account of its supposed infirmity, is not in a position to set up an objection thereto on appeal.

2. PARTNERSHIP ⊂=311(5)—DISSOLUTION AND SETTLEMENT—RESCISSION—EFFECT.

Where partnership was dissolved before contract of settlement was made between former partners, transactions being distinct, rescission by one partner on ground of fraud in contract of settlement did not involve re-establishment of status quo of former partners as such.

3. PARTNERSHIP ⊂=344 — ACCOUNTING — ACTION—TIME FOR JUDGMENT.

Though in general judgment may not be entered in partner's suit for accounting until all assets have been marshaled to pay firm liabilities, where there are no liabilities to settle except as between partners, such course is not necessary, and personal judgment can be rendered against a partner before firm property has been sold and liabilities paid.

4. APPEAL AND ERROR ⊂=907(4)—PRESUMPTIONS FAVORING COURT BELOW—SUPPORT OF FINDINGS.

Where no evidence, except certain exhibits, appears in the transcript, Supreme Court must assume that all findings are supported by ample proof.

5. PARTNERSHIP ⊂=263—DISSOLUTION—RETIREMENT OR AGREEMENT—DIVISION OF ASSETS.

Dissolution of a partnership may be had by retirement of one of the partners, or by agreement of partners, without division of the assets or an arrangement therefor.

Department 2.

Appeal from Superior Court, Los Angeles County; H. D. Gregory, Judge.

Action by S. Shuken and wife against H. Cohen and the Traders' Bank of Los Angeles. From judgment for plaintiffs on their bill, and against defendant Cohen on his cross-complaint, the latter appeals. Affirmed.

Veitch & Richardson and Harry Ellis Dean, all of Los Angeles, for appellant.

Baird, Gerecht & Chambers, of Los Angeles, for respondents.

MELVIN, J. H. Cohen, one of the defendants, appeals from a judgment in favor of plaintiffs on their bill in equity, and against said Cohen on his action, by way of cross-complaint, for recovery on six promissory notes for $500 each. The other defendant made default; so the action as to the Traders' Bank of Los Angeles (a corporation) need not be considered herein.

The transcript consists of the judgment roll alone. There is no bill of exceptions, and it does not appear that any party demurred to any of the pleadings. Before judgment the plaintiffs were permitted to file certain amendments to their complaint to make it conform to the proofs. These amendments were duly noticed and served on appellant's attorneys, but no objection of any kind was made to them. The court found that in July, 1914, S. Shuken and H. Cohen entered into a copartnership, according to a written agreement, by which they were to carry on the business of buying, selling, and dealing in junk; that Shuken invested in the copartnership $7,458.13 and Cohen $1,588.76; that they continued the conduct of the business until December 23, 1914, when they mutually agreed to dissolve the partnership; that prior to the said date Cohen wrongfully took possession of certain books of account and papers belonging to the copartnership and wrongfully denied Shuken access to them until after December 29, 1914; that between December 23 and December 29, 1914, Cohen, personally and assisted by one Joe Margolis, represented to Shuken and his wife that said Shuken had stolen certain of the firm's moneys, and that Cohen and Margolis could prove that fact by the books

and papers in their possession, and that Shuken was guilty of a felony. It was also found that Cohen and Margolis demanded, then and there, that Shuken deliver to Cohen certain specified personal property used in the business and $4,000 in money, or that Shuken should retire from the copartnership, accepting as his share therein $4,000. It was also found that Cohen and Margolis threatened that if Shuken did not comply with their demand they would cause his arrest and imprisonment. According to the findings it appears that plaintiffs, defendant Cohen, Margolis, and one Lyons, are Russian Jews; that Shuken is not conversant with the English language and is ignorant of the laws of this state concerning crimes and their punishments; that Shuken's mental powers, owing to an injury to his head, had been impaired; that Margolis represented that he was about to be appointed to a position in the office of the district attorney, and would have great power and influence in prosecuting offenses; that said Lyons (who was a law student during a part of said period from December 23 to December 29, 1914) counseled and advised Cohen, and was present at some of the conversations between Shuken and Cohen and Margolis; that the Shukens had great confidence in Margolis and in his and Lyons' influence with the state and county officials; that S. Shuken was not guilty of any crime, but, by reason of the threats and statements of Cohen and Margolis, consented to the division of the copartnership property upon the demanded terms, and executed a certain writing and delivered to Cohen a team of horses, wagon, and harness, $500 in cash, one-half of the hay belonging to the copartnership, and signed and delivered seven promissory notes, each for $500, payable to Cohen. The court found that in parting with his property Shuken acted under the compulsion of menace and undue influence amounting to fraud upon him. The notes were put in the Traders' Bank (as the court finds), and one of them was paid early in 1915. There were also findings to the effect that on December 23, 1914, Shuken's total net investment in the copartnership was $5,358.13 (he having already been repaid $2,100), and Cohen's was $1,588.76, making the total investment at the time of the dissolution $6,946.89; the net assets were $6,859.77—showing a net loss of $87.12, of which $43.56 was chargeable to each partner. Accordingly it was found that at all times from December 23 to December 29, 1914, the partners were entitled upon dissolution of the copartnership to the following amounts: Cohen to $1,545.20, of which he has received $1,000 in cash, and horses, etc., worth $400, leaving a balance due him of $145.20. It was also found that since December 29, 1914, Shuken and Cohen have engaged separately in business, using a part of the property formerly belonging to the copartnership, and that by reason of these facts it was impossible to make an inventory of the property which belonged to the copartnership at the time of its dissolution, and that all the liabilities of the copartnership up to December 29, 1914, amounting to $4,278.13, had been paid by plaintiff.

As conclusions of law which were carried into the judgment the court determined that the copartnership ceased to exist on the 23d of December, 1914; that Cohen was entitled to receive from Shuken $145.20, and the latter was entitled to retain all the other property formerly owned by the firm; that the certain instrument made December 29, 1914, purporting to provide for a dissolution of the copartnership, is void and of no effect; that the six promissory notes, each for $500, are void and must be delivered for cancellation; and that plaintiffs recover costs from appellant.

[1, 2] Appellant endeavors to make the point that the complaint was insufficient because it failed to aver that before the commencement of the action plaintiffs restored him to his former rights as a partner. Even if appellant, who did not demur to the pleading nor specify error on account of the supposed infirmity of the complaint, were in a position to set up this objection, nevertheless this criticism of the pleading is without force. By the amended pleading the date of dissolution was averred as of a time prior to the contract of settlement. The dissolution and the other contract were distinct transactions. Therefore the rescission of the latter did not involve a re-establishment of the status quo of the contracting parties as partners.

[3] It is also contended that the court had no power to render a personal judgment against one of the partners until the partnership property had been converted into money and the liabilities paid, as far as possible, from said fund, citing Clark v. Hewitt, 136 Cal. 77, 68 Pac. 303; Rassaert v. Mensch, 17 Cal. App. 637, 120 Pac. 1072. The cited cases really support the contention of counsel for respondents. While those authorities hold that in general a judgment may not be entered against a partner in a suit for an accounting until all of the assets have been marshaled and made to bear the burden of the copartnership liabilities, in cases where there are no liabilities to settle except as between the partners themselves, such course is not necessary. In Harper v. Lamping, 33 Cal. 641, it was held that in proper cases property of the copartnership may be distributed in kind.

[4, 5] There is no force in the contention that the findings do not sustain the complaint or the amended complaint. No part of the evidence except certain of the exhibits appears in the transcript; so we must assume that all of the findings are supported by ample proof. The findings are in substantial accordance with the pleadings as

amended. In this behalf it is asserted that there could be no dissolution without a division of the assets or some arrangement for such division, and that therefore the finding that dissolution did occur may not stand. But dissolution may be had by retirement of one of the partners (Ross v. Cornell, 45 Cal. 133), or by agreement of partners (Wagner v. Wagner, 50 Cal. 76). The court found that the partnership was dissolved by mutual agreement December 23, 1914, and this is in strict accord with the pleading to which appellant did not demur.

Next it is asserted that the complaint does not plead facts sufficient to constitute duress operating upon Shuken in such manner as to compel him to sign the alleged unconscionable agreement. Further criticism is directed against the pleading of Shuken's partial disability by reason of an accident to his head. But, having failed to raise these objections by special demurrer, appellant may not do so now. Spreckels v. Gorrill, 152 Cal. 383, 92 Pac. 1011.

No other alleged errors require discussion. The judgment is affirmed.

We concur: WILBUR, J.; LORIGAN, J.

---

179 Cal. 291

Ex parte BLOIS. (Cr. 2184.)

(Supreme Court of California. Nov. 19, 1918.)

1. MUNICIPAL CORPORATIONS ⊂⊃625—INSPECTION OF LAUNDRIES—FEES—UNREASONABLENESS.

A city ordinance requiring inspection by a health inspector of laundries at least once a month, and providing for an inspection fee of $3 for each inspection and a mileage fee of 30 cents per mile both ways, was unreasonable in the mileage charge.

2. MUNICIPAL CORPORATIONS ⊂⊃589—POLICE POWER—EXTRATERRITORIAL POWERS.

A municipality may, under its police powers, exercise extraterritorial powers, when the possession and exercise of such powers are essential to the proper conduct of the affairs of the municipality, even though the exercise of such power would impose an added burden as respecting the individuals affected.

3. CONSTITUTIONAL LAW ⊂⊃205(7) — PRIVILEGES AND IMMUNITIES — INSPECTION OF LAUNDRIES.

A city ordinance requiring the health department to inspect laundries at least once a month, and providing for an inspection fee of $3 and a mileage fee of 30 cents per mile both ways was unconstitutional, under Const. art. 1, § 21, forbidding special privileges and immunities as applying to a laundry situated 20 miles from town; the mileage fees constituting a discrimination in favor of domestic laundries.

In Bank.

Petition by J. B. Blois for writ of habeas corpus. Petitioner discharged.

H. A. Gabriel, of San Jose, for petitioner.

McWilliams & Hatfield, of San Jose, for respondent.

RICHARDS, Judge pro tem. The petitioner applied for a writ of habeas corpus, setting forth his conviction in the police court of the city of Palo Alto for the alleged violation of the provisions of an ordinance of said city entitled:

"An ordinance for the protection of the health of the people of the city of Palo Alto, providing for the inspection by the health officer of the city of Palo Alto of laundries and other establishments of like character."

The petitioner, whose laundry establishment is in the city of San Jose, undertook to solicit laundry work in Palo Alto without first procuring a license so to do, as required by the terms of said ordinance, and his arrest and conviction followed. He seeks his release by this writ upon the ground that said ordinance is invalid for the reason that the charges therein provided to be paid to the health officer of Palo Alto for inspection, and for mileage in going to and coming from the place or places where such inspection is to be made, are unreasonable, harsh, discriminatory, oppressive, and prohibitory, and hence in violation of the personal and property rights of the petitioner as guaranteed by the Constitution of the United States and of the state of California. The particular portion of the ordinance in question, which the petitioner assails by this writ, is to be found in section 2 thereof, which reads as follows:

"The health officer of the city of Palo Alto is hereby authorized to charge a fee for such inspection which shall be in the sum of three ($3.00) dollars for the time consumed by him in making said inspection, together with mileage at the rate of thirty (30) cents per mile and for each mile actually traveled by him from his said office in Palo Alto to the place where such inspection is to be made and return. Said inspection is to be made at least once every month, and no such permit or license shall be issued for a longer period of time than one (1) month.

"The board of public safety shall not issue any permit or license hereunder until all fees due hereunder for inspecting the plant or place of laundering or washing of the laundry or other establishment at which the person applying for such permit or license proposes to have such laundering or washing done, are paid. All fees and mileage shall be paid into the general fund for the use of the board of public safety."

Upon the hearing and in the briefs which followed the petitioner's assault upon these provisions of the ordinance was chiefly directed against that portion thereof providing for the mileage to be paid the inspector for traveling to and from the place of location of the laundry, which by the terms of the ordinance was to be visited at least once a month in the course of his required inspection. The mileage charge thus objected to is 30 cents a mile both ways, which, in the case of the petitioner, amounted to the sum of not less than $12 per month, exclusive of the stated fee of $3 for the inspection itself. These mileage and inspection charges were to be paid into the general fund of the city treasury for the use of the board of public safety. The effect of these mileage and in-

spection charges, the petitioner contends, is to require of him a gross fee for the privilege of soliciting laundry work in the city of Palo Alto of at least $15 monthly, as compared with the charge of $3 required of all proprietors of laundries located within the said city. It is this which constitutes the discrimination of which the petitioner complains and it is the fact that these inspections, with the consequent fee and mileage charge, may be repeated as often in each month as the inspector chooses to make them, which, according to the petitioner's contention, renders the ordinance not only obviously and harshly discriminative in favor of local laundries, but also practically prohibitive upon the solicitation of laundry work by outside laundries within said city. The distance from Palo Alto to San Jose, where the petitioner's laundry is located, is conceded to be about 20 miles. It is a matter of public knowledge that between these two cities there are two railway systems whose established passenger rates are not to exceed 3 cents per mile, and which afford opportunities for hourly travel between them, and that there is also a motorcar service of one or more companies giving even more frequent service and at somewhat lower rates.

[1] The ordinance, in providing for a mileage rate of 30 cents per mile both ways by the inspector, thus imposes upon the laundry owner in San Jose a mileage fee of $12 for the traveling expenses of the inspector, for which same mileage of travel by the same means of transportation the traveling public pays not to exceed $1.20, thus making the health inspector's mileage fees 10 times that which he would be required to pay for his transportation between said cities by the ordinary means of travel. A further comparison of these mileage rates with those chargeable by other public officers under the state law is enlightening. Sheriffs are allowed mileage at the rate of 15 cents per mile one way when travel can be made by rail. Pol. Code, § 4300b. Constables are allowed mileage at the rate of 25 cents one way in their township, 15 cents out of their township, but in the county, and 5 cents both ways out of the county. Pol. Code, § 4300d. Jurors are allowed 15 cents per mile one way. Pol. Code, § 4300f. Witnesses are allowed 10 cents per mile one way. Pol. Code, § 4300g. It will thus be seen that the mileage charge permitted to the health inspector under this ordinance is not only out of all proportion to the actual cost of ordinary travel in that region, but is also so far in excess of that allowed by the state laws to other public officials as to compel the conclusion that it was imposed for other purposes than that merely of a mileage fee. The respondent perceives this and seeks to meet it by urging that the time occupied by the health inspector in travel to and from the place of inspection is to be taken into account in determining the reasonableness of the charge. There is some force in this argument, but not enough to justify the charge, since the fee allowed the inspector for making the inspection is to be taken as ample compensation for the time actually consumed in making it, and the time occupied in going to and fro between the two cities, as a matter of common knowledge, by train or bus is less than an hour each way, for which the imposition of a charge of $10 or more would be clearly exorbitant.

[2] The source of the power of municipalities to enact ordinances of the general character of that here under review is to be found in article 11, § 11, of the state Constitution, reading as follows:

"Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

In the exercise of the powers thus conferred the municipality is limited by the terms of article 1, § 21, of the Constitution, which provides:

"No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature, nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

This latter section of the Constitution has been given direct application to statutes and ordinances which have been enacted and sought to be enforced either by the state or by political subdivisions thereof, and in which attempts have been made to discriminate in favor of or against particular persons or classes of persons as to whom no reasonable basis of discrimination can be seen to exist, and in all such cases the courts of this state have uniformly held such attempted legislation to be void. Ex parte Frank, 52 Cal. 606, 28 Am. Rep. 642; In re Smith, 143 Cal. 368, 77 Pac. 180; Ex parte Dickey, 144 Cal. 234, 77 Pac. 924, 66 L. R. A. 928, 103 Am. St. Rep. 82; Ex parte Hayden, 147 Cal. 649, 82 Pac. 315, 1 L. R. A. (N. S.) 184, 109 Am. St. Rep. 183; Ex parte Foley, 172 Cal. 744, 158 Pac. 1034, Ann. Cas. 1918A, 180; In re Hines, 33 Cal. App. 45, 164 Pac. 339.

The respondent herein concedes the force and effect of the foregoing decisions as applied to statutes and ordinances which are in the nature of revenue measures, but contends that they are not to be given full application to ordinances enacted under the health and police powers of municipalities, and which have for their purpose the regulation of those classes of business which are peculiarly within the range of these powers. The respondent also insists that in relation to such establishments as laundries, dairies, bakeries, and like institutions located outside of municipalities, but distributing com-

modities within them, which, if not sanitary in the methods of their creation or manipulation, might be the means of spreading infection or disease, the municipality as a proper health precaution may exercise the right of inspection of such establishments wherever located, with the consequent right of making a reasonable charge for the fees and mileage of its inspector, and that ordinances thus providing for such extraterritorial inspection of such institutions should be sustained even though the reasonable cost of such inspection when imposed upon such institutions lying at some considerable distance from the municipality itself would result in placing an added burden upon these inspected places as a condition of their doing business within it, depending as to its amount upon their distance from the municipality adopting such an ordinance as a health measure.

We are disposed to agree with this contention to the extent above indicated, and to concede that municipalities may exercise certain extraterritorial powers when the possession and exercise of such powers are essential to the proper conduct of the affairs of the municipality. As, for example, this court has held that a municipality has power to construct and maintain a system of waterworks outside of its boundaries for the supply of its inhabitants with water, and that it might even go to the extent of supplying water to persons living without the limits of such municipality. So. Pasadena v. So. Pasadena Canal Co., 152 Cal. 579, 93 Pac. 490. So, also, it has been held that a city, in order to protect the health and property of its citizens from the effects of overflowing of a stream passing through such city, might go beyond the corporate limits and construct a ditch for the diversion of such overflow waters. Wilson v. Boise City, 6 Idaho, 391, 55 Pac. 887. Again, with more immediate application to the case in hand it has been decided that a city council might properly pass an ordinance providing for the inspection of dairies and dairy herds outside of the city, but from which it was proposed to supply milk to its inhabitants. State v. Nelson, 66 Minn. 166, 68 N. W. 1066, 34 L. R. A. 318, 61 Am. St. Rep. 399. In none of these cases, however, has the question as to the right or reasonableness of fees or mileage charges for the making of such inspections as are provided for in ordinances of the kind here under review been involved, nor has our attention been called by the respondent to any case where such charges, so clearly discriminative as those involved in the case at bar, have been sustained.

The strongest reliance of the respondent is upon the case of County of Plumas v. Wheeler, 149 Cal. 758, 87 Pac. 909, involving the validity of an ordinance exacting a license fee for conducting the business of raising and pasturing sheep in Plumas county; the license fee charged being 10 cents for each sheep so raised or pastured. In that case, however, no question of discrimination arose and this court very properly held that it could not be determined from the face of the ordinance itself that the charge imposed was so clearly excessive or grossly disproportionate to the expense incurred by the county in the regulation of the business affected as to render the enactment void upon its face. The distinction between that case and the case at bar consists in the fact that no question of discrimination between persons or places of business was involved in the former case, and also in the fact that the ordinance under review in that case did not upon its face furnish any standard by which the reasonableness or unreasonableness of its charges could be determined. In the instant case both of these elements are present. The petitioner, as the representative of a laundry establishment located at San Jose, is required to pay for the permit to solicit washing for his laundry a sum five times as great as that charged the solicitor for a local establishment. This increase over the local charge is made up of mileage fees which are to be charged at a rate not only tenfold greater than the known cost of travel by the usual modes of transportation between the two cities, but that is also more than four times the official mileage fees permitted to be charged by state, county and township officers.

[3] The conclusion is irresistible that the mileage fees to be exacted for the inspection of laundries outside the limits of Palo Alto are unreasonable in amount, measured by any of the known standards for determining the reasonableness of charges of like character, and that since they are to be incurred, charged and collected regularly and at least once a month from the representatives of laundries located elsewhere than within the municipality, but seeking to collect and distribute washing within its limits, the imposition of an exorbitant charge works a substantial discrimination as between nonresident and local establishments, each entitled to solicit and do business within said municipality upon an equal basis, such as is forbidden by the express terms of the Constitution, to which reference has above been made.

These provisions of the ordinance, being inseparable from the main body thereof, it follows that the ordinance is invalid and hence that the petitioner is entitled to his discharge. So ordered.

We concur: MELVIN, J.; SLOSS, J.; WILBUR, J.; LORIGAN, J.

179 Cal. 326

## PRICE v. BEKINS VAN & STORAGE CO.
(L. A. 4557.)

(Supreme Court of California. Nov. 23, 1918.)

APPEAL AND ERROR ⊂=1052(7)—TRIAL ⊂=365 (1)—HARMLESS ERROR—GENERAL VERDICT.

A general verdict for plaintiff imports a finding in his favor on all averments of complaint material to his recovery; and where evidence supporting one cause of action was untainted, error in the admission of evidence as to another cause of action was immaterial.

Department 2.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Charles R. Price against the Bekins Van & Storage Company. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Affirmed.

Collier & Clark, Oliver O. Clark, George M. Pierson, and Claud B. Andrews, all of Los Angeles, for appellant.

Goudge, Williams, Chandler & Hughes and Goudge, Robinson & Hughes, all of Los Angeles, for respondent.

MELVIN, J. Defendant appeals from a judgment and an order denying its motion for a new trial.

The suit was for the value of goods destroyed by a fire, which consumed defendant's warehouse, in which plaintiff's property was stored. The amended complaint was in two counts. In the first it was alleged that defendant falsely represented to plaintiff that his goods, placed in storage with defendant, were in a fireproof building customarily guarded by watchmen, night and day, to prevent loss by fire. It was also averred that, relying upon these representations, plaintiff left his property in defendant's custody and agreed to pay a certain monthly charge to defendant for such storage. The second count contains a statement of a cause of action for conversion.

Appellant contends that the court erred in admitting evidence of the fact that certain other warehousemen in Los Angeles employed watchmen at their warehouses, and in instructing the jury that such evidence was admissible and might be considered by the jurors in arriving at their verdict as to what defendant should have done to protect plaintiff's goods.

Respondent insists that the first cause of action was sustained by evidence admittedly free from error; that the issue of negligence was raised by defendant in its answer to the pleading of the second cause of action, wherein said defendant alleged that the loss by fire was without fault on its part; and that, even if it should be conceded for the purpose of argument that general custom among ordinarily careful warehousemen may not be proven by the method followed by plaintiff, nevertheless the verdict being sustained by ample evidence, free from error in its introduction, establishing the validity of the first cause of action, the error, if any, is immaterial.

This contention must be upheld. A general verdict for plaintiff imports a finding in his favor on all the averments of the complaint material to his recovery. Tremble v. Tuman, 175 Cal. 696, 167 Pac. 142. In this case it is conceded that the first cause of action was supported by a showing which was untainted by error under the authorities. Kirstein v. Bekins Van & Storage Co., 27 Cal. App. 586, 150 Pac. 999; Lynch v. Bekins Van & Storage Co., 31 Cal. App. 68, 159 Pac. 822; Laux v. Bekins Van & Storage Co., 169 Pac. 1012; Hood v. Bekins Van & Storage Co., 172 Pac. 594. It therefore becomes immaterial whether or not the evidence relative to the issue of negligence in the second count was erroneously admitted, and whether or not the instruction thereon was correct.

The judgment and order are affirmed.

We concur: LORIGAN, J.; WILBUR, J.

---

179 Cal. 313

## In re CLOVER'S ESTATE.
## CLOVER v. HATHAWAY et al.
(L. A. 5733.)

(Supreme Court of California. Nov. 20, 1918.)

1. HUSBAND AND WIFE ⊂=278(2) — SEPARATION CONTRACT—VALIDITY.

A contract reciting, "Whereas the said parties hereto have now determined between themselves that such relationship of husband and wife cannot be continued for any longer period of time to the mutual satisfaction of either of said parties hereto, and other reasons existing at this time by reason of which the said parties cannot live together in the relationship of husband and wife, with the degree of happiness that each of said parties deem should exist in such relationship, and," followed by an agreement of separation and division of property is not void as against public policy, under Civ. Code, § 159.

2. EVIDENCE ⊂=271(16) — SELF-SERVING DECLARATION—DECLARATIONS OF DECEDENT.

In a proceeding for appointment of administrator, where wife claimed that there was a reconciliation after a separation agreement, a declaration of deceased, a short time before the alleged reconciliation, that he did not want to have anything to do with his wife, was admissible for purpose of showing decedent's attitude, going to the probability of such reconciliation, and was not self-serving.

Department 2.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

In the matter of the estate of Melvin Clover, deceased. From an order appointing Lew-

is P. Hathaway and Chester Clover administrators, Nellie J. Clover appeals. Affirmed.

Argabrite & Drapeau, of Ventura, for appellant.

Orr & Gardner and Bowker & Sheridan, all of Ventura, for respondents.

WILBUR, J. This is an appeal from an order appointing respondents administrators of the estate of the deceased, who was the husband of Nellie J. Clover, appellant. The refusal of letters of administration to the widow of the deceased was based upon an agreement of separation entered into between them in May, 1913, six months after their marriage. Appellant concedes that if the agreement of separation is valid and binding, she is not entitled to letters of administration, but claims that it is invalid, as against public policy, and if valid in the first instance, that it has been abrogated by reason of a reconciliation between the parties.

[1] Her contention that the separation agreement is void is based upon the proposition that the contract undertook to do more than merely agree to a separation. The recitals in said contract are made the basis of this claim, and are as follows:

"Whereas the said parties hereto have now determined between themselves that such relationship of husband and wife cannot be continued for any longer period of time to the mutual satisfaction of either of said parties hereto, and other reasons existing at this time by reason of which the said parties cannot live together in the relationship of husband and wife with the degree of happiness, respect, and esteem that each of said parties deem should exist in such relationship; and—"

This recital contains no contract between the parties in violation of the law. It is merely stated as a basis for the agreement which follows for a separation and division of their property and an adjustment of their future property rights. Such a contract is expressly authorized by section 159 of the Civil Code. With reference to the claim of reconciliation between the parties, it is sufficient to say that the fact of reconciliation depends upon the truth of appellant's testimony, and the trial court found against the appellant. We are not, therefore, required to determine whether or not such testimony, if true, would establish a reconciliation, nor whether such reconciliation, if established, would so far abrogate the agreement between the parties as to entitle the appellant to administer upon the estate of the deceased.

[2] Appellant claims that error was committed on the trial of the case by overruling her objections to the testimony of a witness as to declarations made by the deceased prior to the alleged reconciliation. On December 1st the witness testified that the deceased said concerning his wife, "He told me he wished she wouldn't come any more, and again at the same time he did not want to have anything to do with her, and she was bothering him the same as she did before they were married." This declaration was admissible solely for the purpose of showing the attitude of the decedent a short time before the reconciliation, alleged to have occurred about December 1st. It went to the probability of such reconciliation and comes within the principle announced in Estate of Walker, 168 Pac. 689, 693, where it was said:

"The objection that the trial court erred in permitting evidence of the conduct of Walker and his wife toward each other and of declarations connected with such conduct goes more to the weight thereof than to its competency. * * * We cannot say that such evidence was erroneously admitted."

These declarations were in no sense self-serving declarations. The case of Carter v. Younger, 123 Ark. 266, 185 S. W. 435, was a case where declarations of the decedent, made after the alleged agreement of reconciliation, were received in evidence as proof that no such reconciliation had occurred, but this case has no application to the declarations admitted in the instant case.

Order affirmed.

We concur: MELVIN, J.; LORIGAN, J.

---

179 Cal. 322

## BOWEN et al. v. DESSER et al.

(L. A. 4525.)

(Supreme Court of California. Nov. 23, 1918.)

1. MECHANICS' LIENS ⟸281(4)—MATERIALS —AGREEMENT TO PAY SPECIFIC AMOUNT—EVIDENCE.

In suit to foreclose mechanic's lien, evidence *held* to justify finding that contractor agreed to pay plaintiffs $1,350 on an express contract for certain work and materials to be used in the erection of a building on defendant's property, and did not agree to pay the reasonable value as contended by plaintiffs.

2. APPEAL AND ERROR ⟸1170(10)—AMENDMENT OF PLEADING—PREJUDICIAL ERROR.

In suit to foreclose mechanic's lien permitting amendment of answer to conform to court finding *held* without material injury to plaintiffs, within Const. art. 6, § 4½.

3. MECHANICS' LIENS ⟸239 — FUNDS RECEIVED FROM OWNER—APPLICATION.

Money paid by defendant owner of premises to materialmen could not be applied by them to payment of an amount owed them by contractor upon some transactions not connected with contract for erection of defendant's building.

Department 2.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Earl Bowen and another, copartners doing business under the firm name

and style of Bowen & Harris, against Herman Desser, sometimes known as H. Desser, and others, in which defendants filed a cross-complaint. From a judgment for defendants, and from an order denying motion for new trial, plaintiffs appeal. Affirmed.

Frank L. Borden, of Los Angeles, for appellants.

Charles M. Ackerman, of Los Angeles, for respondents.

MELVIN, J. Plaintiffs sued to foreclose a mechanic's lien. Defendants answered, and filed a cross-complaint. Judgment was in favor of defendants. Plaintiffs appeal from the judgment, and from an order denying their motion for a new trial.

The court found that the plaintiffs, who are copartners, entered into a contract to furnish to one A. E. Dean, for the sum of $1,350, certain work and the materials to be used in the erection of a building on the property of defendant H. Desser, in the county of Los Angeles. The following facts were also found: This sum of $1,350 has been paid by Desser to plaintiffs. On April 29, 1914, Desser entered into a contract with Dean for the erection of a building at a cost of $4,500. Of this sum $3,500 was to be paid in specified amounts as the building should progress, and the balance, when the building should be completed and accepted. To secure the faithful performance of the said contract, Dean, as principal, and Bowen and Harris, as sureties, entered into another written contract or bond in the sum of $2,250 indemnifying Desser from loss. Both contracts were duly filed for record. Dean, the contractor, began the erection of the building, and proceeded until it was nearly completed when, owing to business reverses, he substituted Bowen and Harris as his agents, and they caused the building to be erected according to the plans and specifications. Upon receipt of orders from Dean, payments due him were made by Desser directly to Bowen and Harris, who prior to the completion of the building, had thus received $3,500, leaving $1,000 in the hands of the owner of the land. Upon the completion of the building Dean and his successors and agents, Bowen and Harris, failed to release and cancel all claims for material and labor. As a consequence, Desser was compelled to pay claims amounting to more than $1,000, the amount left in his possession for the completion of the building.

[1] The first contention of appellants is that the findings are unsupported by the evidence. In this behalf it is contended that there was no contradiction of the testimony of Mr. Harris to the effect that Dean promised to pay the reasonable value of all materials furnished. There was, however, testimony to the effect that plaintiffs entered into an express contract with Dean, after making an estimate based upon the plans for the building, by which they promised to furnish all the necessary material for $1,350. Mr. Dean testified:

"In the beginning I took the plans to Mr. Harris and asked him to figure up the lumber—what he would furnish the lumber and the roof and the flooring to build that flat, and he said, 'Very well.' He measured, he figured it up, and I went back, and he showed me it figured on an estimate sheet, and said he would finish the cement and roof, and everything that was necessary to build the house as specified therein in the bill, for $1,350; and, of course, I took that, and I made my bid on the house—I took that as the price for the material, and I signed up the building contract with that understanding that I was to have that material furnished at that price."

This testimony, if believed by the court, justified the finding which plaintiffs attack as unsupported. It also leads to the conclusion that the claim of lien filed by plaintiffs as a preliminary to this action did not truly set forth the transaction between the contractor and the materialmen. Wilson v. Nugent, 125 Cal. 280, 57 Pac. 1008.

[2] The complaint averred that the contractor agreed to pay the reasonable value of the materials, which was alleged to be $1,712.41. The answer, as originally drawn, admitted that the contractor did agree to pay the reasonable value of the materials, but denied that they were worth more than $1,350. On these pleadings the court found that Dean did agree to pay the sum of $1,350 on an express contract. Subsequently the court permitted an amendment to the answer, based upon the theory of an express contract, and eliminating the admission that the "reasonable value" was the measure of the price to be paid. Appellants insist that they were deprived by this ruling of substantial rights. It appears that the counsel for defendants unsuccessfully moved, during the trial, for permission to make this very change in their pleading, by which it would appear that plaintiffs had sold the material and promised to perform certain labor at an agreed price of $1,350, and not upon contract to pay the reasonable market value thereof. The court announced that when, from the proof of facts at the trial, it should appear that such amendment ought to be made, it would be permitted. The court, in summing up the evidence, not only found upon the express agreement, but also against plaintiffs upon their allegation regarding an agreement to pay a reasonable market value. Counsel for defendants inadvertently failed to renew his motion for leave to file an amendment. The reserved ruling admitting testimony relative to an express agreement, subject to a subsequent determination by the court regarding the motion of defendants for leave to amend the answer, was notice to plaintiffs that they might be called upon to meet that issue. Such notice became a certainty when the

court, in summing up, indicated an agreement with defendants in their contention that the contract was not based upon a "reasonable value" of the materials, but upon an express agreement as to price. The court made the order ex parte, about three weeks after the entry of judgment. Subsequently there was a hearing, on due notice, of a motion by plaintiffs to vacate said order. Their motion was denied, and they appeal from the order of denial.

We are of the opinion that the amendment was merely to bring the pleadings in harmony with the proof and findings, and was without material prejudice to plaintiffs. The issues actually tried, and the ones, too, upon which the court had made findings, were not changed by the amendment. This is a case in which the provisions of section 4½ of article 6 of the Constitution are clearly applicable.

[3] It appears that Dean owed plaintiffs $264.54 upon some transaction not connected with the Desser contract. When plaintiffs received the $3,500 from Desser, they applied a portion of it to the payment of this indebtedness. Clearly, they had no right so to do. Harris received the money for his firm and for himself and his coguarantor for application to the building contract between Dean and Desser, which he had undertaken to carry out for the former. Desser was not responsible for any old debts of his contractor. Clearly, application of this money to the payment of the early indebtedness of the contractor to the materialmen was unauthorized.

No other assignments of error require analysis.

The judgment and orders are affirmed.

We concur: WILBUR, J.; LORIGAN, J.

---

179 Cal. 315

## ALLRED v. PIONEER TRUCK CO.
(L. A. 4483.)

(Supreme Court of California. Nov. 21, 1918.)

1. NEGLIGENCE ⟨⟩134(3) — EVIDENCE — SUFFICIENCY.

In action for death of a boy who, in attempting to climb on projecting end of brake-beam on side of defendant's furniture van or by slipping upon wet pavement, fell in front of rear wheel, receiving the injuries which caused his death, evidence, when construed most strongly in favor of plaintiff, *held* insufficient to show neglect of duty on the part of defendant.

2. NEGLIGENCE ⟨⟩25 — VAN — PRECAUTIONS AS TO CHILDREN.

Failure of defendant to place drivers of its furniture van in a position where they could at all times see that small boys did not find lodgment upon parts of van or come near enough to be endangered did not constitute negligence.

3. NEGLIGENCE ⟨⟩23(1)—TURNTABLE DOCTRINE—APPLICABILITY.

The principle applicable "to turntable cases" is not to be extended so as to include vehicles in common and everyday use on city streets.

4. EVIDENCE ⟨⟩14—HABITS OF BOYS.

It is a matter of common knowledge that boys are prone to steal rides on all sorts of vehicles.

Department 1.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by May Allred against the Pioneer Truck Company. From judgment for defendant and an order denying motion for new trial, plaintiff appeals. Affirmed.

F. L. Richardson, of San Diego, for appellant.

A. H. Sweet, Morganstern, McGee, Henning & Hendee, and Sweet, Stearns & Forward, all of San Diego, for respondent.

VICTOR E. SHAW, Judge pro tem. In this action plaintiff sought to recover damages for the death of her minor son, Melvin Allred, a boy nine years of age, which she alleged occurred as a result of defendant's negligence.

At the close of plaintiff's evidence, the court granted defendant's motion for a nonsuit. In accordance therewith, judgment in favor of defendant was entered, from which, and an order denying plaintiff's motion for a new trial, she prosecutes this appeal.

At the time of the accident, an employé of defendant was driving a furniture van, drawn by three horses, along Broadway, in the city of San Diego. As constructed, this van was an inclosed box some 12 or 15 feet in length, 6 feet high, and 5 feet in width, with a tail or end gate 3 feet wide, suspended by chains so that the outer edge was but 2 feet 8 inches above the surface of the street. The van was filled with furniture, by reason of which neither the driver nor the assistant with him, occupying the front seat of the vehicle, could see the end gate upon which, unknown to them, three or four boys were riding. Melvin Allred and another lad were on their way to school, and seeing these boys on the end gate they ran to the vehicle and his companion climbed upon the end gate. Young Allred, however, ran around the side of the wagon, and, either in attempting to climb on the projecting end of the brake beam or by slipping upon the wet asphaltum pavement, fell in front of the hind wheel, receiving injuries which caused his death. There was also evidence that defendant, in conducting its business, operated trucks, the platforms of which, being uninclosed and surrounded by movable stakes, were low hung, thus rendering them easy of access and upon which theretofore, on occasions, small boys had, with the con-

sent of those in charge, been permitted to ride along the streets. Also, that on one or two prior occasions boys had ridden on the tail gates of defendant's furniture vans.

[1] Construing the evidence thus summarized most strongly in favor of plaintiff, we are clearly of the opinion that it is insufficient to establish any neglect of duty on the part of the defendant towards the deceased.

The contention of appellant is that defendant was not only guilty of negligence in that it had theretofore on occasions permitted boys to ride upon its low-hung trucks, but that they left the end gate of the furniture van down, thus inducing boys to climb thereon, constituting negligence. "It was the duty of defendant," says counsel for plaintiff, "to place its men in a position where they could at all times inspect all parts of the vehicle it was operating, and its failure to do so was negligence."

[2] The proposition, upon the facts shown in the instant case, find no support in the authorities cited. Very few vehicles operated on highways are so constructed that boys cannot climb upon them or some parts thereof, and the proposition advanced, carried to its logical conclusion, would mean that the driver of an automobile or other vehicle whose duty requires him to observe the road along which he is traveling and attend to his motive power must be Argus-eyed or accompanied by outriders charged with the duty of seeing that small boys do not find lodgment upon the running boards or other parts of the vehicle, or approach a position of danger where they may, as in this case, fall under a wheel. The law does not impose such duty on one lawfully operating a vehicle along a public street. Hebard v. Mabie, 98 Ill. App. 543; Bishop v. Union Railroad Co., 14 R. I. 314, 51 Am. Rep. 386; Hestonville, etc., Ry. Co. v. Connell, 88 Pa. 520, 32 Am. Rep. 472.

[3] The facts involved in the case of Cahill v. Stone, 153 Cal. 571, 96 Pac. 84, 19 L. R. A. (N. S.) 1094, upon which appellant so largely relies, brought it within a line of decisions known as the "turntable cases," the principle applicable to which, however, is not to be extended so as to include vehicles in common and everyday use on city streets. Mayfield Water & L. Co. v. Webb, 129 Ky. 395, 111 S. W. 712, 18 L. R. A. (N. S.) 179, 130 Am. St. Rep. 469; Underwood v. Western A. R. Co., 105 Ga. 48, 31 S. E. 123.

[4] It is a matter of common knowledge that boys are prone to steal rides on all sorts of vehicles propelled along the streets, but it would be an intolerable rule that imposed upon the owner of vehicles the duty of employing guards to keep boys so inclined to trespass, at a safe distance therefrom. Foster-Herbert, etc., Co. v. Pugh, 115 Tenn. 688, 91 S. W. 199, 4 L. R. A. (N. S.) 804, 112 Am. St. Rep. 881. Hence, as to deceased, negligence cannot be imputed to defendant merely because other boys at the time, but without its knowledge or consent, were attempting to ride or riding on the end gate constituting a part of the floor of the furniture van wherein to load and transport goods. Moreover, the injury to the lad was not caused by his climbing, or attempting to climb, on the end gate, but, as stated, due to his running to the side of the vehicle, where he fell in front of the hind wheel. Whether attracted to the wagon by the presence of the boys or the novelty of the vehicle's construction, the unfortunate accident was one for which defendant was not liable on account of negligence.

The judgment and order are affirmed.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

---

179 Cal. 309

ROSENHEIM v. HOWZE et al. (L. A. 4569.)

(Supreme Court of California. Nov. 20, 1918.)

CONTRACTS ⊜212(1)—ARCHITECT'S CONTRACT —CONDITIONS PRECEDENT.

Under architect's contract for services certain in their character, compensation for which was fixed, owner could not defeat recovery by abandoning contract or failing to obtain loan, although architect agreed to make no demand for payment "until you have succeeded in negotiating a loan," for if the owner did not negotiate a loan, the indebtedness became payable within a reasonable time.

Department 2.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Alfred F. Rosenheim against John Howze. From a judgment for plaintiff, and an order denying a new trial, A. C. Howze and the Citizens' Trust & Savings Bank, as administrators of the estate of John Howze, deceased, appeal. Affirmed.

W. W. Butler, of Los Angeles, for appellants.

Edward A. Simons, of Los Angeles, for respondent.

MELVIN, J. Plaintiff sued for a fee alleged to be due to him as an architect for designing and supervising the partial construction of a house on land owned by John Howze. There were two causes of action set forth in the complaint, one based upon an alleged written contract, and the other was a declaration upon quantum meruit. Judgment was given for plaintiff in the sum of $2,300.80 and costs. Defendants, as successors of John Howze, deceased, appeal from the judgment and from an order denying the motion for a new trial.

One of the objections urged to the judg-

ment by the appellants is that no recovery on quantum meruit may be had because more than two years had elapsed between the time when the work was completed and the filing of the complaint herein. We need not decide, however, whether or not the statute of limitations bars recovery upon the second cause of action pleaded, because the court correctly found that John Howze was liable for the payment of the architect's fee under a written contract.

The uncontradicted evidence shows that the plaintiff wrote to the defendant on April 15, 1908, a letter of which the material part is as follows:

"The undersigned hereby proposes and agrees to render architectural services in connection with your new residence, proposed to be erected in Westchester Place, for a fee of 10% on the first $20,000, 8% on the next $10,000, and 6% on everything over $30,000, figured on the total cost of the same when completed, as per the schedule of minimum charges of the American Institute of Architects, copy of which is hereto attached.

"I also offer my services in assisting you to the extent of arranging with the contractor to carry the work of construction forward to the point of completing the wooden frame and covering it with the rough boarding and outside trimmings before demanding any payment on account of his contract.

"I will further agree to make no demand for payment on account of my own services until you have succeeded in negotiating a loan."

On April 21, 1908, Mr. Howze wrote his acceptance upon this letter. Subsequently the plaintiff, acting under direction of defendant, and with his full sanction, made arrangements with a contractor who was willing to prosecute the work of building without any payment on account until the construction should go forward to the point indicated in the letter quoted above. Plaintiff also furnished the necessary sketches, detail drawings, plans, etc., necessary for the construction of the house. The court found that thereafter and without any default on the part of plaintiff, Mr. John Howze abandoned the construction of said residence and declined to let the bidding contractor carry on the work of construction at all; that the said Howze did not make diligent, proper, or reasonable efforts to secure a loan upon his premises and the building to be erected thereon; that plaintiff's full fee would have been $3,028, and that he had earned three-fifths of such sum, payable in case of abandonment, or $1,816.80.

Appellants assert that the finding that Mr. John Howze did not make diligent efforts to secure a loan is outside the issues made by the pleadings, and the same contention is made with reference to the finding that plaintiff made no demand for payment on account of services until a reasonable time had elapsed after due performance by plaintiff and abandonment of the construction of the building by Mr. Howze. Neither of these objections to the findings is valid.

Considering, first, the understanding of the meaning of the agreement by the contracting parties, it is evident that Mr. Howze recognized the validity of Mr. Rosenheim's claim. The latter wrote to Mr. Howze in November, 1910, demanding $1,000 on account and the balance at about the first of the succeeding year. To this communication Mr. John Howze replied in a letter assuring the architect that he had not been forgotten, referring to the writer's unchanged financial condition, and closing with the sentence, "Kindly allow me to reassure you that I will take care of you at the earliest possible moment."

This and other evidence in the case demonstrated that the contracting parties did not believe the plaintiff's compensation was dependent upon the mere caprice of the owner of the property who contemplated the building of a place of residence upon his land. The contract did not provide for the payment of the architect only in the event of the securing of a loan by Mr. Howze. There was an agreement for services certain in their character, and the amount of compensation was fixed. Under the terms of this writing the agreed price was due and owing when the work was done, but the architect promised to delay collection of his fee until Mr. Howze could secure money by negotiating a loan. There is absolutely no room for a construction of this document which would make the employment of Mr. Rosenheim to do any work at all dependent upon the precedent condition that Mr. Howze should succeed in negotiating a loan. If there were the slightest reason for such a construction in the language of the contract, it would disappear when we consider the conduct of the parties to the writing. Mr. Howze could not, therefore, by abandoning the contract, defeat recovery by the plaintiff, who had fully performed his part. If he did not negotiate a loan the indebtedness became payable within a reasonable time. Nunez v. Dautel, 19 Wall. 560, 22 L. Ed. 161; Williston v. Perkins, 51 Cal. 554; Greenstreet v. Cheatum, 99 Kan. 290, 161 Pac. 596; Randall v. Johnson, 59 Miss. 317, 42 Am. Rep. 365; Doe v. Thompson, 22 N. H. 217; Sears v. Wright, 24 Me. 278. Therefore, the findings attacked were responsive to the issues and support the judgment of the superior court.

The judgment and order are affirmed.

We concur: WILBUR, J.; LORIGAN, J.

179 Cal. 328

## ABBOTT v. ARP. (L. A. 4586.)

(Supreme Court of California. Nov. 23, 1918.)

1. MALICIOUS PROSECUTION ⟸18(5)—WANT OF PROBABLE CAUSE—EVIDENCE.

Where defendant loaned plaintiff a wagon, and plaintiff left the country, leaving a wagon with a named person, who told defendant that plaintiff had sold the wagon to another, whereupon defendant commenced prosecution for embezzlement, mere fact that defendant knew that the wagon left with the person named was not his did not show want of probable cause.

2. TRIAL ⟸243—INSTRUCTIONS—INCONSISTENCY.

In action for malicious prosecution, instructions authorizing judgment for plaintiff, should the jury believe two utterly inconsistent propositions, *held* improper, as misleading.

Department 2.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by E. M. Abbott against James Arp. Judgment for plaintiff, and order denying motion for new trial, and defendant appeals. Reversed.

Kaye & Siemon, of Bakersfield, for appellant.

J. W. Wiley, of Bakersfield, for respondent.

MELVIN, J. Defendant appeals from a judgment and an order denying his motion for a new trial.

The action was one by which plaintiff sought damages for malicious prosecution. The issues of fact were tried by a jury, and a verdict was returned in favor of plaintiff for $500. Judgment was entered accordingly.

The evidence showed that on the 27th day of January, 1913, defendant, James Arp, swore to a complaint in the justice's court of the Sixth township, county of Kern, charging that E. M. Abbott, on or about the 27th day of November, 1912, did unlawfully convert and embezzle a certain wagon, the property of Arp, of the value of $15, with which property Abbott had been intrusted as bailee. Abbott was arrested upon the charge and imprisoned for several days. When the criminal case came on for trial, it was dismissed on motion of the district attorney.

The plaintiff, Abbott, did not testify at the trial of the civil action; but Arp gave testimony, both for the plaintiff and on his own behalf. He testified that he loaned Abbott a spring wagon in June or July of 1912. In September, Arp met Abbott, and asked for the return of the vehicle. Abbott replied that he had left it at the ranch of a man named Brinkman, and promised either to bring the wagon to Arp or have Brinkman, deliver it. Later, and after Abbott's departure from Kern county, Arp called up Mrs. Brinkman on the telephone, asked if Abbott had left a wagon at her place, and received an affirmative reply. On the following day she notified him that, upon consultation with her husband, she had learned that Abbott had sold the wagon left by him at the Brinkman ranch to a man named Green. Later, on the advice of a peace officer, Arp. went to the district attorney's office, stated the foregoing facts to one of the deputies, and obtained a complaint charging Abbott with embezzlement. Defendant also testified that he did not see the wagon at Green's place until after the issuance of the warrant and just before the trial. Mrs. Green, he said, pointed out to him the wagon which had been purchased from Abbott and he then discovered that it was not the one which he had owned.

The deputy district attorney, who drew the complaint on the criminal charge, had no remembrance of the details of the conversation with Arp which induced him to act in the matter. Mrs. Brinkman corroborated the defendant was reference to the conversations which she had with him by telephone.

While there was evidence from which plaintiff seeks to draw the conclusion that Arp did not own the wagon loaned to the plaintiff, we do not think it justifies that theory. E. M. Roberts testified that he left the old vehicle on the ranch which he sold to Arp, and that "Mr. Arp could have it if he wanted it." Evidently Arp did appropriate and use the wagon, and, as Roberts had abandoned all claim to it, there can be no doubt that defendant considered it his property.

One Goble, who was present when the conversation was in progress between Abbott and Arp with reference to the wagon, testified that the latter said: "You can have the wagon; go out and get it." Upon this testimony plaintiff bases his claim that, as defendant had made a gift of the property to plaintiff, the subsequent prosecution for embezzlement must have been inspired by malice. It is important to remember, however, that Goble was not present throughout the conversation, and that the plaintiff did not contradict defendant's testimony with reference to his subsequent promise to return the property. Such a promise would, of course, be totally inconsistent with the conclusion that Arp had made Abbott a present of the wagon.

[1] Respondent also insists that defendant knew when he swore to the complaint that the wagon sold by Abbott to Green was not the one loaned by Arp. Mrs. Green and her sister told of his visit to the Green place "on or about the 27th of January, 1913," when he was shown a wagon bought by Green from Abbott and exclaimed: "That is not my wagon." But they could not definitely fix the day. Mr. Green gave the time of the visit as "somewhere near a week" before they moved, fixing the latter date as February 2, 1913. In one part of his testimony Arp stated that he

saw a woman whom he supposed to be Mrs. Green at the home of the Greens prior to the time when he swore to the complaint; but he stoutly asserted that she did not show him the wagon, and he did not discover it was not his property until after the complaint against Abbott had been filed. It is argued that, since Mrs. Green and her sister told of but one conversation and one meeting, during which defendant discovered that the wagon in her husband's possession was not the one Abbott had borrowed from Arp, therefore the latter must have known, when he swore to the complaint, that he was verifying a false statement. The record is rather obscure on this point; but, assuming that Arp's discovery regarding the wagon at Green's place antedated the complaint, it does not follow, by any means, that want of probable cause was thereby established. Even if he did discover, before causing Abbott's arrest, that the wagon transferred from the Brinkman place to that of the Greens was not the one which had been loaned to Abbott, the undisputed facts remain that plaintiff had borrowed defendant's wagon, had kept it for more than half a year, had frequently promised to return it, and had departed for Long Beach without doing so, stating that it had been left with Mr. Brinkman. Added to these facts are the undenied statements that defendant had been told by Mrs. Brinkman that his wagon had been sold by Abbott to Mr. Green. The mere discovery that Green had purchased a wagon from Abbott, which was not defendant's, would not necessarily demonstrate that the loaned wagon had not been appropriated by the borrower. Yet the court instructed the jury that there would be "no probable cause for prosecution" if the jurors should find:

"That at time the defendant, Arp, made inquiry at residence of Green, he was shown and saw the wagon sold by Abbott to Green, and then knew and stated that it was not the wagon he had loaned to Abbott, and that these facts were all known to defendant, Arp., before he commenced the prosecution against Abbott."

This instruction was clearly erroneous.

The court gave, among others, the following instruction:

"Evidence has been introduced to show the following facts:

"(1) That the defendant, Arp., did not loan the wagon to plaintiff, Abbott, but gave it to him without consideration, with the statement to the effect that he (Arp) had no further use for it.

"(2) That after Arp had demanded the return of the wagon from Abbott, that Abbott informed the defendant, Arp, that said wagon was at Ben Lamb's, or Brinkman's place, in the Weed Patch, and that he would return it.

"(3) That after Arp had been informed that Abbott had sold the wagon to one Green, he, before commencing the criminal complaint against Abbott, knew that said wagon, which had been sold by Abbott to Green, was not the property of Arp.

"If you find that the above statements are established by a preponderance of the evidence, you are instructed that there was a want of probable cause."

[2] The instruction is one which would be misleading to any jury. The jury was told that one of the things establishing want of probable cause was Abbott's promise to return the wagon. On the contrary, such promise, is unfulfilled and followed by the departure of Abbott, would be one of the strong elements of probable cause, if Arp had good reason honestly to believe that the wagon had been sold by the borrower. By the instruction the jurors were told that they could believe two utterly inconsistent propositions —one that Abbott had received the wagon as a gift, and the other that he had promised to return it to the donor still claiming ownership. The giving of such an instruction was clearly error, requiring this court to reverse the judgment and order. Our conclusion upon this branch of the case makes it unnecessary to examine the other alleged errors.

The judgment and order are reversed.

We concur: WILBUR, J.; LORIGAN, J.

---

179 Cal. 332

## OLCOVICH v. GRAND TRUNK RY. CO. OF CANADA. (S. F. 8606.)

(Supreme Court of California. Nov. 29, 1918. Rehearing Denied Dec. 27, 1918.)

1. CARRIERS ⟸135—CARRIAGE OF GOODS—INJURY—DAMAGE—FREIGHT — "MARKET VALUE."

Carrier's liability for damage to goods based on value at point of destination under Civ. Code, §§ 3300, 3316, does not include freight as such in addition to the loss or deterioration; the market value of goods at destination including freight.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Market Value.]

2. CARRIERS ⟸158(1)—CARRIAGE OF GOODS—LIABILITY FOR INJURY—LIMITATION BY BILL OF LADING—DAMAGES.

Where bill of lading provides that carrier's liability should be computed at the value of the property at the place and time of shipment, the carrier's liability for partial loss of shipment of paper, where damage exceeded cost at point of shipment, was limited to value of paper at the time and place of shipment plus the freight, if paid.

3. CARRIERS ⟸135—INJURY TO GOODS—DAMAGE—INTEREST.

Where carrier's liability was limited by bill of lading to value of goods at time and place of shipment, the shipper in case of partial loss could recover interest on claim under Civ. Code, § 3287; the claim being capable of being made certain.

4. CARRIERS ⟸135—CARRIAGE OF GOODS—LIABILITY—DAMAGES.

Where paper was damaged during shipment so as to be worthless except as waste paper and

shipper reconditioned paper so that its value after deducting cost of reconditioning was greater than its value as waste paper, the cost of reconditioning was properly charged to carrier.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Julian H. Olcovich, as executor of the last will and testament of Herrman Olcovich, deceased, against the Grand Trunk Railway Company of Canada, a corporation. From judgment giving him less relief than demanded and from order denying new trial, plaintiff appeals. Reversed.

William E. Billings, of San Francisco, and C. V. Riccardi, of Los Angeles, for appellant.

Elmer Westlake and E. J. Foulds, both of San Francisco, for respondent.

WILBUR, J. Plaintiff appeals from a judgment and order denying a motion for new trial in an action to recover damages for injury to two shipments of freight by plaintiff's testator, from Berlin, N. H., to San Francisco, Cal., under bills of lading issued by the defendant. The first consignment consisted of 3,000 rolls of wrapping paper, shipped March 27, 1907, weighing 35 tons, costing $1,221.60 in Berlin with freight paid thereon amounting to $416.79. The second consignment, shipped October 23, 1907, consisted of 570 bundles of wrapping paper, weighing 26 tons, costing $1,196.59 in Berlin, with freight paid thereon amounting to $344.73. Both shipments were so far damaged that they had no market value except as waste paper. The value of the first shipment as waste paper in San Francisco was not to exceed $165, and that of the second shipment not to exceed $130. Plaintiff's testator, however, in an effort to reduce the loss, reconditioned the first shipment at an expense of $1,144.54. Its value was so increased that it sold for $1,558.82, making the net value of the reconditioned paper $414.28, instead of its waste paper value of $165. In the same manner the net value of the second shipment was increased by reconditioning to $770.13. The reconditioning consisted of sorting out the damaged and destroyed paper and retying the paper in new bundles with new wrapping thereon.

The actual expenditures of the plaintiff's testator on the first shipment were the cost, $1,221.60, the freight, $416.79, and the expense of reconditioning, $1,144.54, while the amount realized therefor was $1,558.82, making the total expenditures $1,224.11 in excess of receipts. On this shipment the trial court allowed as damages $60. On the second shipment the expenditures exceeded the receipts by $770.19. On this shipment the trial court allowed $40 as damages. The actual money loss of plaintiff's testator was therefore $1,994.30, and the judgment was $100.

The sole question presented by the appeal is the measure of damages.

[1-4] It is conceded that at common law, in the absence of any contract limiting the liability, the depreciation of the market value at the point of destination is the measure of damage. Ringgold v. Haven & Livingston, 1 Cal. 108, 118; Hart v. Spalding, 1 Cal. 214; Civ. Code, § 3316. The bill of lading, however, provided "that the amount of any loss or damage for which the carrier becomes liable shall be computed at the value of the property at the place and time of shipment," and it is conceded that such contract governs in fixing the measure of damages. Hutchinson on Carriers (3d Ed.) § 430; Civ. Code, § 2174; Donlon Bros. v. Southern Pacific Co., 151 Cal. 763, 91 Pac. 603, 11 L. R. A. (N. S.) 811, 12 Ann. Cas. 1118. Appellant claims that he is entitled to recover the value of the paper at Berlin, plus the freight and other charges expended to get it to San Francisco, plus the expenditures to put the property in a salable condition, less the amount for which the goods sold, plus interest on the balance from the date of delivery. Respondent claims that the measure of damages is the difference between the market price of the paper and the market value of the damaged paper at Berlin as of the time of shipment, of which latter no evidence was offered. No authority for this proposition is cited or has been found. When the loss is total, it has been held in this state that under such a contract the measure of damages is the value at the time and place of shipment, plus freight and interest. Pierce v. Southern Pacific Co., 120 Cal. 156, 47 Pac. 874, 52 Pac. 302, 40 L. R. A. 350. The authorities are not in accord as to the measure of damages in case of partial loss or injury. In Corpus Juris it is said:

"Very generally the view is entertained that such stipulations are to be considered as permitting recovery for the damage actually done, the amount recoverable not to exceed the amount agreed on as compensation for the total loss." 10 Corpus Juris, § 608b.

See, also, section 612, 3 Sutherland on Damages, 3391, citing Wilson Co. v. Ill. Cen. Ry. Co., 130 Tenn. 92, 169 S. W. 311. While the exact question has never been determined in this state, in the case of a partial loss under such a contract, it has been determined, in harmony with the general view, that the loss is limited by the value stated and agreed upon in the bill of lading in the case of a total loss. Pierce v. Southern Pacific Co., supra. If this limit is valid as to a total loss, there seems to be no reason why it should not also be considered as a limitation upon the damage in the case of a partial loss. The general rule of damage for breach of contract is the "amount which will compensate the party aggrieved for all the

detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." Civ. Code, § 3300. As has been said, this is the value at the point of destination in case of total loss (Civ. Code, § 3316), and the depreciation in value at that point in case of partial loss, unless limited by contract. As to the question of freight. It is not allowed as such. If the shipment follows the proper lines of commerce, the market value at the destination will include freight. If, however, as may be the result in the instant case, the damage thus estimated exceeds the cost or value at the point of shipment, the question remains as to whether the limitation upon the damage by the contract is the cost plus the freight, or the cost alone; that is to say, as to the first shipment in the instant case, whether limit of liability is $1,221.60, the cost at Berlin, N. H., or $1,638.39, the cost plus the freight. There seems to be no logical reason for a different rule, in the case of a partial and a total loss. In the instant case, to say that in case of a total loss the recovery could be $1,638.39, but that where there was a salvage value of $165 the recovery must be $1,221.60 less $165, instead of $1,638.39 less $165, would be as absurd as it is unjust. The limitation, therefore, upon the liability, is the value at the point of shipment plus the freight, if paid. The Supreme Court of Colorado has recently laid down this rule in Denver Co. v. Peterson Co., 59 Colo. 125, 130, 147 Pac. 663, and our own decision in Pierce v. Southern Pacific Co., supra, compels us to the same view. The question of plaintiff's right to interest is also raised. Respondent claims that although interest was allowed in the case of Pierce v. Southern Pacific Co., supra, in case of a total loss, it should not be allowed in case of a partial loss, under the rule that interest is not allowed in the case of unliquidated damages. The statutory rule is that—

"Every person who is entitled to recover damages certain or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day," etc. Civ. Code, § 3287.

If, within the meaning of this rule, a claim based upon the value at the point of shipment, as in the case of a total loss, is to be deemed "capable of being made certain, as we held in Pierce v. Southern Pacific Co., supra, the fact that it requires the proof of two market values to establish the damage in the case of a partial loss instead of one, that is, the market value at destination of the goods, if uninjured, and the market value of the damaged goods, would not be sufficient to render the amount of damage "uncertain," within the rule. We are therefore of the opinion that interest should be allowed from the date of delivery of the goods on the depreciation of market value. This case was not tried on this theory of the measure of damages. Appellant proved the cost and value in Berlin, N. H., the freight thereon, and the selling price of the "reconditioned" goods and the cost of such reconditioning. While there are late cases holding that the measure of damages under such a bill of lading as that herein is the difference between the cost price at the shipping point and the selling price of the injured freight at the point of destination (Wallingforth v. A., T. & S. F. Ry. Co., 101 Kan. 544, 167 Pac. 1136, L. R. A. 1918B, 716), and under this rule the evidence here furnished a sufficient foundation for such a determination, we prefer to follow the general view above stated, and under this rule the evidence is insufficient to determine the market value in San Francisco, either of the goods as sold, or the value if uninjured, nor does the record squarely present the matter. However, as it was shown that 570 bundles cost $1,196.59 in Berlin and 365 bundles thereof sold for $1,108.35 in San Francisco, and 3,000 rolls cost $1,221.60 in Berlin and that 2,720 thereof sold for $2,000.22 in San Francisco, and as the "reconditioning" consisted simply of discarding the paper that was torn and dirty, and retying the balance into bundles, it is a necessary inference from the evidence that the plaintiff was at least injured to the extent of the expense of reconditioning the paper, over $1,800, and for this reason the judgment for $100 should be reversed. The defendant claims that the plaintiff should not be allowed the large expenditures made in reconditioning the paper. The result of this work was to substantially increase the value of the reconditioned paper over the value thereof before the work, plus the cost of reconditioning. The defendant was entitled to the benefit of the net gain resulting from such reconditioning, namely, the difference between the value before such work and the net value thereafter, and therefore should be charged with the cost thereof.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SLOSS, J.; LORIGAN, J.; RICHARDS, Judge pro tem.

---

179 Cal. 302

## In re MOORE'S ESTATE AND GUARDIANSHIP. (L. A. 5495.)

(Supreme Court of California. Nov. 20, 1918.)

1. GUARDIAN AND WARD ⇐10 — APPOINTMENT—RIGHTS OF PARENT.

The father or mother of a minor child under the age of 14 years has a preferential right to be appointed guardian, which right the court

must recognize unless the parent be incompetent, has unnaturally or willfully abandoned the child, or failed to maintain it.

2. GUARDIAN AND WARD ⟸11—RIGHTS OF PARENT—APPOINTMENT.

Where a divorced wife, having been given the custody of the child, died and left a will appointing a guardian for it, such appointment was ineffectual, when the father survived.

3. GUARDIAN AND WARD ⟸13(4)—RIGHTS OF FATHER—ABANDONMENT—EVIDENCE.

In proceedings by a father to be appointed guardian for his minor child, evidence *held* not to sustain a finding that the father, by abandoning the child, had lost his right to its guardianship.

4. GUARDIAN AND WARD ⟸10 — APPOINTMENT OF GUARDIAN—RIGHTS OF PARENT.

In proceedings by a parent for the guardianship of his child, the welfare of the child is not a consideration so exclusive as to prevail over the natural and legal right of the parent.

Department 1.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Separate proceedings for the appointment of a guardian for Phelps S. Moore, a minor, brought by Charles Walter Moore and Hugh T. Gordon. From an order appointing Hugh T. Gordon as guardian, Charles Walter Moore appeals. Reversed.

George A. Hooper, of Los Angeles, for appellant.

Hugh T. Gordon and Ernest P. Wellman, both of Los Angeles, for respondent.

SLOSS, J. Opposing petitions for letters of guardianship of the person and estate of Phelps S. Moore, a minor, were filed by Charles Walter Moore, father of the child, and by Hugh T. Gordon. The petitions were heard together, and the court made its order denying the application of the father, and appointing Mr. Gordon guardian. The father appeals.

In addition to the petitions, there was on file a paper embodying the objections of Hugh T. Gordon to the petition of Charles W. Moore for appointment. This document alleged the unfitness of the father and his abandonment of the child. The court made no finding upon the first issue. It found, in effect, that Charles Walter Moore, the father, had knowingly and willfully failed to contribute to the support of the child, or to communicate with it, although he had the ability to do so. A declaration that he had abandoned the child is embodied in the conclusions of law.

[1] At the time of the hearing, the minor was of the age of seven years. It is settled law in this state that the father or mother of a minor child under the age of 14 years has a preferential right to be appointed guardian, and that the court must recognize this right unless it finds the parent seeking appointment incompetent, or unless such parent has knowingly or willfully abandoned the child, or, having the ability so to do, has failed to maintain it. Code Civ. Proc. § 1751; Civ. Code, § 246, subd. 4; Guardianship of Mathews, 169 Cal. 26, 145 Pac. 503; In re Mathews, 174 Cal. 679, 164 Pac. 8; In re Forrester, 162 Cal. 493, 123 Pac. 283; In re Salter, 142 Cal. 412, 76 Pac. 51. In this case, as we have seen, the court did not find against the father on the issue of his competency, and it is, at the very least, extremely doubtful whether a finding of incompetency could have been sustained on the evidence produced. We are satisfied, further that the evidence was not such as to support a finding that the father had abandoned the child (assuming that the court did so find), or the finding that he had failed to maintain it.

[2] The appellant and Marion A. Moore, the mother of the child, were married at Los Angeles in 1909. Charles W. Moore, the husband, was a resident of the state of New York, and he and his wife took up their abode in that state, where the child was born the following year. In November, 1911, Mrs. Moore, with her child, left the appellant and came to California. Thereafter she resided in this state. The husband remained in New York, where he was engaged in business, with his father, as a jeweler. He did not, apparently, make any protest against his wife's departure. The wife had means of her own, was able, after the separation to give the child good care and nurture, and did so. The husband did not contribute toward her support or that of the child. She did not, however, request him to do so. On the contrary, there is evidence that she told the appellant she would accept nothing from him for herself or the child. He did not write letters or send presents to the child, but his testimony, which is uncontradicted, is that his wife would not permit correspondence. In January, 1917, she obtained in the superior court of Los Angeles an interlocutory decree of divorce, whereby the custody of the minor child was awarded to her. The decree, which was based upon the grounds of desertion and willful neglect, was entered on the defendant's default. Some months thereafter Mrs. Moore died. She left a will by which she undertook to appoint the respondent, Hugh T. Gordon, guardian of the child, but, the father surviving, she had no right of testamentary appointment, and the provision of her will in this regard was ineffectual. Matter of Allen, 162 Cal. 625, 124 Pac. 237.

[3] The court was not authorized, on this evidence, to find that the father had abandoned the child and thus lost his right to its guardianship. "In order to constitute aban-

donment 'there must be an actual desertion, accompanied with an intention to entirely sever, so far as it is possible to do so, the parental relation and throw off all obligations growing out of the same.'" Guardianship of Snowball, 156 Cal. 240, 104 Pac. 444. The mere fact that the father permitted the child to remain with the mother is not enough to show such intent. The spouses had separated, and his right to the custody of the child was in no way superior to that of the mother. Civ. Code, § 197. Indeed, in view of the tender years of the minor, it was entirely proper that the mother should have its custody and care. Nor, under the circumstances, did his failure to contribute amount to a failure to maintain the child. The wife was able and willing to provide for its needs, and the father's acquiescence did not work a forfeiture, under Civil Code, § 246, of his right of guardianship. In re Forrester, supra.

[4] The court below seems to have proceeded upon the theory that in awarding guardianship, the paramount consideration is the welfare of the child. Our recent decisions, and particularly those in the two appeals in the matter of Mathews, cited above, make it manifest that, under the law of this state, this consideration alone will not prevail over the natural and legal right of the parent. Such parent is entitled to the guardianship, unless he or she be found incompetent, or has forfeited the right by abandonment or failure to maintain. One may readily sympathize with the desire of Mr. Gordon to carry out the trust which the deceased mother had attempted to confide to him, and to promote what he deems to be the best interests of the child. But however commendable his motives, they cannot justify us in sustaining an order which deprives the father of his natural right to the custody of his child, without a showing of legal ground therefor.

The order is reversed.

We concur: RICHARDS, Judge pro tem.; VICTOR E. SHAW, Judge pro tem.

---

38 Cal. App. 411

## McCOLLUM v. BARR. (Civ. 1876.)

(District Court of Appeal, Third District, California. Oct. 14, 1918.)

1. Appeal and Error ⟸930(1) — Review — Findings.

In determining whether evidence sufficiently supports the findings, the appellate court will give to the evidence such interpretation as the jury gave it, and adduce from it such inferences as the jury adduced, if such interpretation and deduction were such as reasonable men might make in the discharge of their duties as jurymen.

2. Physicians and Surgeons ⟸18(8) — Action for Damages—Improper Diagnosis—Failure to Discover Fracture — Sufficiency of Evidence.

In action against physician for failure to discover fracture of plaintiff's forearm during diagnosis, and during subsequent treatment, and for negligence in treating arm for dislocation where in fact there was a fracture, evidence *held* to support verdict for plaintiff.

3. Evidence ⟸558(4)—Expert Testimony—Cross-Examination.

In action against physician for failure to properly diagnose fractured forearm, where expert had testified that proper practice would have required use of X-ray, exclusion, during cross-examination, of testimony that he had treated certain patient without X-ray was proper, being as to collateral matter, and expert having testified that he had treated patients without X-ray, and that X-ray was not essential in case of "pure dislocation."

4. Evidence ⟸555 — Expert Evidence — Facts of Case.

An objection that the opinion of an expert witness was not founded upon all the facts of the case goes to the weight of the evidence rather than to its competency or materiality.

5. Trial ⟸110—Conduct of Counsel.

Where court has stricken certain evidence, it is improper for counsel to attempt to get the same evidence before the jury by means of putting the question in another form.

6. Appeal and Error ⟸930(2)—Review—Presumptions.

Where the court instructed the jury to pay no attention to the answer to a certain question, it will be presumed on appeal that the jury obeyed the court's instruction.

7. Trial ⟸252(8) — Instructions — Evidence.

In action for malpractice against a physician, refusal to instruct jury to render verdict for defendant, if plaintiff's forearm was not fractured, was proper, where the fracture was not contradicted.

8. Appeal and Error ⟸1067 — Review — Harmless Error.

Where court instructed jury that plaintiff was required to prove every material allegation in his complaint, its failure to instruct that such proof must be by a preponderance of the evidence was not of sufficient importance to justify a reversal.

9. Trial ⟸253(4) — Instructions — Evidence.

In action against physician for negligence in examining and treating plaintiff's forearm, requested instruction that plaintiff alleged negligence in examination of arm, and must prove such allegation, was not error, having omitted reference to plaintiff's allegation of negligence in treatment of arm.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by Frank N. McCollum against J. H. Barr. From judgment for plaintiff, defendant appeals. Affirmed.

J. E. Ebert and W. H. Carlin, both of Marysville, for appellant.

E. C. Levey, of San Francisco, W. P. Rich, of Marysville, and Geo. M. Lipman, of San Francisco, for respondent.

CHIPMAN, P. J. This is an action for damages resulting from defendant's alleged unskillful treatment as physician and surgeon of an injury to plaintiff's right forearm.

It is alleged in plaintiff's second amended complaint that on October 24, 1915, he fractured and broke his right forearm in cranking an automobile, and upon that day he called upon defendant and informed him thereof, and employed defendant as a physician and surgeon "to examine such fractured and broken forearm, and ascertain the extent of the injury thereby caused, and to set the same if broken, and to treat and heal the same for whatever the injury was to it." It is further alleged as follows:

"That defendant thereupon, as a physician and surgeon, and pursuant to such employment and undertaking, had a reasonable opportunity for examining, and did examine, the injured forearm of plaintiff; that by the exercise of ordinary skill in making said examination the defendant could have discovered that said plaintiff's forearm was fractured and broken, but defendant examined plaintiff's forearm in a negligent and careless manner, and without exercising ordinary skill, and by reason thereof defendant failed to ascertain that plaintiff's forearm was fractured and broken, and he, the said defendant, treated and tried to heal plaintiff's injured forearm as though the same was not fractured and broken, greatly to plaintiff's injury."

In his answer defendant alleges that plaintiff came to him for treatment as alleged in the complaint—

"with the wrist joint of his right arm completely dislocated backward, but defendant denies that his right forearm was broken or fractured;" that "defendant then and there examined said forearm, and used all due diligence and care to ascertain the extent of the injury thereby caused, and he did treat the same, and continued such treatment at intervals whenever called upon by plaintiff, until on or about the 11th day of December, 1915; that up to said time defendant discovered no fracture in plaintiff's said forearm, nor had plaintiff complained of or mentioned any such fracture until said 11th day of December, 1915; that on said date, however, plaintiff did ask defendant if he thought his said forearm was in fact fractured, and thereupon defendant stated to him that he had as yet discovered no fracture, but that he could and would make further examination of said forearm by applying thereto the X-ray process. Thereupon plaintiff left the office of defendant, and failed to return for further treatment or at all."

Defendant denies the averments of the complaint set forth in the fourth paragraph, and, on information, alleges—

"that plaintiff's forearm was not in fact fractured, or, if fractured, the fracture was not of such a nature or character that, with the exercise of ordinary care and skill on the part of defendant, he was unable to discover the same."

The cause was tried by the court with a jury, and plaintiff had the verdict for the sum of $1,000, and judgment followed accordingly for plaintiff. Defendant appeals from the judgment.

Plaintiff testified that he was cranking his automobile in Yuba City, "shoving down hard, and it back-fired, throwed my arm back in this condition. It made a big lump up here, and a lump underneath here, and after that I immediately got a horse and buggy and came to Dr. Barr's residence," where he met Dr. Barr in Yuba City. He was asked to describe the condition and general appearance of his arm when he called upon Dr. Barr, and answered: "Well, my arm—there was a large lump underneath here and a hump on the top, and the bones were spread out here and inclined down a little bit." He stated that his hand "was kind of back a little bit; * * * my hand was black and blue and up to my elbow here." He was asked to state what Dr. Barr did and said at this time:

"The doctor examined my arm, pressing in here in this manner, and on the side for about a minute, and told me to come out to his automobile and he would examine it further. I went out to his automobile there and he asked Mr. Beaver— Q. Who is Mr. Beaver? A. He is a brother-in-law of mine—to hold his arm on my shoulder, he would pull on it in this position, worked my arm up and down like this a little bit, still continuing to press on it, and asked Mr. Beaver to hold my arm in this position while the doctor wrapped it with the bandage, merely wrapped it; then helped me on with my coat, stuck my hand through the bib of my overalls, and told me I would be all right in a few weeks. Q. Did you have any further conversation at that time? A. That was all at that time, but later in the day I met him at the Rideout Hospital. My arm was paining me very severe. We got in his automobile and rode up to the cold-storage place, and he waited on Mr. Heilman's daughter, I believe— Mr. Carlin: Unless the witness was along we object to it as hearsay. Mr. Levey: Q. Did you ride with him? A. I rode in the front seat of the automobile with the doctor. We went from the Rideout Hospital to the cold-storage, and from there to the doctor's office, and after visiting his office he took my arm, nipped the bandage off with a pair of scissors, pressed on it again in this manner, not over a minute, then laid my arm in one of these metal splints in this condition, with the hand turned in, wrapped it with a bandage, and I had a sling around my neck at the time. After wrapping the bandage about here to here, he laid it in the sling, and said I would be all right in a few weeks. Q. How many splints did he use? A. Just the one." He testified that the splint extended from the wrist to a point near the elbow. "Q. Did Dr. Barr say anything or not at this time as to what was the nature of the injury? A. He merely stated it was a dislocated arm."

He testified that he continued his visits to Dr. Barr for treatment from October 24, 1915, to December 11, 1915, visiting him about three times a week. He was asked what Dr. Barr did at these visits:

"A. Every time I would visit Dr. Barr he would merely take his scissors, rip the bandage off, and feel my arm, in this position, lay the splint back and wrap it up; that is all he ever done. Q. Did you and Dr. Barr have any conversation during any of these visits with relation to the condition of your arm or the cause of the injury? A. Yes, sir; I asked Dr. Barr what made that large bump in my arm there. He stated that the tendon was out of place,

and that pulled my hand back in that position. He showed me a skeleton hanging up in the corner, and explained to me where this tendon was out of a little groove that passed over that bone; he says that is what pulled that cord back; he says, 'I will never be able to get that back in place any more.' Q. Did Dr. Barr use any other method of examination during the course of your treatment with him other than what you have testified to? A. None whatever. * * * Q. During this time what was the condition of your arm? A. I couldn't use my arm for any purpose whatever; I was unable even to hold a lead pencil in my hand, to write with a lead pencil; no motion whatever, or only a little bit. Q. What was the general outward appearance of the arm at the end of the seven weeks? A. Crooked, in this condition; a large lump here; one underneath, and these bones spread apart."

He testified that at the end of seven weeks, on December 10, 1915, he consulted Dr. Kauffman, who examined his arm through a fluoroscope, and then told him to go back to Dr. Barr, but plaintiff was not permitted to testify what Dr. Kauffman said of the nature of the injury.

"Q. Did you go back to Dr. Barr? A. Yes, sir; I went back to Dr. Barr, and I asked Dr. Barr if my arm was broke, and he stated no, it was merely dislocated; be all right in three or four weeks; could go to work. I asked him the question the second time, 'Is my arm broke?' and he stated, 'No, it was not.' Q. Did he say anything further at this time? A. No, sir; none whatever. Q. Then what did you do, if anything? A. I went back to Dr. Kauffman; he examined my arm the second time, and told me to go to San Francisco."

He testified that he went to San Francisco, and consulted Dr. Hunkin, who took an X-ray picture of the arm, and from there he went to the Fairmont Hospital in San Francisco, where he received treatment under Dr. Hunkin's direction for ten days, and remained at San Francisco under Dr. Hunkin's treatment for thirteen weeks, after which he returned to Marysville. He testified that while under the care of Dr. Barr he followed his instructions with reference to his arm, and did nothing contrary thereto; that he was incapacitated to work from October 24, 1915, until April 3, 1916. He was a mill worker and plumber.

It came out on cross-examination that Dr. Kauffman told plaintiff his wrist was broken. This was the day before plaintiff made his last visit to Dr. Barr.

"Q. So you said, 'Dr. Barr, is my wrist broken?' A. Yes, sir. Q. You asked him the second time? A. Yes, sir. Q. He told you he thought not? A. He told me it wasn't broken. Q. And you said, 'That is all I want to know?' A. I told him I wanted to know if my arm was broken. Q. Then what did you say to him? A. 'That is all I want to know if my arm is broke.' Q. Why didn't you tell him that you had the opinion from another doctor or surgeon that the wrist was broken? A. I didn't know which doctor was right."

The witness stated that he did not tell defendant that he had seen another physician or what that physician had told him.

Dr. Kauffman testified that when plaintiff visited him he examined plaintiff's arm, both visually and by use of the fluoroscope, "an apparatus used in conjunction with the X-ray, coil, and tube, whereby one can visually see the bones or other structures without taking a plate"; that he found a fracture of both of the bones, both the radius and ulna of the right forearm, these two bones connected with the bony structure of the forearm.

"Q. What condition did you find in the arm? A. Both bones broken. Q. What was the exterior appearance of the arm at the time Mr. McCollum called upon you? A. The lower end, that is, the lower end of the radius where the bone was broken, the broken piece, the detached piece of the radius, lay heaped up on top of the portion of the radius associated with the elbow joint, and on the underneath surface, the distal extremity, the other end of the radius, the other end of that broken bone, was sticking out in a projection underneath. The broken piece was heaped up on top of the bone, and there was a projection due to the unbroken piece projecting below it. Q. Was this visible to the naked eye? A. Yes. Q. What was the position of the styloid process, that is, the ends of each of the two bones of the arm, at the time? A. The styloid process of the radius was up above the level of the remaining portion of the radius; that is to say, instead of being in line with the rest of the bone, it was sticking up about three-quarters, between three-quarters and an inch, out of alignment, and the styloid process of the ulna, while not as much difference, was still distinctly out of alignment."

Dr. Hunkin testified that plaintiff consulted him, and that he found that both bones of the right forearm—the radius and ulna—were broken, with some displacement; that he made an examination with the X-ray, which disclosed both bones broken; that plaintiff came to him December 15, 1915, and that he saw him up to March 25, 1916; that plaintiff was taken to the Fairmont Hospital, where he was operated upon.

"Q. Will you state what you did and what course was followed in making the first examination when Mr. McCollum first called upon you? A. I examined him with my fingers and with the X-ray. Q. Will you state what the examination of the fingers consisted of? A. I examined the arm and hand as to movement and as to the character of the power and as to the position. Q. Was any opening made at the point of fracture at the time of examination? A. No opening was made at that time. Q. Will you state just what condition you found there at the time of the operation and will you state exactly what was done? A. The bones were lifted in place and secured in proper position. Q. What condition did you find with respect to the bones? A. I found the lower fragments displaced backwards and impacted. Q. From your examination, both at the time of the first calling and at the time of the operation, can you say of how long standing this fracture was? A. I cannot. * * * Q. From your examination and the condition presented at the time of the operation, can you say whether or not there was any dislocation of the wrist between the radius and the small bones of the wrist? A. No, there was no dislocation. Q. Did you find any dislocation in the arm in the course of your examination or at the time of the operation? A. Technically, I would have to answer no. Q. Did you or did you not find a dislocation in the course of your examination in this case? A. No, I have had many cases of like fractures, but every case

is different. There was no dislocation; there was some displacement of the ends of the fractured bones; displacement is not dislocation. Dislocation is where the bone is out of place with its mate, if you understand. Displacement is where the bones are broken and out of place somewhere else. * * * Q. Will you state what the displacement consisted of and what was the result? A. The lower fragments were displaced backwards. * * * Q. In your examination, upon what did you determine an operation to be necessary? A. The displacement chiefly. Q. Was an operation essential and necessary in this case or not? A. I think so. Q. At the time of the operation was there a union between the bones? A. There was not. Q. Was there any impaction of the fragments? A. Yes. Q. Will you state just what the condition was in that respect? A. The upper fragment was jammed into the lower fragment. Q. Would you call this an ordinary fracture? A. The manipulation of the wrist between the fingers showed this to be more than an ordinary fracture. * * * Q. What was the position of the hand with respect to the arm at the time Mr. McCollum called upon you? A. The hand was displaced backwards. Q. At about what angle? A. Displacement has no relation to angle. Q. Will you state just what was the position of the hand with relation to the forearm at the time the patient called upon you? A. The lower fragment was displaced backwards and impacted into the upper and the position of the hand was displaced backwards."

Defendant testified in his own behalf. He was asked to give his account of plaintiff's injury and the treatment given. He replied:

"He came to my residence on October 24, 1915, informing me that he had injured his hand by cranking an automobile and wanted me to take care of it. I looked at the hand, and my bandages and case were out in the automobile. We went out there, and with the assistance, I believe he said his brother-in-law, Mr. Beaver, I believe is the name—between us, Mr. Beaver holding the arm and my pulling and manipulating the wrist, I reduced a dislocation of the right wrist between the carpal and metacarpal bones. Q. To what extent did you at that time examine the forearm or wrist? A. I examined it very thoroughly at that time to see—beforehand to see what the conditions were, and after placing them to seeing that they were in place. Q. Did you at that time discover any evidence of a fracture? A. I did not. * * * Q. For what purpose was your examination made? A. For the purpose of ascertaining the extent of the injury. Q. Proceed, if you will, and detail the times when you treated him and the nature of the treatment. A. During the same day he called on me, saying that his hand was quite painful and was swelling very rapidly. I stated I would be at the Rideout Hospital in a short time, and to meet me there, and I had to make a call; he got in the automobile with me and I made the call. We returned to the office, I removed the bandage I had previously applied, then applied Levis' metallic splint to the hand, and rebandaged it again. I also examined the hand very thoroughly at the office at that time."

He testified that plaintiff came to him at different dates giving them, in October and November, and on November 3d, he removed the splint from the hand and applied the bandage only.

"Q. At that time, in your opinion, what progress was being made with the forearm? A. That it was in very good shape. There was still some swelling, still some thickening. On November 29th I removed the bandage, and I last saw him on December 11th and examined the hand. He said, 'Doctor, I cannot grasp anything.' I said, 'Take something in the hand, put it in motion, and it will strengthen it as you use the hand and put it in motion.' That is the last time I saw him to examine the hand under my care. Q. Was there anything said by him at that time or any question asked about whether his hand was broken or his arm? A. On December 11th he came to my office and asked me, saying, 'Doctor, do you think my arm is broken?' I said, 'Up to the present time I have seen nothing to indicate that your arm was broken.'"

He was asked to describe what he did on October 24th when plaintiff first came to him, and answered:

"I took his hand in my hand, grasping the fingers firmly, Mr. Beaver taking hold of the shoulder and arm, and by giving a very vigorous pull with my hand pulling on his, and with my fingers against the dislocated parts, pressing and bringing them down and working them in place, so they were placed down into their proper position. I then requested Mr. Beaver to take hold of his hand, and as I had no splint at the house, and I don't like to put on a piece of stave or barrel or anything of that kind, I simply bandaged the hand until I could get to the office, which was done in the afternoon. The hand was kept in the position we usually keep fractures or dislocations, which is a position with the fingers slightly extended out as in all splints if you look at them. The hand was padded and bandaged in that position, and kept in that position in the splint, brought up against the body, bending the elbow, bringing it up here for easy carriage. At the time I examined the forearm there was a deformity in the wrist and the palm of the hand, and a deformity on the back of the hand by the bones projecting backward out of their place. Q. On the hand, you mean? A. And the wrist, in the wrist."

He testified that the deformity referred to was caused by "a dislocation of those bones from each other"; that the "discoloration of the hand extended only about two and a half inches from the palm of the hand in the wrist." He further explained as follows:

"The dislocation occurred in this location between the carpal and metacarpal bones. The metacarpal bones were driven upward and backward over the carpal bones. By traction it was pulled and worked, with the assistance of Mr. Beaver, until those bones were reduced and in place. Of course, there was some swelling at that time; but on examining the hand at the present, with the exception of the scar I see here on the hand, I cannot see much, if any, difference in the alignment than what it was when I last saw it in my office on December 11, 1915. There was some thickening all through the hand, and by nonuse it had probably atrophied some. The hand to-day is about perhaps the same alignment that it was at that time. There is still some thickening at this place on the hand at the present, which can take place in all cases of the tearing of the ligament of any joint."

He testified that at no time did he discover any indications of a fracture, and that at all times he treated him to the best of his ability.

On cross-examination he testified that when plaintiff first came to him the discoloration was as he had stated, but later, within two or three days, "it showed further up"; that he employed no method of examination of

plaintiff's injury "other than digital and visual," and did not use a fluoroscope or X-ray; that he visited patients in the Rideout Hospital, and that there was an X-ray apparatus there; that he treated the case as one of dislocation; that in his practice, if he had a suspicion that there was a fracture, he used the X-ray, but in this case he had no such suspicion.

The foregoing facts are found in the testimony of the only witnesses who saw or treated plaintiff or had personal knowledge of his injury. The remaining testimony is that of physicians who had practiced surgery, given as experts. For example, the following questions propounded to Dr. Miller by defendant, and his answers, will illustrate the scope of this class of evidence relied upon by defendant:

"Q. Assume on the 24th of October, 1915, the plaintiff here was at that time 27 years of age, called upon a surgeon, the defendant in this case, stating to him that he, the plaintiff, had just that day received an injury to his right forearm or wrist by the cranking of an automobile. Will you please state to the jury what, in your opinion, ordinary care and skill would require of the surgeon in diagnosing and treating that injury? A. The first thing we do usually is to inquire how the accident happened, the direction in which the force was applied, and the amount of force that was exerted, as near as can be found out. Then we look at the arm or the wrist, note if there is any deformity, any swelling or discoloration. Then we usually put it through certain motions, using both hands, to see if there is a dislocation or fracture, in fact to discover the extent of the injury. That is the ordinary procedure in examination of injuries of this nature. Q. And assuming that the physician or surgeon should diagnose the case as a dislocation, and be called upon to treat the patient for a period of time, some weeks thereafter, state, Doctor, what, in your opinion, reasonable care and skill on his part would require in such treatment, and how it should be done? A. The first treatment consists in correcting any condition that may exist. For instance, if it is a dislocation, the dislocation is reduced; if it is a fracture, the fracture is reduced; whatever condition exists is corrected as discovered by the surgeon; for instance, a dislocation of the wrist, the parts are put back into position, and the hand and arm are put in a splint and immobilized. * * * Q. Now, Doctor, in your opinion, in such a case as I have suggested to you in my first question, would ordinary care and skill on the part of the surgeon necessarily require the use of the X-ray? A. Not necessarily, no; because we treat a great many fractures and dislocations without the use of the X-ray, and it is ordinarily done."

On cross-examination he testified that where there is doubt "it is customary to use the X-ray."

Dr. Gray, called by defendant, gave somewhat similar answers to like questions put to Dr. Miller. On cross-examination he testified that in case of doubt he regarded it as essential to use the X-ray; that the treatment described by him had reference to dislocations and not to fractures; that the treatment would not differ "if the bones were properly approximated"—that is, "if the bones had set in their proper position."

Dr. Kauffman, called by plaintiff, testified that where an injury such as the one in question is presented to a surgeon the usual and recognized method of examination among the profession for the purpose of diagnosis is by the X-ray, and that an examination without the use of the X-ray—

"would not indicate the exercise on the part of the examining surgeon of ordinary skill and care. Q. If a patient's arm, at the time of examination, reveals a deformity in the form of a prominence on the inner or front surface of the forearm, a widening of the two bones of the forearm at the wrist, and a discoloration of the forearm from the wrist to a point near the elbow, would that condition indicate a fracture or a dislocation, or either, in your opinion? A. Fracture. Q. If both bones of the forearm are broken near the wrist, would you, in your opinion, say that the placing of the forearm in the splint, with the hand drawn towards the body, was the usual or is the usual and recognized method of treatment among the profession to secure proper results in the case of a fracture? A. No. Q. Will you give your reasons for that statement, Doctor? A. Because one is not getting apposition in that way. Q. Explain what you mean by apposition. A. Merely carrying out the procedure as indicated in the question won't bring the two ends of each bone in position; that is, if both bones of the forearm were broken, putting on a splint bringing them toward the body is doing nothing whatever to bring these two bones and the broken ends of the bones together; it is bringing the whole forearm against the body, not bringing the two ends of the bone together. * * * Q. In your opinion, where a patient calls upon a surgeon with his arm injured in the manner indicated by me in my previous questions, would the examination and treatment of the arm or wrist in the case of a dislocation without the use of an X-ray plate be in accordance with the usual method pursued by the profession in such cases?" Over objection, the witness answered: "No. May I explain that? Q. Give your reasons; you may explain it. A. I was wondering what was happening. One can't be sure that any dislocation is a pure dislocation or that associated with the dislocation there is not some concomitant fracture. In treating the dislocation without treating the fracture that may go with it, you won't get perfect results; while you may treat a case successfully of pure dislocation without the X-ray plate, it isn't good practice. A dislocation per se may be treated without an X-ray plate."

Dr. Casper, adjunct surgeon of Mount Zion Hospital, San Francisco, was called by plaintiff:

"Q. If a patient who has injured his right forearm in cranking an automobile calls upon the surgeon to examine the forearm and ascertain the cause of the injury, and if the forearm at the time reveals a deformity near the wrist, ascertainable by observation, would the taking of the patient's hand by the surgeon, coupled with the pressing of the latter's thumb upon the wrist bones of the patient's arm, and other manipulations, the feeling with the fingers of both bones of the arm, and the pulling of the patient's arm, be sufficient, by the exercise of ordinary skill and care on the part of the surgeon, to determine the existence of a fracture and displacement and dislocation, or either, if the same were present?" Over objection, the witness answered: "Yes; and I would say such an examination supplemented by the X-ray, either before or after. Q. In the case of an injury of this character, happening as I have stated in my previous questions, if an X-ray was not used, would you

say in your opinion that that would indicate the exercise of ordinary skill or care on the part of the surgeon?" An objection was overruled and the answer was: "I would say it was not. Q. If the patient's arm, at the time of examination, reveals a deformity in the form of a prominence on the inner or front surface of the forearm, a widening of the two bones of the forearm at the wrist, and a discoloration of the forearm from the wrist to the elbow, would that condition indicate, if there was exercised by the surgeon ordinary care and skill in his examination, a fracture or a dislocation or either?" Over objection, the witness answered: "It would be very suggestive of a fracture. * * * Q. If there were a dislocation, would there, in such a case, be a discoloration of the arm from a point near the wrist to a point near the elbow? A. It is not as likely as in a fracture."

He testified that in his opinion it was not ordinary skill and care on the part of the surgeon to treat a dislocation of an arm or wrist without using the X-ray if the latter were accessible; that if the X-ray is not accessible when the patient is first treated, it should be resorted to "as soon as the splints are applied."

The instructions given by the court correctly and without objection stated the principles of law by which the jury were to be governed as follows:

"One who holds himself out to the world as a physician and surgeon impliedly contracts that he possesses the skill properly to practice his profession and specialty. He is bound, therefore, in the discharge of his duties, to use ordinary care, diligence, and skill, according to the circumstances of the case.

"If the defendant in this case possessed the skill and learning which is required of one of his profession, and failed to exercise it in this case, and, in his examination and treatment of patient's injured arm, was careless and negligent, and the plaintiff was injured and sustained damages in consequence thereof, the defendant is liable for such damages as plaintiff has sustained.

"A patient is entitled to ordinarily careful and thorough examination such as the circumstances, the condition of the patient, and the physician's opportunities for examination will permit. If there is a reasonable opportunity for examination, and the nature of the injury or ailment can be discovered by the exercise of ordinary care and treatment, then the physician is answerable for failure to make such discovery.

"The court instructs the jury that if you find that plaintiff's forearm was fractured and displaced, and not dislocated, at the time he consulted defendant, and during the times he remained under defendant's treatment, and that defendant's failure to ascertain that such forearm was fractured and displaced, and his subsequent treatment of the same for a dislocation, were the result of a failure on the part of defendant to exercise, as a surgeon, ordinary care and diligence in connection therewith, you will find, under the evidence, that plaintiff is entitled to a verdict for the amount of the damages which in your opinion he should recover in accordance with the evidence in the case.

"A surgeon does not undertake to perform a cure, nor does he undertake to use the highest possible degree of skill, but he undertakes only a fair and reasonable degree of skill, and the question for the jury to decide is whether in his treatment of the plaintiff defendant used such reasonable care and skill; and unless you find from the evidence that he failed in this respect plaintiff cannot recover, and your verdict must be for defendant.

"In his treatment of plaintiff defendant as a physician and surgeon was not required to avail himself of the use of any particular appliance. All that was required of him was to adopt such means and follow such procedure and use such appliances as, under the circumstances, was required in the exercise of ordinary care and skill; and if you find from the evidence that in this regard defendant did use ordinary skill and care, then your verdict must be for defendant.

"Even if you find from the evidence that at the time plaintiff called upon defendant for treatment he was suffering both from a fracture and dislocation of the forearm, and that defendant treated him for a dislocation only, and that in so doing defendant exercised reasonable skill and care to ascertain and treat the nature of plaintiff's injuries, then your verdict must be in favor of defendant."

In point of numbers the expert witnesses called by defendant and testifying substantially as did Dr. Miller and Dr. Gray exceed the number testifying as experts at plaintiff's call. It will be observed, however, that the attention of defendant's expert witnesses was directed more particularly to a case where the attending surgeon's diagnosis and treatment had relation to a case of dislocation, whereas the two expert witnesses called by plaintiff were given a statement of what was claimed to be the facts in the present case as shown by the evidence. Appellant's contention is that he made an honest diagnosis upon sufficient examination, according to accredited practice in such cases, and did all he could in subsequent treatment, and all that ordinary care and skill required, to accomplish a restoration of the injured forearm to its normal condition; that his diagnosis revealed to him no more than a dislocation, and, having properly treated the injury as such, no liability attached for results. Defendant not only diagnosed the case as one of dislocation and treated it as such for seven weeks, but, in his verified answer to the complaint, he denied that plaintiff's forearm suffered a fracture, although the testimony of Dr. Kauffman and Dr. Hunkin leaves no doubt that both bones of plaintiff's forearm were broken.

[1] It is very clear that defendant made a faulty and erroneous diagnosis of plaintiff's injury and adhered to it during the period of his treatment. Does the evidence sufficiently support the implied finding of the jury that this erroneous diagnosis was illy considered and carelessly or negligently made and not warranted by the facts as they presented themselves to defendant? In solving the question we must give to the evidence such interpretation as the jury gave it, and deduce from it such inferences as the jury deduced, if such interpretation and deduction were such as reasonable men might make in the discharge of their duties as jurymen.

The testimony of Dr. Kauffman was that when plaintiff came to him, while still under defendant's care, he discovered at once, by visual and digital examination, that plain-

tiff's forearm was fractured, and this he confirmed by the X-ray. So, also, Dr. Hunkin made the same discovery without using the X-ray. Dr. Kauffman's description of the condition in which he found plaintiff's wrist at the end of seven weeks' treatment by defendant should have suggested to defendant that something more serious than a dislocation was present. Accepting as true the testimony of Drs. Kauffman and Hunkin (as we must assume that the jury so treated it, and considering other established facts in the case), we cannot say that the jury were without support in finding that had defendant exercised ordinary care and skill when he made his diagnosis he would have discovered the existing fracture, or, if not then, at least at some period during a seven weeks' treatment. The expert witnesses seemed to agree that in case of doubt the X-ray, if accessible, should be used. There was testimony of the experts that where discoloration existed to the extent here shown, though not conclusive, was indicative of fracture. Defendant testified that he had no doubt of the correctness of his diagnosis. But was he justified, in view of the facts, in closing his mind against any doubt, and neglecting an available and accepted means of testing the correctness of his judgment? Defendant's ability and skill as a physician and surgeon seem not to be questioned. The point urged is that in this particular instance he did not exercise the care and skill of which he was capable, and did not "use ordinary care, diligence, and skill, according to the circumstances of the case," as the court instructed the jury was his duty.

At the oral argument the attorney for defendant assumed that defendant treated the patient properly for a dislocation, and that, had the diagnosis been correct, the treatment was proper. But we think counsel was in error in assuming that "about the only issue made during the trial was as to whether or not Dr. Barr should have examined the patient, when making his diagnosis, by the X-ray process." Counsel also claimed that it was "after an X-ray had been applied to the injured member that it was discovered, or claimed to have been discovered, that there had been a fracture." We think counsel justified in his assumption that the treatment given by defendant was proper for a dislocation had the defendant's diagnosis been correct. But whether or not defendant should have used an X-ray in making his diagnosis was not the only issue. As to that the experts differed in opinion, and it was shown that surgery had been successfully practiced before the X-ray was discovered. Apart from the conflicting expert testimony on this point, there was testimony by two surgeons who examined plaintiff's wrist, one of whom was practicing in the locality, that the presence of a fracture was revealed readily without the use of the X-ray. May not the jury have been justified in finding that, by the exercise of ordinary skill and care, defendant would have discovered, at some time during his seven weeks' treatment of plaintiff, what these surgeons saw at once upon examining plaintiff's arm without using the X-ray? May not the jury have been justified in finding that, had defendant used the ordinary skill and care which he possessed, enough evidence of a fracture would have been revealed to him to require of defendant that he verify or test his diagnosis by resorting to the X-ray, which was available to him at the Rideout Hospital? It may be conceded that defendant's expert witnesses were correct in their opinion that ordinary skill and care did not require of defendant that he should have used the X-ray in making his diagnosis. But there still remained the question whether the defendant did in fact exercise ordinary care and skill in making his diagnosis, and the still further question whether, had he exercised ordinary care and skill in his treatment, he would not have discovered the error in his diagnosis.

Counsel quote as follows from the opinion in Hesler v. California Hospital Co., 174 Pac. 654: "It is never enough to show"—that is, as against a physician—"that he has not treated his patient in that mode, nor used those measures, which in the opinion of others, even medical men, the case required, because such evidence tends to prove errors of judgment, for which the defendant is not responsible, as much as the want of reasonable care and skill, for which he may be responsible"—citing a New Hampshire case. It may be doubted that the degree of skill and care of a physician in diagnosing and treating disease is the same as that of a surgeon in all cases of surgery. A broken or dislocated member of the body, usually discernible to the eye or the touch of the surgeon, presents an entirely different problem from internal disorders whose manifestations are obscure and often misleading. However this may be, the question is always open to inquiry whether or not the physician or surgeon in a given case did in fact exercise ordinary skill and care. The statement above quoted has reference to the force of expert or opinion testimony as to whether or not in a given case ordinary care and skill have been shown. In the present case the verdict finds support in facts shown irrespective of expert testimony.

[2] We cannot say that the verdict was without sufficient support.

[3] Error is assigned "in ruling against the introduction of evidence." During the cross-examination of Dr. Kauffman by defendant an offer was made to show by a patient of Dr. Kauffman's present in court, that he had treated this patient without resort to the X-ray. The purpose was to discredit his testi-

mony. The court sustained plaintiff's objection. To have permitted this would have involved an inquiry into the character of this patient's injury, the diagnosis made and the treatment given, and practically opened up an investigation upon a collateral matter much the same as was being investigated in the case itself. The witness testified that he had treated patients with dislocated and fractured forearms "without subjecting the member to the X-ray process." He also testified that in case of "pure dislocation" the X-ray was not essential. Having had these answers, it was not error to rule against exhibiting the witness' patients.

[4] A hypothetical question was propounded to Dr. Kauffman in which the facts in this case were stated, and an opinion asked as to the length of time it would take for "the bones to knit and the injury to heal if they were primarily set and if primary attention and treatment were given to the patient." Objection was made that the question omitted to state "the condition of the patient, nothing at all except the mere fact of the injury." The point now made that his opinion was not founded upon "all the facts of the case goes to the weight of his evidence rather than to its competency or materiality." Reardon v. Richmond Land Co., 21 Cal. App. 357, 131 Pac. 894.

[5, 6] Error is claimed for misconduct of plaintiff's attorney in seeking to get before the jury statements made by defendant to plaintiff in a conversation between plaintiff and defendant after plaintiff returned from San Francisco. Defendant's attorney moved to strike out all the testimony. "The Court: Strike it out. The jury is instructed to pay no attention to the testimony that has been stricken out, the answer of the witness as to the conversation taking place between him and Dr. Barr at the time is to be disregarded by you altogether, and treated as though you had not heard it." Plaintiff's attorney put the question in another form, and defendant moved to strike out the answer. "The Court: Strike it out; the same injunction as before," turning to the jury, "that you pay no attention to that answer." It was improper for plaintiff's attorney, after a ruling against him, to endeavor to get before the jury in another form the matter ruled out. We must assume, however, that the jury obeyed the court's instructions.

Defendant offered the following instructions, which were refused:

"Unless you find from the evidence that when plaintiff called upon the defendant for treatment, or during the course of the treatment, plaintiff's forearm was fractured, then your verdict must be for defendant."

"Plaintiff in this action alleges that defendant, as a surgeon, examined his forearm in a negligent and careless manner, and without exercising ordinary skill, thereby causing the injury and damage claimed by him in his complaint; and I instruct you that the burden rests upon the plaintiff to prove these allegations by a preponderance of the evidence, and that if he fails in this respect you should find your verdict for defendant."

[7] Of the first of these instructions it may be said that, although defendant in his answer denied that plaintiff's forearm was fractured, the testimony was uncontradicted that plaintiff's forearm was fractured; and when on the witness stand defendant made no claim further than that he did not discover any fracture, we think the jury must necessarily have found that plaintiff's forearm was fractured, and hence the refusal to give the instruction was not error.

[8, 9] As to the second instruction, the court instructed the jury that "the burden rests upon the plaintiff to prove every material allegation in his complaint, and if he has failed in this respect you should find your verdict for defendant." The error now assigned is that the court in its instruction failed to tell the jury that plaintiff must prove every material allegation "by a preponderance of the evidence." This omission we do not think of sufficient importance to justify a reversal. Furthermore, the plaintiff not only alleged negligence in examining plaintiff's forearm, but in its treatment. The proposed instruction omits this latter feature of the case.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

179 Cal. 347

## In re COWPER'S ESTATE. (L. A. 5548.)

(Supreme Court of California. Dec. 2, 1918. Rehearing Denied Dec. 30, 1918.)

INSANE PERSONS ⊂=33(2)—GUARDIANSHIP—PROCEEDINGS—REVIEW.

Where the court's order appointing guardian for alleged incompetent person is based upon sufficient evidence to justify the order, the order will not be disturbed on appeal in absence of claim or showing that court abused its discretion in making order; the lower court having personally observed the alleged incompetent, and having had a superior opportunity to estimate the value and weight of the evidence.

Department 1.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

In the matter of the estate and guardianship of Mary Jane Cowper, an incompetent person. From an order appointing guardian, the alleged incompetent appeals. Affirmed.

Isidore B. Dockweiler and J. Wiseman Macdonald, both of Los Angeles, for appellant.

W. N. Goodwin and Wm. J. Variel, both of Los Angeles, for respondent.

RICHARDS, Judge pro tem. This is a proceeding wherein it was sought to have a guardian appointed for the estate of Mary Jane Cowper. The petitioner was her sister, Margaret A. Saunders. The petition was opposed by Mary Jane Cowper herself, supported by another sister named Mrs. Julia Brown. The petitioner averred that Mary Jane Cowper was the owner and in possession of certain real and personal property in the city and county of Los Angeles, of considerable value and income; that she was of the age of 52 years, unmarried, and for several years last past had been and then was in delicate health, and by reason thereof had been and then was mentally incompetent to manage or properly take care of her said properties. The petition asked for the appointment of the Title Insurance & Trust Company of Los Angeles as the guardian of her said estate. The opposition to the petition denied its averments as to the ill health or incompetency of Mary Jane Cowper. The matter came on for hearing before the court upon this single issue on July 25, 1917, the parties supporting and opposing the petition being present in court and respectively represented by able counsel. The hearing occupied three days, during all of which time Mary Jane Cowper was present in court, and during a considerable period on two of said days was upon the witness stand and was subjected to the observation of the court and to a very careful and thorough examination as to her mental and physical condition. The respective members of the family supporting and opposing the petition were examined at length, as were also numerous witnesses familiar with her life history. After such hearing, observation, and examination, the court took the matter under advisement for some time, after which, and on September 11, 1917, its findings of fact and conclusions of law were filed, wherein the court found:

"That the said Mary Jane Cowper is not insane, but that she is incompetent because, by reason of weakness of mind, she is unable unassisted to properly manage and take care of her property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons."

The court accordingly appointed the Los Angeles Trust & Savings Bank guardian of the estate, and from its order to that effect this appeal has been taken.

The sole matter discussed in the briefs of counsel upon this appeal is the sufficiency of the evidence to sustain the foregoing finding and order of the trial court. Some authorities are cited on behalf of the appellant upon the value of expert evidence with which this court has no quarrel, but which would be more persuasively directed to the trial court, since they relate to the weight of such evidence. Our attention is also called to the case of Matter of Coburn, 165 Cal. 202, 131 Pac. 352, which in some of its features resembled the case at bar, and in which the order of the trial court appointing a guardian was upheld. The test of competency declared by this court in that case was evidently the one adopted by the trial court in the instant case, since its finding follows the precise wording of the former decision. We are also referred to the Estate of Schulmeyer, 171 Cal. 342, 153 Pac. 233, in which the language of this court in the Coburn Case as to the proper test of incompetency was approved, and in which also the order of the trial court appointing a guardian was affirmed. In this latter case this court very aptly said that the trial court had the advantage, not only of hearing and seeing the other witnesses, but of observing the appellant himself, and was in a far better position than we could be to determine his mental condition. The Matter of Sarah A. Watson, 168 Pac. 341, is also cited as being a case in which this court reviewed the evidence and found it insufficient to sustain the order for a guardian's appointment; but a comparison of that case with the instant case disclosed quite a difference between its facts and those of the case at bar.

Without undertaking to recite at length the testimony presented in the instant case, we are satisfied from a careful examination of the record that there was sufficient evidence before the court to justify its order, and that in view of the superior opportunity of the trial judge to estimate the weight and value of such evidence, and especially to determine the mental and physical condition of the alleged incompetent from personal observation and from her extended examination in his presence, we are not disposed to interfere with the result of its exercised discretion, in the absence of any claim or showing that such discretion has been abused.

Order affirmed.

We concur: SLOSS, J.; VICTOR E. SHAW, Judge pro tem.

179 Cal. 353

## TITLE INS. & TRUST CO. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (L. A. 5763.)

(Supreme Court of California. Dec. 4, 1918.)

EXECUTION ⊂399 — SUPPLEMENTARY PROCEEDINGS—PRIVILEGE.

In proceedings supplemental to execution, under Code Civ. Proc. § 717, where a trust company was averred to have in its possession property, etc., of the judgment debtor, the trust company cannot, under the provisions of Bank Act, § 103, as amended by St. 1913, p. 183, § 71, requiring trust companies to keep inviolate all communications, etc., refuse to divulge information sought on the ground it concerned a private trust.

In Bank.

Application by the Title Insurance & Trust Company, a corporation, for a writ of prohibition prayed to be directed against the Superior Court of the state of California in and for the county of Los Angeles and Grant Jackson, judge presiding. Transferred by the District Court of Appeal to the Supreme Court. Writ denied.

Erle M. Leaf and James E. Shelton, both of Los Angeles, for petitioner.

John W. Luter and Randall & Bartlett, all of Los Angeles, for respondents.

RICHARDS, Judge pro tem. This application for a writ of prohibition was presented to the District Court of Appeal for the Second Appellate District, and an alternative writ issued. Upon the hearing thus ordered, the justices of that court being unable to agree as to whether a permanent writ should issue, the matter was transferred to this court for decision.

The facts upon which the application for the writ was based are briefly these: One Charles C. Branch commenced an action in the superior court of the county of Los Angeles against George C. Peckham and H. E. Branch, and in said action recovered judgment against said defendants in the sum of $579.75 and costs of suit. Thereafter, and on March 7, 1918, an execution was issued upon such judgment in the usual form, which was delivered to the sheriff of said county for levy. On March 8, 1918, the said sheriff levied said execution upon the petitioner herein, by notifying said petitioner that all moneys, goods, credits, and debts due or owing, or any personal property in petitioner's possession or under its control, belonging to said defendants, and particularly any escrow by which defendant H. E. Branch was to receive money from Gillman Bros., or others, for the sale of Gillman's Relief Hot Springs, formerly known as San Jacinto Hot Springs, of San Jacinto, Cal., were attached by virtue of the execution, a copy of which was delivered to the petitioner. To this levy and garnishment the petitioner made no reply, whereupon, and on May 1, 1910, upon the filing of an affidavit of L. B. Randall, one of the attorneys of record of the plaintiff in said action, setting forth the fact of said garnishment and of the failure of the petitioner herein to reply thereto, and averring "that the Title Insurance & Trust Company of Los Angeles, Cal., has in its possession and under its control money and personal property belonging to the defendant H. E. Branch," and further deposing that according to the information and belief of the affiant "said Title Insurance & Trust Company has in its possession or under its control certain books, papers, and documents showing the condition and details of the said assets of said defendant," and thereupon praying for an order of said court requiring the officers of said petitioner to appear and be before said court at a designated time, there to "answer such questions as may be proper concerning the assets of said defendant H. E. Branch in the hands of or under the control of said Title Insurance & Trust Company, producing with them at said time and place all books, papers, and documents necessary to show the condition and details of said assets of said defendant in its control," the court thereupon made an order in accordance with the prayer of said application, which was duly served upon the petitioner herein, and thereafter one of the officials of said petitioner appeared before said court in response to said application and order, and a hearing was then had thereon, at which hearing the said official of said petitioner was asked the question as to whether petitioner had in its possession or under its control any property belonging to the defendant H. E. Branch, to which question the said official of the petitioner answered that the petitioner had no property in its possession or under its control belonging to the said defendant, "unless the same was in connection with a private trust." He was thereupon asked if the petitioner had in its possession or under its control any property belonging to the defendant H. E. Branch in connection with any private trust. This question he declined to answer for the stated reason that the petitioner was required under section 103 of the California Bank Act, under which it was organized, to keep inviolate all communications and writings made to or by any trustee touching upon the existence, condition, management, and administration of any private trust confided to such trustee, except in certain instances provided in said section within which exceptions this proceeding did not come. Thereupon the court made an order that the hearing be continued to the 15th day of May,

1918, and that said court on said day would require the said official of said petitioner to fully answer all questions relating to the existence and condition of any private trust of which the petitioner herein might be trustee, and in which the said defendant H. E. Branch might have any beneficial interest. It is the making and threatened enforcement of this order which the petitioner herein claims is beyond the jurisdiction of said court.

The section of the Bank Act of California (St. 1909, p. 108, § 103, as amended by St. 1913, p. 183, § 71) upon which this claim is predicated reads as follows:

"Any trust company exercising the powers and performing the duties provided for in this act, shall, except as herein otherwise provided, keep inviolate all communications and writings made to or by said trustee touching the existence, condition, management and administration of any private trust confided to it; and no creditor or stockholder of any such trust company shall be entitled to disclosure or knowledge of any such communication or writing: Provided, however, that the president, vice president, manager, trust officer, secretary or regularly employed attorney of any such trust company shall be entitled to knowledge of any such communication or writing; and provided further, that in any suit or proceeding touching the existence, condition, management or administration of any such trust, the court wherein the same is pending may require disclosure of any such communication or writing."

It is the concluding proviso of the foregoing section of the Bank Act which, according to the respondents' contention herein, justifies the making and enforcement of the order which the petitioner herein objects to and seeks to avoid. We are satisfied that the respondents' contention in that behalf must be sustained. It is true that the original action in which the judgment was entered which is sought to be enforced by the writ of execution which was served upon the petitioner did not involve any matter touching the existence, condition, management, or administration of the private trust which the petitioner claims the right to keep inviolate; but we think it is equally true that the proceeding in which the order of the court complained of was immediately made was such a proceeding as was contemplated in the final proviso of said Bank Act as being one touching the existence, condition, management, and administration of such trust as to authorize the court to require a disclosure of any communication or writing within the possession or knowledge of the petitioner with regard to the same. The proceeding in question was one instituted under and in accordance with the provisions of chapter 2 of title 9 of the Code of Civil Procedure, entitled "Proceedings Supplemental to Execution." Section 717 of said Code, under that title, reads as follows:

"After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon proof by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding fifty dollars, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place before him, or a referee appointed by him, and answer concerning the same."

It thus appears that the supplemental proceedings provided for by this chapter, and particularly by the above-quoted section thereof, have for their direct and immediate purpose and procedure the making of such inquiries of persons other than the judgment debtor as may serve to reveal to his execution creditor and to the court the existence and condition of such property or interests of such debtor as may be within the possession or control of such persons. It is a proceeding, therefore, "touching the existence, condition, management, and administration" of any trust with which the petitioner herein may be invested respecting property or interests of the judgment debtor, and which have thereby been placed in its possession or under its control. It comes, therefore, within the exception embraced in the foregoing final proviso of the Bank Act, and under its terms the court had and has power to make the precise inquiry which the petitioner herein seeks to prohibit.

It may be suggested in conclusion that the construction of the foregoing section of the Bank Act for which the petitioner contends would open a convenient door to judgment debtors behind which they might safely sequester their property and effects subject to execution, and thereby set at defiance and render practically ineffectual the salutary provisions of the Code of Civil Procedure relating to proceedings supplemental to execution.

The writ is denied.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SLOSS, J.; VICTOR E. SHAW, Judge pro tem.; LORIGAN, J.; MELVIN, J.

---

179 Cal. 349

WHITELAW v. McGILLIARD. (L. A. 4482.)

(Supreme Court of California. Dec. 4, 1918. Rehearing Denied Jan. 2, 1919.)

1. APPEAL AND ERROR ⊂=1001(1)—REVIEW—VERDICT.

It is not the province of an appellate court to review the conclusion of the jury, if there is any rational basis in the testimony for the verdict.

---

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

2. MUNICIPAL CORPORATIONS ⚖706(6) — STREETS—CROSSING ACCIDENTS—JURY QUESTION.

In an action for injuries received by plaintiff when defendant's automobile came into collision with his motorcycle at a street intersection, the question of negligence and liability for the collision *held* for the jury.

3. MUNICIPAL CORPORATIONS ⚖705(2) — CROSSING ACCIDENTS—RIGHT OF WAY.

An ordinance giving vehicles traveling north or south the right of way does not require a traveler proceeding east or west to yield the right of way to a motorist proceeding northward, who was bound to slow down at the street intersection and was about 40 feet from the median line extended of the east and west street.

4. MUNICIPAL CORPORATIONS ⚖706(7) — CROSSING ACCIDENTS—NEGLIGENCE.

Though plaintiff in crossing an intersecting street was negligent because on the wrong side of the median line of the street on which he was traveling, extended across the intersection, *held*, that his negligence cannot as a matter of law be deemed the proximate cause of a collision between his motorcycle and defendant's automobile.

Department 2.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Reid Whitelaw against Gideon D. McGilliard. From a judgment for plaintiff and an order denying new trial, defendant appeals. Affirmed.

R. L. Horton, of Los Angeles, for appellant.

R. T. Lightfoot, of Los Angeles, for respondent.

MELVIN, J. Plaintiff was awarded by a jury $1,000 damages for personal injuries, and judgment was entered accordingly. From said judgment and from the order denying his motion for a new trial, defendant appeals.

[1] The accident occurred at the intersection of Broadway and Temple street, in the city of Los Angeles. Defendant's son, a young man 17 years of age, was driving defendant's automobile at an admittedly unlawful rate of speed, that is, from 20 to 25 miles an hour, northward on the east side of Broadway, and he did not modify the speed of the motor vehicle as he approached the intersection of Broadway and Temple street. Plaintiff was crossing Broadway at Temple street, coming from the west on a motorcycle. The two vehicles came into collision east of the central point of the intersection of the two streets. There was a conflict of testimony regarding the exact point and the precise manner of the contact. Some of the witnesses testified that the motorcycle ran into the automobile, others that the left front wheel of the motor car struck the motorcycle, dismounting the rider, and that the rear wheel of the larger vehicle passed over his legs.

Of course, it is not the province of this court to review the conclusion reached by the jury upon such testimony, if there be any rational basis for the verdict.

According to plaintiff's testimony, as he was proceeding at a very low rate of speed across Broadway a truck was going south on that street. He passed behind the truck a little south of the center line of Temple street. He was then moving, he said, at the rate of about 4 miles an hour. When he emerged from behind the truck, he saw the automobile moving north on the east side of Broadway at a rate of 20 to 25 miles an hour. (Anything over 10 miles an hour at such an intersection was contrary to ordinance.) He further testified:

"When I saw the automobile first, I was only about 4 feet from it. The automobile came in contact with my motorcycle, the left front wheel of the automobile striking the motorcycle which I was riding. I did not hear any signal given by the automobile, no gong or blowing of horn. The collision occurred a little north of the center of Temple street and on the west side of Broadway."

The witness also testified that as soon as he saw the approaching automobile he did all in his power to stop the motorcycle.

The testimony of the young man who was driving the motor car was not entirely consistent. Upon his cross-examination he said:

"I saw the motorcycle when it was about 4 feet from me. I did not slacken the speed of the car as I went up Broadway, and I did not blow any horn."

But upon his direct examination he had testified, among other things:

"When I had reached a point at about 10 feet to the south of the southeast corner of Temple street and Broadway, I first noticed the motorcycle. I knew I had the right of way, and so I proceeded right along. The motorcycle was, at the time I first saw it, about the same distance beyond the intersection of Temple and Broadway on the west. The motorcycle looked to me as though it would pass behind me, as I had about cleared the railroad tracks in the the center of Temple street going north, and was several feet north of the center of Temple street on the west side of Broadway when the motorcycle which was coming down the center of Temple street took a sharp turn to the north and struck the automobile on the running board just back of the front wheel."

[2-4] The local ordinance, which was introduced in evidence, provided that the drivers of vehicles traveling north and south had the right of way over those proceeding east and west, and it is argued that since the plaintiff was violating that ordinance by

failing to yield the right of way, and was disobeying the rule of the road by seeking to cross Broadway north of the middle line of Temple street extended, his own negligence was the proximate cause of his injury, and that therefore the judgment should not be allowed to stand. There is no force in this argument. The jury may have believed the first statement of defendant's son, which placed him about 40 feet from the median line of Temple street extended and 10 feet from the south line when he saw the plaintiff already passing across the street. The plaintiff could not be expected to yield the right of way to one so far away, whose duty it was to slow down in crossing the intersection. When the defendant's son drove the vehicle upon that space, he was going at an unlawful rate of speed, which he maintained. The rule regarding right of way does not impose upon the person crossing the street the duty of assuming that the other will continue across an intersecting street without slowing down, as required by law. It is clear that if the defendant's son had been going at a lawful rate of speed, or had slowed down as required by law, there would have been ample opportunity for the safe passage of the motorcycle. If the driver of the motorcycle was violating the rule of the road by being north of the median line of Temple street extended across the intersection, it cannot be justly said as a matter of law that such violation, if any, was the proximate cause of the injury. The questions of the defendant's negligence and the plaintiff's alleged contributory negligence were duly submitted to the jury upon instructions of which we find no criticism in the brief of appellant. It was a case in which the jury might determine from the evidence whether there had been negligence or not, and who was guilty thereof.

Judgment and order affirmed.

We concur: WILBUR, J.; LORIGAN, J.

---

179 Cal. 338

## In re HUME'S ESTATE.

## REEVES v. HUME.

(S. F. 8701.)

(Supreme Court of California. Dec. 2, 1918. Rehearing Denied Dec. 31, 1918.)

LIMITATION OF ACTIONS ⊜39(15)—PROBATE PROCEEDINGS—"ACTION."

In view of the long-continued practice, Code Civ. Proc. § 343, providing a four years' limitation in actions for relief not otherwise provided, and section 363, declaring that the word "action" as used in the same title shall be considered, when necessary, as including a "special proceeding of a civil nature," *held* not to apply to probate proceedings provided for by title 2 (§§ 1312–1318).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Action.]

Department 1.

Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

In the matter of the estate of G. W. Hume, deceased. From an order admitting to probate, on the petition of C. E. Hume, the will of the deceased, Dorothy Hume Reeves appeals. Affirmed.

Edgar D. Peixotto, of San Francisco, Chapman & Trefethen, of Oakland, and Metson, Drew & Mackenzie, of San Francisco, for appellant.

Abe P. Leach, of Oakland, and Chickering & Gregory, of San Francisco, for respondent.

SHAW, J. G. W. Hume died on February 12, 1912, a resident of Alameda county. He left a will executed on December 8, 1908. By its terms his entire estate was left to his wife, Annie E. Hume, and it declared that he intentionally left none of it to his children or grandchildren. After making the will, he transferred to his wife all of his property. Upon his death it was believed that he left no estate, and for that reason his will was not presented for probate. On January 15, 1917, nearly five years after Hume's death, the appellant, Dorothy Hume Reeves, a grandchild, who would have been entitled to succeed to one-sixth of his property if there was any, if he had died intestate, began an action to quiet title or to recover an undivided one-sixth of the estate, claiming that the said Hume died intestate, that he was seized of a large amount of property and that he had not transferred it to his said wife. On January 23, 1917, C. E. Hume, a son of the decedent, filed in the superior court a petition for the probate of the aforesaid will. Dorothy Hume Reeves appeared in said proceedings and filed a paper purporting to be a demurrer to the petition for probate, assigning as cause therefor that the proceeding for such probate was barred by the provisions of sections 343 and 363 of the Code of Civil Procedure. The court overruled the demurrer, heard the testimony in support of the petition, and thereupon made an order admitting the will to probate. From this order Dorothy Hume Reeves appealed.

The petition was originally set for hearing on February 7, 1917. Of this due notice was given. The hearing was continued to April 16, 1917, and on April 2, 1917, the aforesaid demurrer was filed to the petition. After the overruling of the demurrer, which took place on April 16, 1917, the appellant asked for a continuance to enable her to "prepare and

file such further papers in answer, or opposition or contest" as her counsel should advise. The court refused to continue the case for that purpose. This ruling and the overruling of the demurrer are assigned as errors.

No error is shown in the order refusing a continuance. The appellant stated nothing to show that she had any grounds of contest or opposition to the probate of the will other than that it was barred by the statute of limitations. That point had already been presented to the court and decided against her by the order overruling the demurrer. She did not show that she had any cause for resisting the probate of the will on the ground of fraud, undue influence, insanity, or defective execution. Under these circumstances the court was justified in refusing any continuance.

The respondent makes the preliminary objection that the law does not authorize a demurrer to a petition for the probate of a will. There is no special provision for such practice in the chapter on probate of wills; but, if such a proceeding may be barred by the statute of limitations, we do not consider that the mode by which the point is presented is important, for, in the event that it is good, it must be considered at some stage of the proceeding. We shall therefore disregard the objection and proceed to consider the proposition on its merits. It is a new question in this state.

Section 343 of the Code of Civil Procedure provides that—

"An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

This section is a part of title II, pt. II, of that Code. Nowhere in that title is there any provision for a limitation against proceedings to probate wills. Consequently it is not thereinbefore provided for, and, if it comes within the meaning of the word "action" and is a matter to which the phrase "cause of action shall have accrued" could be applied, it would be included in the four-year period. It is contended that this conclusion must follow from the terms of section 363, which is a part of the same title. It reads as follows:

"The word 'action' as used in this title is to be considered, whenever it is necessary to do so, as including a special proceeding of a civil nature."

In the introduction the Code divides civil remedies into two classes, namely, actions and special proceedings. Section 21. It then defines an "action" as:

"An ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." Section 22.

"Every other remedy is a special proceeding." Section 23.

The body of the Code is divided into four parts stated in the outline preceding the text in the original official edition of the statute enacting it, as follows:

"Part I. Courts of Justice. Part II. Civil Actions. Part III. Special Proceedings of a Civil Nature. Part IV. Evidence."

The detailed outline of the subjects treated in part III, following the subhead "Special Proceedings of a Civil Nature," enumerates the several proceedings that come within that description, designating them separately as "Titles." Title I embraces proceedings in review, in mandamus, and in prohibition. Title II relates to election contests; title III to summary proceedings, judgments by confession, submissions without action, discharge of persons imprisoned on civil process and proceedings in unlawful detainer and forcible entry. Title IV relates to the enforcement of liens; title V to contempts; title VI to dissolution of corporations; title VII to eminent domain; title VIII to escheated estates; title IX to change of names; and title X to arbitrations. The subhead of title XI, which is here involved, is "Proceedings in Probate Courts." This title is divided into twelve chapters, and it includes, among other things, proceedings to probate wills and appoint executors, proceedings to appoint administrators, proceedings to determine heirship, proceedings to sell property of the decedent, and proceedings to appoint guardians. An application to sell real estate of a decedent is a proceeding against the heirs in whom the property vested at the death of the ancestor. Estate of Crosby, 55 Cal. 580. If a proceeding to probate a will is a special proceeding of a civil nature, as that phrase is used in section 363, it must be admitted that the other proceedings just mentioned are also of that character.

It is our opinion that sections 343 and 363 do not apply to a proceeding for the probate of a will. The reasons for this conclusion we proceed to state.

The chapter of the Code relating to the probate of wills does not provide for opposition to such probate on the ground of the bar of the statute of limitations, but, in effect, excludes it from the category of grounds allowed as a basis for such opposition. Section 1299 declares that any person interested in the estate "may at any time after the death of the testator, petition the court having jurisdiction to have the will proved." This implies that there is no arbitrary time limit. Section 1300 specifies the facts which must be alleged in the petition, and sections 1303 and 1304 prescribe the notice to be given of the hearing and the mode of service on the heirs. Section 1306 provides that unless the parties appear at the time set for the

hearing the court "must require proof that the notice has been given, which being made, the court must hear testimony in proof of the will." Section 1307 provides that "any person interested may appear and contest the will." Section 1308 declares that, "if no person appears to contest the probate of a will, the court may admit it to probate," on proof of its execution and of the sanity of the testator. The proceedings to be had if there is a contest of the will are set forth in article 2 of the chapter, embracing sections 1312 to 1318. Section 1312 provides that the person contesting the will "must file written grounds of opposition to the probate thereof" and serve the same upon the petitioner and other residents of the county interested in the estate, to which grounds of opposition any of such interested parties may demur. If the demurrer is overruled the proponents may answer. The issues of fact which the contestant may raise upon such contest are also specified. They are: (1) The competency of the decedent to make a will; (2) his freedom from duress, menace, fraud, or undue influence; (3) the due execution of the will; (4) "any other questions substantially affecting the validity of the will." There is no provision for an issue or a finding upon any other facts, or for presenting any other grounds of opposition to the probate. The fourth ground refers only to matters affecting the validity of the will. It does not include a plea of the statute of limitations, which, in effect, concedes its validity, but interposes the statute as a bar. Provision is made for the submission of the issues above enumerated to a jury and for findings thereon by the jury, or by the court if a jury is not demanded. Section 1317 declares:

"If the court is satisfied, upon the proof taken, or from the facts found by the jury, that the will was duly executed, and that the testator at the time of its execution was of sound and disposing mind and not acting under duress, menace, fraud, or undue influence, a certificate of the proof and the facts found, signed by the judge and attested by the seal of the court, must be attached to the will."

This excludes the bar of the statute of limitations from consideration as one of the matters which may be shown in opposition to the probate. This is further emphasized by section 1314, which, in substance, declares that, if upon the verdict of the jury the facts mentioned in section 1317 as aforesaid appear to be established, the court "must" admit the will to probate. Section 1314 thus makes it imperative that the court shall admit the will to probate if the execution is proven and the grounds of opposition authorized by section 1312 are not established. This clearly implies that no grounds of opposition other than those enumerated in section 1312 may be set up, and it leaves no place for the application of the statute of limitations.

It is further to be observed that, notwithstanding the positive and comprehensive language of sections 343 and 363, if taken literally, there can be no doubt that they cannot apply to all special proceedings of a civil nature. Proceedings for a change of name, or in arbitration, or for voluntary dissolution of a corporation, or for guardianship, or for a married woman to become a sole trader, are all within the definition of the phrase, and each is enumerated, classed, and defined as such proceeding by the Code. If the statute of limitations applied, it would begin to run against such proceedings as soon as the right to institute them accrued. Yet from the very nature of these proceedings it is obvious that neither of them could be subject to such limitation.

This construction of these Code provisions is confirmed by the long-continued and uniform practice and the universal understanding of the bench and bar of the state on the subject. It is not uncommon for a will to be offered for probate more than four years after the death of the testator and for such a will to be contested. It is a well-known fact that in searching titles preparatory to sales of real estate it is often found that there has been no administration upon the estate of some deceased person from whose heirs the vendor derives title. As our statute makes real estate of a decedent primary assets for the payment of his debts, this would be a cloud upon the title. Consequently, in such cases it has always been customary to cure the defect by administration upon the estate, regardless of the lapse of time since the death of such person. A plea of the bar of the statute of limitations in any of these cases, so far as we are aware, has never been made and is an unknown thing in our jurisprudence. The appellant does not claim that such a plea has ever been presented in any case. As instances of cases where such a plea, if it were permitted, would have been effectual to defeat the probate or the granting of letters, we cite Estate of Strong, 119 Cal. 663, 51 Pac. 1078; Kleinclaus v. Dutard, 147 Cal. 245, 81 Pac. 516; Bell v. Hudson, 73 Cal. 285, 14 Pac. 791, 2 Am. St. Rep. 791; and Estate of Yorba, 167 Pac. 854. The opinions and the records in these cases fail to show that the bar of the statute of limitations was even suggested as a defense. We have no doubt that further investigation would reveal a large number of similar cases. In Estate of Crosby, supra, 17 years had elapsed after the allowance of the claim, for the payment of which the administrator applied for an order to sell the real estate. It was urged that the proceeding was barred, not by the statute of limitations, but by the equitable doctrine of laches. The lower court denied this claim and made the

order of sale. On appeal the Supreme Court said:

"We have not found it necessary to inquire whether any provision of our statute of limitations is applicable, in terms, to a proceeding of the character we have been considering. Neither of the counsel has claimed this; but, on the contrary, it was assumed by both that the statute did not apply. Since, however, it has been decided that a proceeding in the probate court is in the nature of an original proceeding against the heirs, and such proceeding is simply statutory, and is not analogous to an action conducted according to the course of the common law, it may be perhaps 'a special proceeding of a civil nature,' and, as such, subject to an appropriate section of the title of the Code of Civil Procedure which treats of limitations. Code Civ. Proc. § 363."

But it was not deemed necessary to determine the question, for the court held that under the facts appearing in the record the proceeding was barred by laches and reversed the order of sale, remanding the case with directions to dismiss the petition or deny the order. In Estate of Arguello, 85 Cal. 151, 24 Pac. 641, nineteen years had passed after the allowance of the claim involved and before the petition, which was by a creditor, for the sale of real estate to pay the claim, was filed. Circumstances to account for the delay were shown, and the court below held them a sufficient excuse, and made the order. This order was affirmed on appeal. It does not appear that the statute of limitations was pleaded; but, as this was a special proceeding of a civil nature, it would have barred the proceeding many times over, regardless of the existence of facts excusing the delay, if it were applicable in such cases. Section 738 of the Code of Civil Procedure, as amended in 1895, provides that—

If in any action to quiet title to real property, "the validity of any gift, devise, or trust, under any will, or instrument purporting to be a will, whether admitted to probate or not, shall be involved, such will, or instrument purporting to be a will, is admissible in evidence; and all questions concerning the validity of any gift, devise, or trust therein contained, save such as under the Constitution belong exclusively to the probate jurisdiction, shall be finally determined in such action."

Actions to quiet title frequently involve wills of persons who have died many years before the action was begun. The section contemplates that such a will, although not yet probated, may be construed in the action and may be afterwards probated, and it clearly shows that the Legislature did not understand that the right to probate such will would be barred if the testator had died more than four years before the petition for probate was filed.

This uniform practice and understanding of the bench and bar, and of the legislative department of the state also, is a strong argument to the effect that the statute of limitations does not apply to such proceedings. The authorities on the effect of such long acquiescence are numerous. In Bancroft v. Bancroft, 110 Cal. 378, 42 Pac. 897, the court approved the following passage from the opinion in Le Caux v. Eden, 2 Doug. 594:

"A universal silence in Westminster Hall on a subject which so frequently gives occasion for litigation is a strong argument to prove that no such action can be sustained."

In Knowles v. Yates, 31 Cal. 90, speaking of a construction by practice and implication, and not by direct decision, the court said:

"Contemporaneous exposition has ever been esteemed by jurists and statesmen as strong evidence in support of an interpretation or construction of a statute, or of a provision of the organic law in consonance with such exposition."

In Bruce v. Schuyler, 4 Gilman (Ill.) 267, 46 Am. Dec. 450, the court thus stated the rule:

"In short, it has been either directly sanctioned or acquiesced in by all the departments of government, and by its officers, with the concurrence of the entire community, without a doubt or question, for about 20 years. Such a contemporaneous construction of a statute, or constitutional law, thus approved and sanctioned, has always been regarded by the courts as equivalent to a positive law."

In Stuart v. Laird, 1 Cranch, 308 (2 L. Ed. 115), speaking of the effect of an act of Congress, the Supreme Court of the United States said:

"Practice and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of a most forcible nature."

The following are of similar import: Cronise v. Cronise, 54 Pa. 261; Faribault v. Misener, 20 Minn. 401 (Gil. 347); State v. Wrightson, 56 N. J. Law, 206, 28 Atl. 56, 22 L. R. A. 548; Kenny v. Hudspeth, 59 N. J. Law, 504, 37 Atl. 67; People v. Draper, 15 N. Y. 544; 6 Am. & Eng. Ency. of Law, 931.

The Code of Civil Procedure, which includes sections 343 and 363 and the title on probate proceedings, was enacted in 1872. From that time to the present, as we have seen, it has been understood that these sections did not apply to probate proceedings, and the uniform practice has been in accordance with that understanding. Under the principles set forth in the foregoing authorities, this long-continued practice and acquiescence in the aforesaid construction must be taken as settling the question.

In support of her contention on this point, the appellant cites Gwinn v. Melvin, 9 Idaho, 202, 72 Pac. 961, 108 Am. St. Rep. 119, 2 Ann. Cas. 770; Allen v. Froman, 96 Ky.

313, 28 S. W. 497; Foster v. Jordan, 130 Ky. 449, 113 S. W. 490; and Thompson v. Penn, 149 Ky. 158, 148 S. W. 33. The Idaho statute on the subject of limitations is in the same language as the statute of this state, and so also, apparently, is the statute on probate of wills, although the latter is not referred to in the decision in Gwinn v. Melvin. The Kentucky statute of limitation is substantially the same as ours. These decisions hold that a proceeding to probate a will is barred after the time limited, in Idaho four years, in Kentucky ten years. In Foster v. Jordan it was held that the ten-year limitation applied to the probate of a foreign will which had been probated 48 years before in the state of the testator's domicile. If we were disposed to follow these decisions, they unquestionably uphold the appellant's position. But we think, in view of the specific provisions of our probate law, and the long-continued practical construction of our statute on the subject, the better rule is to the contrary.

Our conclusion is that sections 343 and 363 do not bar the proceeding, and that the court below properly allowed proof of execution and admitted the will to probate.

The order is affirmed.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

---

179 Cal. 364

## CAMPBELL v. BRADBURY et al.
(L. A. 4484.)

(Supreme Court of California. Dec. 5, 1918. Rehearing Denied Jan. 2, 1919.)

1. INSANE PERSONS ⟸80 — TORTS — NEGLIGENT OPERATION OF PASSENGER ELEVATOR.

An incompetent was liable for the negligent operation of a passenger elevator owned by her and operated for her benefit.

2. CARRIERS ⟸316(1) — OPERATION OF PASSENGER ELEVATOR—BURDEN OF PROOF.

In action for injuries from fall of passenger elevator, it is unnecessary to prove actual negligence save as such negligence may be inferred from the injury.

3. INSANE PERSONS ⟸65—PERSONAL INJURY ACTION—INDIVIDUAL LIABILITY OF GUARDIAN.

A guardian of an incompetent is not individually liable for injuries sustained in fall of passenger elevator owned by and operated for benefit of the incompetent, merely by reason of fact that he was in active control and management of her property as guardian.

4. APPEAL AND ERROR ⟸1033(5)—ERROR FAVORABLE TO APPELLANT.

Court's refusal to define the preponderance of evidence was not prejudicial to defendants, where court did instruct that plaintiff was required to produce proof "which produces conviction in an unprejudiced mind" and was required to prove his case by such evidence as "satisfies and produces conviction in the mind of the jury"; the instruction given being more favorable to defendants than they were entitled to.

5. TRIAL ⟸296(3)—INSTRUCTIONS—CURE OF ERROR.

In action for injuries from fall of elevator, where defendants' requested instruction that defendants were not liable if elevator dropped from unforeseen or unknown conditions was modified by requiring jury, in holding defendants not liable, to find the safety and sufficiency of materials entering into the construction of elevator, the modification was harmless, where only evidence concerning such materials related to the safety device, the cables, and the bumpers, and court instructed jury that defendants were not liable for a defect in cables not discovered by careful examination and that defendants were not liable if elevator fell by mere accident without any fault on their part.

6. CARRIERS ⟸321(21)—FALL OF PASSENGER ELEVATOR — ACTION FOR INJURY — INSTRUCTION.

In action for injuries from fall of passenger elevator resulting from breaking of cable, it was proper for court, in instructing jury as to presumption of negligence, to omit to state that the injury must have resulted from the operation of elevator in order to raise such presumption.

7. INSANE PERSONS ⟸99—ACTION FOR INJURIES—INSTRUCTION.

In action for injuries from fall of passenger elevator, where both the incompetent owner of elevator and her guardian individually were defendants, an instruction that the fact of the accident raised presumption of negligence on part of defendants was improper in permitting a recovery against the guardian individually without affirmative proof of actual negligence on his part.

8. DAMAGES ⟸159(3)—PLEADING AND PROOF —PERMANENT DAMAGE.

Plaintiff in a personal injury action was not limited, as to his right to recover for loss of earning power, to the amount specifically alleged in his complaint as damages resulting from total inability to practice his profession up to time of filing complaint and six months thereafter, but, under general allegation of damage, could recover for subsequent permanent impairment of his capacity to practice his profession.

9. APPEAL AND ERROR ⟸930(1)—REVIEW—PRESUMPTIONS.

A jury will be presumed to have rendered a verdict according to the evidence after having sworn so to do under Code Civ. Proc. § 604.

10. CARRIERS ⟸296—LIABILITY—OVERLOADING OF ELEVATOR.

Owner of building for whom passenger elevator is being operated may be liable for injuries sustained in fall of elevator, where operator was powerless to prevent overloading of elevator.

11. Damages ⟸132(6)—Excessive Damages —Personal Injuries.

Where young lawyer enjoying annual income of $9,000 suffered permanent injuries to feet, making it doubtful whether he would ever be able to walk without crutches, had been unable to practice his profession for more than six months, and was permanently crippled so as to impair his usefulness as an attorney before a court and jury, making it appear doubtful if he would ever regain former income, a $35,000 verdict was not excessive.

12. Damages ⟸208(1)—Question for Jury.

In personal injury action, it is for jury in the first instance to determine what sum will compensate plaintiff for his injuries.

13. New Trial ⟸162(1)—Damages—Excessiveness—Duty of Court.

It is for the trial judge, upon motion for new trial, to consider the testimony, and if verdict is, in his judgment, excessive, to reduce amount, or, in default thereof, to grant new trial.

14. New Trial ⟸140(3)—Affidavits—Excessive Damages.

On motion for new trial of personal injury action, affidavits that courtroom during trial was crowded with pupils of plaintiff, who was a law professor, and that there was laughter and other manifestations of approval or disapproval by such pupils, were inadmissible under Code Civ. Proc. § 658, as evidence to prove passion or prejudice for purpose of having damages reduced.

Department 2.

Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by Kemper B. Campbell against Simona Bradbury, Incompetent, by Lewis Bradbury and Louisa Bradbury, guardians of the estate and person of Simona Bradbury, and Lewis Bradbury. Judgment for plaintiff, and defendants appeal. Judgment against Simona Bradbury affirmed, and against Lewis Bradbury reversed.

Joseph Scott, Henry T. Gage, and W. I. Foley, all of Los Angeles, for appellants.

E. B. Drake and Frank P. Doherty, both of Los Angeles, for respondent.

WILBUR, J. Plaintiff recovered a judgment against Simona Bradbury, an incompetent, and Lewis Bradbury individually, for $35,000 for damages for personal injuries due to the fall of an elevator in the Tajo building, in Los Angeles, owned by Simona Bradbury. Defendants appeal. The evidence is undisputed that the cables supporting the passenger elevator broke while it carried 20 persons, most of them law students attending a law college on the fourth floor of said building; that it dropped about four floors to the basement; that the plaintiff, a teacher in the law school, was a passenger in the elevator at the time; that his ankles were crushed and his feet permanently injured by the fall; that at the time of the accident and for a long time prior thereto Simona Bradbury had been an incompetent; that her property was under the management and control of Lewis Bradbury and Louisa Bradbury, the guardians of her person and estate; that, by reason of an arrangement between the guardians, the defendant Lewis Bradbury at the time of the accident was in general supervision and control of the building, but that the actual supervision over the building was delegated by the guardians to an agent of the Bradbury estate; and that the elevator at the time of the accident was actually being operated by an employé of the guardians.

Simona Bradbury appeared by her general guardians, and Lewis Bradbury appeared individually. They were represented by the same attorney. Upon the appeal the incompetent is represented by the attorney for the guardians, and a brief also has been filed on behalf of the incompetent by her guardian ad litem. In the latter brief it is claimed that the negligence, if any, was the negligence of the guardians, for which she is not responsible. The instructions to the jury, offered by both plaintiff and defendants, in the main did not discriminate between the liability of the incompetent and of Lewis Bradbury individually for the negligence, if any, resulting in plaintiff's injury. At the request of the plaintiff, the jury was instructed, in effect, that if they believed that Lewis Bradbury, as guardian, had employed the elevator operator in the building, and also as guardian was in charge and control of said building, by himself or agents, then he would be responsible individually for any act of negligence charged in the complaint which might be found to be the proximate cause of the injury to the plaintiff. These acts of negligence alleged in the complaint consisted in lowering the elevator in a careless and negligent manner, overloading the elevator, failure to apply a proper safety appliance, failure to equip the elevator properly, failure to maintain bumpers in the basement to lessen the impact of the falling elevator, carelessly permitting the safety device to become clogged with dirt, carelessly installing the elevator and cables so that the latter became crystallized, failure to provide the elevator with necessary appliances, etc. It will be observed, therefore, that the responsibility of Lewis Bradbury is based upon his duty as guardian to employ the elevator operator, and to control the building. At the trial plaintiff relied upon the breaking of the cables and the fall of the elevator to establish a prima facie case of negligence, but, in addition to the presumption arising from the nature of the accident, offered testimony to the effect that the safety device on

the elevator failed to operate because it was clogged with dirt, and that the elevator was loaded beyond its rated capacity, but offered no other evidence to support the other specifications of negligence. Defendants offered evidence tending to show that the elevator and cables were in apparently good condition; that the cables were new and recently installed; that the injury must have resulted from a latent defect in the cables which could not have been discovered by the exercise of the highest degree of care; and that the safety device was in good condition. The jury was instructed that the responsibilities of the defendants were those of a carrier of passengers for hire, and that the accident raised a presumption of negligence. The liability of the incompetent was, by the instruction, based upon her ownership of the building and consequent responsibility for the injury, if caused by negligence.

Respondent relies upon the case of Morain v. Devlin, 132 Mass. 87, 42 Am. Rep. 423, wherein a lunatic, under guardianship, was held liable for an injury to the plaintiff by reason of the defect in a doorstep of a tenement building owned by the lunatic, but in the care and management of the guardian. It is there said:

"The owner of real estate is liable for such a defect, although not caused by his own neglect, but by that of persons acting in his behalf or under contract with him. * * * And there is no precedent and no reason for holding that a lunatic, having the benefits, is exempted from the responsibilities of ownership of real estate."

The guardian ad litem, on the other hand, relies upon the case of Rooney v. People's Trust Co., 61 Misc. Rep. 159, 114 N. Y. Supp. 612, under similar facts, holding the guardian, or "committee" as the guardian is there called, individually liable for injuries resulting from such a defect, and upon the case of Ward v. Rogers, 51 Misc. Rep. 299, 100 N. Y. Supp. 1058, holding that the incompetent and the guardian as such were not liable therefor. The case of Gillet v. Shaw, 117 Md. 508, 83 Atl. 394, 42 L. R. A. (N. S.) 87, dealing with the question of the responsibility of a lunatic for an injury resulting from a collision between a traveler upon the highway and an automobile owned by the lunatic, but purchased by the guardian, is also cited, but presents a very different state of facts. There, neither the chauffeur nor the automobile was, at the time of the accident, under the direction, control, or authority of the lunatic, and at the time the automobile was not performing any service for the lunatic, but was engaged in the business of the institution where the lunatic was confined; while in the instant case the profits derived from the operation of the elevator in question belonged to the estate of the incompetent. Both of the cases, decided by the New York Supreme Court, grew out of the ownership of property. Neither of them involved the operation of an elevator or the conduct of a business in the nature of that of a common carrier of passengers for hire. The responsibilities of a guardian in the carriage of passengers for hire on behalf of the ward would seem to be more nearly analogous to those of a receiver of a railroad in conducting its business as a carrier of passengers for hire. In each case the business is conducted by an officer of the court (Matter of Otis, 101 N. Y. 580, 585, 5 N. E. 571; 34 Cyc. 15) for and on behalf of those interested in the property. The rights of persons injured by the operation of railroads in the control of receivers are well settled by the courts.

In McNulta v. Lochridge, 141 U. S. 327, 12 Sup. Ct. 11, 35 L. Ed. 796, the Supreme Court of the United States, in passing upon the question as to whether or not a suit could be maintained against a receiver upon a cause of action arising out of the negligent operation of the railroad during the administration of a previous receiver, said:

"So long as the property of the corporation remains in the custody of the court and is administered through the agency of a receiver, such receivership is continuous and uninterrupted until the court relinquishes its hold upon the property, though its personnel may be subject to repeated changes. Actions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasances, negligences, and liabilities are official and not personal, and judgments against him as receiver are payable only from the funds in his hands."

See, also, Archambeau v. Platt, 173 Mass. 249, 53 N. E. 816.

The doctrine of the liability of a receiver is thus stated in Elliott on Railroads, § 576:

"His liability for acts done in the discharge of his duties is official only, and such acts bind only the trust estate. It accords with sound principle and reason that a receiver exercising the franchise of a railroad company shall be held amenable, in his official capacity, to substantially the same rules of liability that are applicable to the company while it exercises the same powers of operating the road. And this is the rule established by the great weight of modern authority. * * * The cases are practically unanimous in holding that a receiver who assumes to exercise the rights and powers of a common carrier become answerable in his official capacity for all injuries and losses sustained by persons dealing with him in that capacity to the same extent in general that the corporation would have been liable."

[1-3] In Williams v. Hays, 143 N. Y. 442, 38 N. E. 449, 26 L. R. A. 153, 42 Am. St. Rep. 743, it was held that the captain and part owner of a vessel was responsible to the other part owners for his negligence in the operation of the vessel, even though he was at the time insane, and for that reason unable properly to manage the vessel in a storm.

The authorities on the subject are there collated. If an insane person, the owner and manager of a business building, would be responsible for the negligent operation of an elevator, notwithstanding his insanity and incapacity, there seems no good reason for holding that he should be exempt therefrom because of the fact that his property was being operated for him by an agent (Pharis v. Gere, 110 N. Y. 336, 347, 18 N. E. 135, 1 L. R. A. 270) appointed by the court. Liability for elevator accidents is one of the incidents of the ownership of property equipped with elevators. This view, by which damages inflicted by the operation of an elevator are treated as an expense of maintaining the building in which it is installed, was in part the basis of a decision of the Supreme Court of Tennessee, where the building was owned by a charitable corporation not liable for torts. Gamble v. Vanderbilt University, 138 Tenn. 616, 200 S. W. 510, L. R. A. 1918C, 875. It was there held that such damages as may be adjudged against the owner for breaches of duty in respect of the negligent management of the elevator should be charged as expenses of the operation of the particular property, and only the residue of the income should be considered available for the uses of the charity. See, also, Stewart v. Cal. Med. M. & B. Ass'n, 176 Pac. 46. The same reasons which hold the property of a railroad, in the hands of a receiver, liable for the negligent operation of its trains, and which induced the Supreme Court of Tennessee to hold the owner of the building liable for damages in the case of Gamble v. Vanderbilt University, supra, seem to apply with equal force to the instant case, and require that the incompetent be held liable for the negligent operation of an elevator owned by and operated for the benefit of the incompetent. The decisions of this court in relation to the responsibility of a decedent's estate and of the executor of a will for torts, cited in behalf of the incompetent (Eustace v. Jahns, 38 Cal. 3, and Sterrett v. Barker, 119 Cal. 492, 51 Pac. 695) each related to an entirely different state of facts, and the principle thereof cannot be applied here. It is not necessary in a case of this kind for plaintiff to prove actual negligence, save as such negligence may be inferred from the injury to the plaintiff by the operation of the elevator. This rule is established for the benefit of the passenger, and it would be a harsh rule, indeed, by which to measure the individual responsibility of a guardian. We think therefore, on the whole, that the rules relating to the obligations and liabilities for torts of a receiver operating the properties of a carrier of passengers for hire furnish the true test of the individual liability of a guardian and the liability of the ward in this case. The instruction therefore, basing the individual liability of Lewis Bradbury solely upon the fact that he was in the active control and management of the property as guardian, was erroneous, and, for the same reason, the instructions to the effect that the defendant Simona Bradbury was liable for the injuries received by the plaintiff, based upon the theory that the defendant was charged with the liability of a common carrier of passengers for hire, were correct.

Some other alleged errors require consideration.

[4] Appellants complain of the refusal of the court to give an instruction defining "the preponderance of evidence." At the request of the plaintiff, however, two instructions, W and X, were given on the measure of proof required of the plaintiff. Instruction W is as follows:

"While it is incumbent upon the plaintiff to prove his case, the law does not require from him absolute demonstration—that is, such a degree of proof excluding possibility of error as produces absolute certainty, because such proof is rarely possible. Moral certainty is all that is required, or that degree of proof which produces conviction in an unprejudiced mind."

A similar instruction was held by this court, in the case of People v. Miller, 171 Cal. 649, 652, 154 Pac. 468, to be the equivalent of one requiring proof beyond a reasonable doubt. The same may be said of instruction X, as follows:

"By a preponderance of evidence is not necessarily meant a greater number of witnesses; but, if the plaintiff has proven his case by such evidence as satisfies and produces conviction in the mind of the jury, then he has proven his case by a preponderance of the evidence." People v. Miller, supra.

As these instructions on the measure of proof required of plaintiff were more favorable to the defendants than they were entitled to, they were not prejudiced by the failure of the court to give the instruction requested by them.

[5] Defendants offered an instruction to the effect that if the jury found from a preponderance of the evidence that the elevator was in proper condition and repair at the time it dropped and was properly operated at said time, and that it dropped from unforeseen and unknown conditions that could not have been guarded against by the exercise of the utmost care and prudence on the part of the defendants, their verdict "must be for the defendants." The court modified the instruction by an additional proviso requiring they should also find "the safety and sufficiency of the materials entering into the construction of the elevator and its appliances and the safety and sufficiency of the mechanical construction of these materials." The only evidence concerning the safety and sufficiency of the materials entering into the construction of the elevator and its appli-

ances related to the safety device, the cables, and the bumpers. The jury was elsewhere instructed that, "if the fall of the elevator happened by mere accident without any fault on the part of the defendants, plaintiff could not recover," and also that defendants were not responsible for a defect or fault in the cables "not discoverable upon a reasonable and careful examination, according to the best known tests reasonably practicable." No prejudicial error resulted from the modification of the instruction.

[6, 7] Defendants complain of an instruction:

"That it is only necessary for the plaintiff to prove that he was being carried on the elevator; that there was an accident to the elevator in which he was riding, and when the accident is proved the law presumes negligence, and the burden of proof shifts upon the defendants to show, either that the accident could not have been avoided by the exercise of the highest degree of care on their part, or that said accident was caused by inevitable casualty, or some other cause which human foresight could not prevent."

The accident and injuries having resulted from the breaking of the cables, it was proper to omit the usual qualification in such instruction that the injury must have resulted from the operation of the elevator, in order to raise the presumption of negligence. The instruction, however, predicates the individual liability of the guardian, Lewis Bradbury, upon the res ipsa loquitur doctrine, and thus permits a recovery against him without affirmative proof of actual negligence on his part, and for that reason was erroneous. The criticism of the instruction that the burden of proof "shifts" is sufficiently disposed of by our previous decisions. Steele v. Electric Ry. Co., 168 Cal. 378, 143 Pac. 718; Valente v. Sierra Ry. Co., 151 Cal. 540, 91 Pac. 481; Treadwell v. Whittier, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175; Worden v. Central Fire Proof Bldg. Co., 172 Cal. 94, 155 Pac. 839; Champagne v. Hamburger, 169 Cal. 683, 147 Pac. 954.

[8, 9] At plaintiff's request, the court gave the rule as to the measure of damages substantially as stated in Storrs v. Los Angeles Traction Co., 134 Cal. 91, 66 Pac. 72. In addition thereto, at the request of the defendants, the court instructed the jury as to the elements of damages, stating that they were "to assess plaintiff's damage at such sum as you may believe from all the evidence will compensate him for all the injuries sustained by him, if any, by reason of said accident." They are also instructed "not to allow any speculative damages or to consider any element of damages which is remote or imaginary or uncertain or conjectural or speculative," etc. From a critical analysis of the complaint, defendants contend that the plaintiff has limited his right to recover for damages for loss of earning power to the amount specifically alleged in his complaint, namely, $2,500 up to the time of filing the complaint, and $5,000 for six months after the filing of the complaint. But this allegation relates to the injuries suffered from the "total" inability of the plaintiff to practice his profession, and the pleader's theory was that after the lapse of six months he would be able to take up his professional duties, but with impaired capacity to carry them on. The element of damage resulting from this impairment was covered by the general allegation of damage in the complaint and properly presented to the jury by the instructions. Nor is the instruction complained of susceptible of the construction that the jury were thereby told to disregard the evidence in determining the damages plaintiff suffered by reason of his loss of earning capacity, as was the case in Rouse v. Pacific Ry. Co., 27 Cal. App. 772, 151 Pac. 164. The effect of the instruction was merely to inform the jury that it was not necessary in order for them to estimate future damage for any witness to testify thereto. Other instructions emphasized the fact that they were to be guided by the evidence in determining the amount of damages to be awarded the plaintiff, and the jury, of course, were sworn to render a verdict "according to the evidence" (Code Civ. Proc. § 604), and it is presumed that they did so.

[10] Defendants offered an instruction to the effect that, if the operator of the elevator was powerless to prevent the overloading thereof, "the verdict should be for the defendants." This is not the law. Many other elements entered into the question of negligence in this case.

[11-13] It is claimed that the verdict is excessive. The evidence shows that the plaintiff was a comparatively young attorney and was making an income of $9,000 per year. At the time of the trial he came into the courtroom using two crutches, and it was a serious question whether he would ever be able to walk without the aid of crutches. He had suffered great pain and had been unable to transact any business for more than six months at the time the case was tried; was permanently crippled in such fashion as to impair his usefulness as an attorney before a court and jury. The natural effect of his injury was that he would lose some of his clients, some part of the business already on hand, and that, on becoming able to transact business again, if he ever regained his former income, it would require a long time to do so. It was the duty of the jury in the first instance to determine what sum would compensate the plaintiff for his injuries. It was the duty of the trial judge, upon the motion for new trial, to consider the testimony, and, if the verdict was in his judgment too large, to either provide for a reduction of the judgment, or, in default thereof, grant a new

trial. In view of the earning capacity of the plaintiff, the nature and character of his injuries, his permanent handicap in re-establishing and conducting his practice, we cannot say that the verdict is excessive. Aldrich v. Palmer, 24 Cal. 513; Zibbell v. Southern Pacific Co., 160 Cal. 255, 116 Pac. 513.

[14] For the purpose of proving "passion or prejudice" on the part of the jury in awarding damages, defendants offered certain affidavits upon the motion for new trial, to the effect that the courtroom was crowded with law students, pupils of the plaintiff, and that during the trial there was laughter and other manifestations of approval and disapproval of the proceedings by such students. It is sufficient to say upon this subject that on the question of excessive damages these affidavits were not admissible as evidence. Section 658, Code Civ. Proc.; Harrison v. Sutter Street Ry. Co., 116 Cal. 157, 161, 47 Pac. 1019; Doolin v. Omnibus Cable Co., 125 Cal. 141, 144, 57 Pac. 774.

The judgment against Simona Bradbury is affirmed; that against Lewis Bradbury is reversed.

We concur: LORIGAN, J.; MELVIN, J.

---

(179 Cal. 376)

BRINCK v. BRADBURY et al. (L. A. 4560.)

(Supreme Court of California. Dec. 5, 1918. Rehearing Denied Jan. 2, 1919.)

1. STIPULATIONS ⟸14(7)—EXPERT EVIDENCE —QUALIFICATIONS.

Where qualifications of expert witness were stipulated to, it was not proper to cross-examine witness as to his qualifications.

2. APPEAL AND ERROR ⟸259 — FAILURE TO EXCEPT.

Conduct of witness will not be *held* prejudicial error on appeal, where no exception was taken.

3. TRIAL ⟸191(8)—INSTRUCTIONS—COMMENT ON EVIDENCE.

In personal injury action, an instruction, authorizing damages in such reasonable sum as jury shall award plaintiff on account of pain and anxiety she has suffered by reason of her injuries, was not objectionable as assuming that plaintiff had in fact suffered pain and anxiety, though there was testimony that plaintiff was stolid and reticent concerning her injuries.

4. APPEAL AND ERROR ⟸1064(2)—REVIEW— HARMLESS ERROR.

In personal injury action, an instruction as to measure of damages recoverable, if erroneous by reason of assuming that plaintiff suffered pain and anxiety, was harmless, where plaintiff's foot was twisted at right angles to proper position, the bone broken and protruding, and the back permanently injured.

5. DAMAGES ⟸208(1)—JURY QUESTION.

In personal injury action, the amount which would compensate plaintiff for injuries received was for jury under proper instructions of court.

6. NEW TRIAL ⟸76(1)—EXCESSIVE DAMAGES —DISCRETION.

Trial court has wide discretion to grant new trial where, in its opinion, considering the weight of evidence, verdict is excessive.

7. APPEAL AND ERROR ⟸930(1)—REVIEW— PRESUMPTION.

On appeal from judgment for plaintiff in personal injury action after trial court denied motion for new trial on ground that verdict was excessive, the testimony will be viewed most favorably to plaintiff.

8. DAMAGES ⟸132(3)—EXCESSIVE DAMAGES— PERSONAL INJURY ACTION.

Where attractive young woman 25 years of age, a student of law, was so permanently crippled in foot and ankle that she will never be able to walk without limp, and her spine so permanently injured that at time of trial she was unable to occupy ordinary chair, and her nervous system permanently impaired, extensive atrophy of the muscles of the back existing and increasing, a $17,354.80 judgment was not excessive.

9. INSANE PERSONS ⟸80—LIABILITY FOR INJURIES.

An incompetent is liable for injuries received from negligent operation of passenger elevator in a building owned by the incompetent.

Department 2.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Grace Brinck against Simona Bradbury, an incompetent, by Lewis Bradbury and another, guardians of the estate and person of Simona Bradbury, and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Joseph Scott, Henry T. Gage, and W. I. Foley, all of Los Angeles, for appellants.

E. B. Drake, of Los Angeles, for respondent.

Isidore B. Dockweiler and Dockweiler & Mott, all of Los Angeles (G. C. O'Connell, of Los Angeles, of counsel), for Isidore B. Dockweiler, guardian ad litem.

WILBUR, J. [1, 2] This is an appeal from a judgment rendered against the defendants Simona Bradbury, incompetent, and Lewis Bradbury, for damages for personal injuries received by the plaintiff by the falling of a passenger elevator in a building owned by the defendant, Simona Bradbury. The same accident is referred to in Campbell v. Bradbury, 176 Pac. 685, filed herewith. Defendants admitted liability, and the only issue tried was as to the amount of damages. Upon the trial an objection to a question asked by defendants on the cross-examination of a

witness testifying for plaintiff was sustained. Defendants claim that the question was proper for the purpose of testing the qualifications of the physician as an expert. As his qualifications were stipulated to, there was no error in sustaining the objection. Defendants claim that prejudicial error occurred on the trial by reason of the fact that plaintiff's physician, called by her to testify to her injuries, without consulting or advising plaintiff's attorney thereof, while on the witness stand requested the plaintiff to leave the room before he testified as to her injuries. The reason given by him, after plaintiff retired from the room, was that he did not wish to testify in her presence that her injuries were permanent, for fear of the bad effect upon her mind and nervous system of such a declaration by him. Plaintiff in her complaint alleged and verified a statement that she was permanently injured, and it is therefore claimed that in this apparent effort of the physician to keep her from the knowledge of his opinion of her injuries he was not acting in good faith, but for the purpose of arousing the sympathy of the jury. The conduct of the witness was entirely consistent with his sworn statement to the effect that plaintiff was permanently injured in her nervous system and added nothing thereto. It is a sufficient answer, however, to defendants' contention, to say that no exception thereto was taken at the time.

[3, 4] Defendants complain of an instruction substantially the same as that given on the measure of damages in the case of Storrs v. Los Angeles Traction Co., 134 Cal. 91, 66 Pac. 72, and particularly the item therein "such reasonable sum as the jury shall award her on account of pain and anxiety she has suffered by reason of her injury." It is claimed that this amounted to an instruction on the part of the court that the plaintiff had suffered pain and anxiety by reason of her injury. Even if it be conceded that a critical analysis of this instruction might lead to the conclusion that the court assumed that the plaintiff had in fact suffered pain and anxiety, in view of the severe character of the injuries suffered by the plaintiff, her foot being twisted at right angles to the position that it ought to assume, the bone being broken and protruding from the flesh, the back permanently injured, and the plaintiff facing the prospect of going through life a cripple, there could be no prejudicial error in such an instruction to the jury on the theory that it assumed that she had in fact suffered both pain and anxiety. Nor does the testimony that the plaintiff was stolid and reticent concerning her injuries make the instruction objectionable.

Defendants offered an instruction predicated upon the theory that the damages suffered by the plaintiff were in part the result of malpractice by the physician who had her case in charge. There was no evidence or pleading upon which such an instruction could properly be based, and therefore no error in its refusal.

[5-7] It is claimed that the verdict and judgment for $17,354.80 was excessive. The amount which would compensate the plaintiff for the injuries received by her was to be decided by the jury under proper instructions from the court, and subject to the wide discretion vested in a trial court to grant a new trial where in its opinion considering the weight of the evidence, the verdict was excessive. The trial court by its refusal to grant a new trial has left the defendants to such remedies as they may have in this court for an excessive verdict. Here it is assumed that the verdict is based upon the testimony most favorable to the plaintiff and all the inferences most favorable to her to be drawn therefrom.

[8] The plaintiff, an attractive young woman, 25 years of age, a student of law, was so permanently crippled in the left foot and ankle that she will never be able to walk without a limp. Her spine between the neck and middle of the waist is permanently injured, so that at the time of the trial she was unable to occupy an ordinary chair, but spent most of her time in a Morris chair. Her nervous system is permanently impaired. Extensive atrophy of the muscles of the back already exists and is increasing and will continue to increase. Without stating in further detail the nature and character of the injuries, we cannot say, as a matter of law, that the verdict of the jury is so disproportionate to the injuries as to justify the interference of this court.

[9] The incompetent is liable for the injuries received by the plaintiff from the negligent operation of the elevator. Campbell v. Bradbury (opinion filed herewith), 176 Pac. 685.

Judgment affirmed.

We concur: LORIGAN, J; MELVIN, J.

38 Cal. App. 441

Ex parte BOUCHARD. (Cr. 820.)

(District Court of Appeal, First District, California. Oct. 16, 1918.)

1. CRIMINAL LAW ⟸1206(3) — JUDGMENT—INDETERMINATE SENTENCE.

An indeterminate sentence applied to an offense committed before the indeterminate sentence law took effect is absolutely void, as a sentence should be given under the laws in effect at time crime was committed.

2. CRIMINAL LAW ⟸977(1)—SENTENCE—VALIDITY.

Though court has jurisdiction of defendant and offense charged, a judgment, to be valid, must be one which court has power to pronounce.

3. CRIMINAL LAW ⟸993—JUDGMENT—PASSING OF INVALID SENTENCE—CORRECTION.

Under Pen. Code, §§ 1191 and 1202, as amended in 1909 (St. 1909, p. 898), where sentence pronounced by court was void because passed under indeterminate sentence law, which had not taken effect at time crime was committed, a sentence could be pronounced later; the case standing as though no sentence had ever been passed.

4. JUDGMENT ⟸486(1) — COLLATERAL ATTACK.

A void judgment in a criminal case could be either directly or collaterally attacked.

5. CRIMINAL LAW ⟸192, 193¼, New, vol. 19 Key-No. Series—SENTENCE—JEOPARDY.

Defendant who by appeal or habeas corpus causes a second sentence to be imposed upon himself ordinarily will not be heard to claim twice in jeopardy.

6. CRIMINAL LAW ⟸168—SECOND SENTENCE—JEOPARDY.

Court, having pronounced void sentence, could not, after defendant had served nine months thereof, resentence him, where such resentence was not on appeal or habeas corpus proceedings brought by defendant; such sentence placing defendant twice in jeopardy.

7. CRIMINAL LAW ⟸1188 — INVALID SENTENCE—REMANDING PRISONER.

In view of Pen. Code, § 1484, where sentence was invalid because pronounced under indeterminate sentence law, though offense charged was committed before such law took effect, and resentence passed after prisoner had served nine months was void because placing prisoner twice in jeopardy, the Court of Appeals, where prisoner has already served the term of imprisonment fixed by the resentence, will on habeas corpus release prisoner and not remand him for a valid judgment to be entered.

Application by Edwin Bouchard for a writ of habeas corpus. Petitioner discharged.

Petitioner, in pro. per.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for respondent.

STURTEVANT, Judge pro tem. The petitioner filed a petition for a writ of habeas corpus, seeking thereby to be discharged from the custody of the warden of San Quentin state prison. From the petition and the return thereto it appears that heretofore an information was filed in the superior court of San Diego county charging the petitioner with the crime of robbery, alleged to have been committed on the 14th day of March, 1917. The petitioner pleaded guilty to the crime of grand larceny. October 4, 1917, he was sentenced to "imprisonment in a state prison of the state of California for the term prescribed by law." He was received at the prison October 6, 1917. Later, on the motion of the district attorney of San Diego, the petitioner was taken back to San Diego, and on May 13, 1918, he was sentenced to "imprisonment in the state prison of the state of California at San Quentin for the term of one year"; and it is admitted that he has earned his credits under section 1588 of the Penal Code.

Under these facts and the law applicable thereto, is the petitioner entitled to be discharged?

[1-5] The crime alleged against the petitioner was committed before July 27, 1917, the date upon which the indeterminate sentence law took effect, and as to him it is an ex post facto law, and not applicable. He should have been sentenced in the first instance under the laws in effect when the crime was committed. Ex parte Lee (Sup.) 171 Pac. 958. It is a common statement that a judgment is not void if the court pronouncing it has jurisdiction of the defendant and of the offense charged. Ex parte Gibson, 31 Cal. 619, 627, 91 Am. Dec. 546; Ex parte Bigelow, 113 U. S. 328, 330, 331, 5 Sup. Ct. 542, 28 L. Ed. 1005. That rule has at least one well-defined qualification, which is that the judgment must be one which the trial court has power to pronounce. In re Bonner, 151 U. S. 242, 258, 14 Sup. Ct. 323, 38 L. Ed. 149; 1 Bailey, Habeas Corpus, § 51. That qualification of the rule was not called to the attention of this court when it was considering the case of Ex parte Silva, 175 Pac. 481. When the trial court, in passing the first sentence, applied the indeterminate sentence law to a crime committed before that law took effect, it attempted to exercise a power which had not been conferred on it, and such sentence was absolutely void. In re Bonner, supra; Ex parte Lee, supra. As the act was absolutely void, the case then stood as though sentence had never been pronounced, and therefore a sentence could later be pronounced. Such was the rule before sections 1191 and 1202 of the Penal Code were amended in 1909 by St. 1909, p. 898 (In re Smith, 152 Cal. 566, 568, 93 Pac. 191); and, as applicable to the facts now

before us, the amendment to those sections did not change the rule (Ex parte Lee [Sup.] 171 Pac. 958). As its judgment of October 4, 1917, was absolutely void, the trial court, or any other court, could attack such judgment, either directly or collaterally. People v. Dodge, 104 Cal. 487, 38 Pac. 203. The trial court, therefore, had power on May 13, 1918, to vacate its former judgment, but the question then arises as to its power to enter a second judgment. If the defendant in a criminal case by appeal or habeas corpus causes a second sentence to be imposed upon himself, ordinarily he will not be heard to claim twice in jeopardy. Com. v. Murphy, 174 Mass. 369, 54 N. E. 860, 48 L. R. A. 393, 75 Am. St. Rep. 353; note to In re Taylor, as reported in 45 L. R. A. 136; Marshall v. Texas and note as reported in L. R. A. 1915A, 526. When the defendant was not the actor in bringing about the second sentence, the authorities hold that he should be discharged because a second sentence would place the defendant twice in jeopardy. In those cases it was said that the question did not turn on whether the second judgment was entered during the term or after the term, or whether the first judgment was valid or void; but it depended upon whether the prisoner had served a part of the term. Ex parte Lange, 85 U. S. (18 Wall.) 163, 175, 21 L. Ed. 872; Feeley's Case, 66 Mass. (12 Cush.) 598; People v. Whitson, 74 Ill. 20; Re Jones, 35 Neb. 499, 53 N. W. 468; Rutland v. State, 14 Ga. App. 752, 82 S. E. 293; Smith v. Court, 132 Iowa, 603, 109 N. W. 1085, 11 Ann. Cas. 296; State v. Meyer, 86 Kan. 793, 122 Pac. 101, Ann. Cas. 1913C, 278; s. c., 40 L. R. A. (N. S.) 90, and note; Rupert v. State, 9 Okl. Cr. 226, 131 Pac. 713, 45 L. R. A. (N. S.) 60; In re Johnson (C. C.) 46 Fed. 481; State v. Warren, 92 N. C. 828; Grisham v. State, 19 Tex. App. 514; In re Sullivan, 3 Cal. App. 193, 84 Pac. 781.

[6] In the case before us the prisoner had served nine months when he was taken back for resentence. Such resentence was, under the last authorities cited, a void act.

[7] Finally the question remains whether this court should apply the rule in Ex parte Lee, supra, and remand for a valid judgment to be entered. We think not. The facts are much different than in Lee's Case. Lee had served a very short time when he applied. This petitioner has served over a year. On October 4, 1917, the petitioner was in effect sentenced for not less than 1 year nor more than 10. On May 13, 1918, for the same offense the trial court again stated its mind and fixed the punishment at 1 year, which, allowing credits, means 10 months. But the petitioner has now served over 12 months. It is the duty of this court to "dispose of such party as the justice of the case may require." Pen. Code, § 1484; In re Bonner, 151 U. S. 242, 261, 14 Sup. Ct. 323, 38 L. Ed. 149; Feeley's Case, supra, p. 600. We do not hesitate in saying we think that the "justice of the case" does not require that the prisoner be remanded. The Supreme Court has remanded for further proceedings in some cases when it appeared from the record that the petitioner had not served much of his term. In Ex parte Lee, supra, the petitioner had been convicted of manslaughter, and had served only about 4 months. In Ex parte Smith, supra, he had been convicted of burglary, but was still in the custody of the sheriff and had served no time. Although the judgment was void and the petitioner had served only a part of his term, in other cases, he was discharged. Ex parte Baldwin, 60 Cal. 432; Ex parte Bulger, 60 Cal. 438; Ex parte Bernert, 62 Cal. 524; Ex parte Kelly, 65 Cal. 154, 3 Pac. 673; Ex parte Sylvester, 81 Cal. 199, 22 Pac. 550; Ex parte Morton, 132 Cal. 346, 64 Pac. 469; In re Sullivan, 3 Cal. App. 193, 84 Pac. 781.

Under the facts of this case we are not disposed to remand. It is therefore ordered that the petitioner be discharged.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

---

38 Cal. App. 784

Ex parte TUREK. (Cr. 819.)

(District Court of Appeal, First District, California. Oct. 16, 1918.)

In the matter of the application of John Turek for a writ of habeas corpus. Petitioner discharged.

Petitioner, in pro. per.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for respondent.

PER CURIAM. This is an application for a writ of habeas corpus. The facts are in all material respects the same and the principles of law involved are the same as in Ex parte Bouchard (Crim. No. 820) 176 Pac. 692, this day decided.

On the authority of that case, the petitioner should be discharged. It is so ordered.

---

38 Cal. App. 784

Ex parte JACOBSON. (Cr. 821.)

(District Court of Appeal, First District, California. Oct. 16, 1918.)

In the matter of the application of Oscar Jacobson for a writ of habeas corpus. Petitioner discharged.

Petitioner, in pro. per.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for respondent.

PER CURIAM. This is an application for a writ of habeas corpus. The facts are in all material respects the same and the principles

of law involved are the same as in Ex parte Bouchard (Crim. No. 820) 176 Pac. 692, this day decided.

On the authority of that case, the petitioner should be discharged. It is so ordered.

---

(38 Cal. App. 493)

## PEOPLE v. ROSE. (Cr. 455.)

(District Court of Appeal, Third District, California. Oct. 23, 1918. Rehearing Denied by Supreme Court Dec. 19, 1918.)

1. ARSON ⊜3 — DEFRAUDING INSURER — INTENT—KNOWLEDGE.

Intent to defraud insurer, which cannot exist without knowledge of the insurance, is of the essence of the offense under Pen. Code, § 548, of willfully burning insured property to defraud insurer.

2. ARSON ⊜37(3) — DEFRAUDING INSURER — KNOWLEDGE—EVIDENCE.

Circumstances *held* to warrant inference that defendant, charged with burning property to defraud insurer, knew of policies held by his wife on the property.

3. CRIMINAL LAW ⊜1120(3)—APPEAL—RECORD—EXCLUSION OF EVIDENCE.

The record showing merely exclusion of defendant's question to his witness, as to what conversation they had, and not what he expected to prove, or what bearing it would have, discloses no error.

4. CRIMINAL LAW ⊜1111(4)—APPEAL—REMARKS OF COUNSEL — TRIAL COURT'S VERSION.

The trial court's version of the remarks of counsel must be accepted on appeal, being the only version authenticated, the remarks not having been taken down, and counsel on motion to amend transcript by inserting them having been unable to agree what they were.

5. CRIMINAL LAW ⊜722½ — REMARKS OF COUNSEL.

Remarks of prosecuting attorney that the person who set the fire was experienced in setting fires, which had some basis in the evidence, is not ground for reversal, especially where the court promptly, on defendant's request, admonished the jury to pay no attention thereto.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Solomon Rose was convicted under Pen. Code, § 548, of burning insured property, and, from the judgment and an order denying a new trial, appeals. Affirmed.

G. C. Ringolsky and H. A. I. Wolch, both of San Francisco, and Will A. Dower, of San Andrea, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was informed against, by the district attorney of Calaveras county, for the crime of willfully burning insured property with intent to defraud the insurer, He was duly tried and convicted, and was thereupon sentenced to imprisonment in the state prison in conformity with the statute relating to indeterminate sentences. He appeals from the judgment and from the order denying his motion for a new trial.

The points made on appeal are: (1) That the evidence is insufficient to support the verdict of guilty; (2) misconduct of the prosecuting attorney.

[1] The alleged insufficiency of the evidence is addressed specifically to the failure of the prosecution to show that defendant knew the buildings and other property destroyed by fire were insured. It is urged that, under section 548 of the Penal Code, "the motive is an essential portion of the crime and must therefore be expressly proven by the prosecution," citing People v. Schwartz, 32 Cal. 160, 165. It is hence urged that the prosecution must prove that the defendant had actual knowledge that the property was insured, citing Moore v. State, 66 Tex. Cr. R. 169, 146 S. W. 183; State v. Greer, 243 Mo. 599, 147 S. W. 968, Ann. Cas. 1913C, 1163.

[2] Obviously, the intent to defraud the insurance company is of the essence of the crime, and no such intent could exist without knowledge on the part of the accused that the property was insured. We are asked to read the record carefully, for it is claimed that "the record on this very important element of the offense charged is silent."

Witness John Cosgrave, sheriff of Calaveras county, testified that defendant came to his house about 10 o'clock on the night of December 16, 1917, and informed him that his house and all his belongings had that day been burned. The witness narrated a conversation he had with the defendant at that time. He testified:

"I asked him if the place was insured. He says, 'I think my wife had a little insurance.' I asked him how much. He said he did not know. Then he talked considerable what his losses were."

Sheriff Cosgrave met defendant and his wife at the premises the next day:

"Q. Did Mrs. Rose make any statement? A. I asked about the insurance, and she seemed to be very reluctant about telling. I asked if there was $1,500, and he said they told maybe there was, and then I told him I would have to arrest him, * * * and I brought him into town and made the charge, and the judge fixed the bail."

The title to the property was in defendant's wife.

It appeared that there were two insurance

policies issued and in force at the time the fire occurred (one for $2,000 and one for $500) covering two buildings, the household effects, and farming implements—substantially all the improvements on the place and all the personal property. The evidence of defendant's guilt was circumstantial, but was, we think, sufficient to fix the burning of this property upon him. There is no conceivable motive for his destroying this property by fire unless it was that his wife should realize on her insurance policies, and the circumstances, aside from his admission to Sheriff Cosgrave, warranted the inference that he knew of the existence of these policies. There was no evidence tending in any degree to indicate that some evil-disposed person other than defendant set fire to the property.

[3] Defendant's counsel say that—

"The court expressly refused to permit the defendant to show that he did not know there was any insurance upon the place."

Attention is called to pages 177 and 178 of the transcript. It appears that Mrs. Rose received a letter, dated November 10, 1917, written by William Adams, informing her that she had not sent him the insurance premium on policy "taken out last June." Mrs. Rose testified that this letter was opened by Mr. Rose who handed it to her. She was then asked "what conversation was had" between her and her husband. The court sustained an objection to the question. Counsel for defendant then asked that the jury be excused and he allowed to renew the question. The witness was again asked to state what was said in that conversation "with reference to keeping that policy in force." The objection was renewed.

"Mr. Ringolsky (one of defendant's attorneys): My purpose is that it goes to a motive, a lack of motive for the crime that is alleged to be committed. Mr. Keetch (assistant to district attorney): Let's argue it out then. By the Court: The jury is excused, after being admonished, and leave the room until called back. * * * Stipulated that the jury are all present."

And there the record ends. No ruling appears and no explanation by defendant's counsel as to what he expected to prove or what its bearing would have on the issues. There is no showing that the court was advised of the facts or matters on which defendant relied to establish motive or tend to destroy the showing as to motive. The record presents no ground for holding that the court erred.

[4, 5] The remaining ground for reversal is alleged misconduct of the assistant district attorney in making his closing argument. At page 216 of the transcript appears an objection "to the statements of counsel with reference to the history and previous record of the defendant." What the objectionable remarks were is not set forth, but defendant's attorney asked that—

The court "instruct the jury to refrain from (paying attention to?) certain remarks of that character made by the prosecuting attorney. * * * The Court: The jury will refrain from paying any attention to the remarks of counsel as far as that was concerned."

The objectionable remarks of Mr. Keetch were not taken down by the court reporter, and, after the transcript was certified a motion was made to amend by inserting at page 216 the remarks referred to. The matter was heard, and counsel for the parties respectively stated what their recollection was of these remarks.

"The Court: My recollection may not be any better than the counsel's for the respective parties, but my recollection of the matter was that Mr. Keetch remarked 'the person who set the fire was experienced in setting fires,' and then he was interrupted by Mr. Ringolsky and asked why he did not produce the defendant's record here, and the statement was 'that he had no right to introduce the record in this case, but if given an opportunity he would do so.' That is the conversation as I recall it."

We must accept the version as given by the court, as it is the only one that comes to us authenticated. The statement made, that whoever set the fire was experienced, had some basis in the evidence. Some neighbors, who came to the place while the dwelling was burning, found a burning candle placed in a sack saturated with coal oil in the barn and in a position which would have caused the barn to burn in a short time. Some hours later in the day, while defendant was at the place, the barn burned. He could give no satisfactory explanation how it happened, The suggestion that attorney Keetch meant to apply his remarks to defendant was made by defendant's attorney when he asked Mr. Keetch why he did not produce defendant's record. The remarks first above quoted do not on their face necessarily give rise to the inference that they were pointed to defendant. We do not think the episode in any view can warrant a reversal of the judgment, especially as the court very promptly, on defendant's request, admonished the jury to pay no heed to it or to the remarks of counsel.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

38 Cal. App. 492

## PEOPLE v. YOUNG. (Cr. 451.)

(District Court of Appeal, Third District, California. Oct. 23, 1918.)

CRIMINAL LAW ⊜1130(4)—ABANDONMENT OF APPEAL.

Where, after cause was placed on calendar, it was ordered, counsel for appellant not appearing, that appellant have 15 days in which to file opening brief, court will assume that appeal has been abandoned, and will affirm judgment for want of prosecution; the time having expired, and not having been extended.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

W. J. Young, alias James Brown, was convicted of making and drawing a fictitious check, and appeals from judgment and order denying new trial. Judgment amended and affirmed.

C. E. Nuland, of San Andreas, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM. Defendant was convicted of "making and drawing a fictitious check," and was sentenced to the state prison at San Quentin "for a term of from 1 to 14 years." He appealed from the judgment and from the order denying his motion for a new trial. The cause was placed upon the September calendar, and, counsel for the defendant not appearing, it was ordered, on September 10, 1918, that appellant have 15 days in which to file his opening brief, the respondent 10 days to answer, and appellant 10 days to reply, cause then to stand submitted.

The time for filing appellant's opening brief having expired, and the time not having been extended, we must assume that the appeal has been abandoned, and therefore affirm the judgment for want of prosecution. We have, however, read the evidence in the case, and find it sufficient to support the verdict.

The judgment is amended by striking out the words "for a term of from 1 to 14 years," and as thus amended the judgment and order are affirmed.

---

38 Cal. App. 461

## AKERMAN et al. v. MOODY, City Auditor. (Civ. 2774.)

(District Court of Appeal, Second District, California. Oct. 17, 1918.)

1. MUNICIPAL CORPORATIONS ⊜54—GOVERNMENTAL POWER.

A "municipal corporation" is but a branch of the state government and is established for the purpose of aiding the Legislature in making provisions for the wants and welfare of the public within the territory for which it is organized.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Municipal Corporation.]

2. MUNICIPAL CORPORATIONS ⊜64—POWERS—LEGISLATIVE CONTROL.

It is for the Legislature to determine the extent to which it will confer upon a municipal corporation any power to aid in the discharge of the obligation which the Constitution has imposed upon itself.

3. MUNICIPAL CORPORATIONS ⊜211—BOARD OF EDUCATION—RECALL.

Under Const. art. 11, § 8½, Charter of City of San Diego, art. 7, § 2, as amended in 1905, article 1, c. 3, as amended in 1909, article 1, c. 4, § 4, and article 7, § 3 and Pol. Code, §§ 1576 and 1616, the members of the board of education of the city of San Diego are subject to recall, though the San Diego school district comprises certain territory outside of the corporate limits of the city, and the board members are paid by warrants drawn upon the county treasurer.

Petition for writ of mandate by John S. Akerman and others against H. L. Moody, as Auditor of the City of San Diego. Peremptory writ issued.

Harrison G. Sloane, of San Diego, for petitioners.

Warren E. Libby, of San Diego, for respondent.

T. B. Cosgrove, City Atty., of San Diego, amicus curiæ.

CONREY, P. J. In accordance with proceedings regularly taken for that purpose, the common council of the city of San Diego, on the 31st day of July, 1918, adopted a resolution calling for a primary election to be held in said city for the purpose of nominating candidates for three offices of members of the board of education of that city in case the incumbents be recalled at a proposed recall election. The resolution was duly referred and presented to the defendant for the purpose of procuring from him a written certificate to the effect that the indebtedness incurred under the terms of said resolution could be incurred without the violation of any of the provisions of the freeholders' charter of the city. The defendant has refused to make the required certificate, basing his refusal upon the ground that the recall provisions of the charter do not apply to members of the board of education. In this proceeding the petitioners pray for a writ of mandate commanding the defendant to make the demanded certificate.

The duty of the city auditor to make certificates of the kind here required is prescribed by section 14 of chapter 2 of article 2 of the charter of the city of San Diego. That he must do this in a proper

case is not denied. Higgins v. San Diego Water Co., 118 Cal. 524, 551, 45 Pac. 824, 50 Pac. 670; Pollok v. City of San Diego, 118 Cal. 593, 596, 50 Pac. 769.

Section 8½ of article 11 of the Constitution of California, as amended October 10, 1911, and also as amended November 3, 1914, provides that—

"It shall be competent, in all charters framed under the authority given by section eight of this article, to provide, in addition to those provisions allowable by this Constitution and by the laws of the state as follows: * * * 2. For the manner in which, the times at which, and the terms for which the members of boards of education shall be elected or appointed, for their qualifications, compensation and removal, and for the number which shall constitute any one of such boards."

The charter of the city of San Diego at all times since its adoption in 1889 has provided that the government of the San Diego school district shall be vested in a board of education. As amended in the year 1905, section 2 of article 7 of the charter reads as follows:

"The government of the San Diego school district shall be vested in a board of education, composed of five persons, who shall be elected by the electors of the city of San Diego, at large, at the same time and in the same manner as other municipal officers, and each of whom shall have been for two years a resident of said city, who shall be styled member of the board of education. They shall serve four years, or until their successors are elected and qualified."

Chapter 3 of article 1 of the charter, as amended in 1909, provides for the manner in which all primary and general municipal elections for the nomination and election of municipal officers shall be conducted in the city of San Diego. In that chapter members of the board of education are listed as municipal officers to be elected. Section 4 of chapter 4 of article 1 of the charter, as enacted in the year 1915, provides for the recall of "the holder of any elective office of this municipality," and prescribes the procedure for such recall. Section 3 of article 7 of the charter provides that—

"The duties and powers of the board of education shall be such as are now, or may hereafter be enjoined and conferred on boards of education in city and school districts by the laws of the state of California."

Section 1576 of the Political Code provides that every city (with an exception not important here) shall constitute a separate school district which shall be governed by the board of education or board of school trustees of such city. Section 1616 of the same Code provides that—

"Boards of education are elected in cities under the provisions of the laws governing such cities, and their powers and duties are as prescribed in such laws, except as otherwise in this chapter provided."

The provisions of the city charter leave no room for doubt that the charter recognizes members of the board of education as municipal officers. That the Constitution authorizes a city in its charter to create such municipal offices is also entirely clear and certain. The legislation of the state concerning school districts has been framed with an evident intent to harmonize with the power of cities to act as school districts and to be governed by boards of education. In Allen v. Board of Trustees, 157 Cal. 720, 109 Pac. 486, a writ of mandate was granted requiring the board of trustees of a city of the fifth class to include in their call for an election of officers of the city the matter of election of members of a board of education thereof. After citing that section of the municipal corporations act which provides that in cities of the fifth class there shall be a board of education, and after quoting from section 1576 of the Political Code, the Supreme Court declared that—

"Under the plain terms of the statutes above cited, such city will form a school district, to be governed by the board of education of such city. A board of education, composed of five members, is a part of the governmental machinery of cities of the fifth class, and it would therefore seem plain that a call for the election of the officers required by law to be elected in corporations of this class must include a call for the election of five members of the board of education."

It has been stipulated as a fact in this case that the San Diego school district of the county of San Diego comprises certain territory outside of the corporate limits of the city of San Diego; that the members of the board of education of the city of San Diego are paid the salary provided for them in the charter of said city by warrants drawn upon the county treasurer, upon orders approved by the superintendent of schools of the county of San Diego, and are not paid by the city treasurer of the city of San Diego. Relying upon these facts, the defendant claims that the members of the board of education of the city are not subject to recall under the provisions of the charter, and are not municipal officers, because electors outside of the city limits and within the school district have the right to vote for the said members, and therefore they cannot be termed municipal officers, and also because electors outside of the city are qualified as candidates for such offices, and therefore members of the board of education cannot be termed municipal officers.

[1, 2] If the provisions of the written law on this subject were obscure, we might follow counsel for defendant in a study of the character of the duties, powers, and functions of school districts and of their offi-

cers, as a method of testing the question as to whether or not a member of a city board of education is a municipal officer. But in the absence of such ambiguity or obscurity such investigation is not necessary. If any rights of the persons residing in or owning property within the limits of the San Diego school district and outside of the city of San Diego have been encroached upon by the creation of the city of San Diego as a school district, there are within the law ample means for the protection of those rights without denying to the city of San Diego the right to have and to choose the members of a board of education.

"That the education of the youth is properly included within the functions of a municipal government cannot be denied. A municipal corporation is but a branch of the state government, and is established for the purpose of aiding the Legislature in making provision for the wants and welfare of the public within the territory for which it is organized, and it is for the Legislature to determine the extent to which it will confer upon such corporation any power to aid it in the discharge of the obligation which the Constitution has imposed upon itself." In re Wetmore, 99 Cal. 146, 150, 33 Pac. 769, 770; Los Angeles City School Dist. v. Longden, 148 Cal. 380, 83 Pac. 246.

While those decisions recognize the principle that the school system of the state is a matter of general concern, and not a municipal affair, they also recognize the right of a municipality to maintain educational departments running current with the general laws of the state touching the common school system. For such purposes there is no reason why a city should be denied the right to have municipal officers to take charge of the educational activities of the city. In the case of Stern v. City Council of Berkeley, 25 Cal. App. 685, 145 Pac. 167, the defendant challenged the validity of a provision of the city charter of the city of Berkeley which provided for compensation to a school director. It was contended that, inasmuch as the public school system of the state has been made by the Constitution and general laws a matter of general concern, the regulation of that system is a state affair as distinguished from a municipal affair, and therefore can be rightly covered and controlled only by general state laws. To which the court responded:

"Generally speaking, this may be so; but in our opinion appellant, as a school director of the city of Berkeley, is a municipal officer, irrespective of whether or not the duties of the office are exacted by the charter or imposed by the general law of the state, and therefore the compensation to be paid him by the city out of the city treasury for services rendered the city in maintaining its school system as an integral part of the state school system is purely a municipal affair, which is exclusively controlled by charter provisions."

[3] It is our opinion that the right to recall members of the board of education, equally with the right to elect such members, is vested in the city of San Diego. On the record presented herein, the petitioners are entitled to the demanded relief.

Let the peremptory writ issue.

We concur: JAMES, J.; SHAW, J.

---

38 Cal. App. 474

## Ex parte JACOBS. (Cr. 459.)

(District Court of Appeal, Third District, California. Oct. 18, 1918.)

1. HABEAS CORPUS ⊂⊃4, 27, 30(1)—FUNCTION OF WRIT.

Habeas corpus in California is not a writ of error, or a mode of review, but merely a means to inquire into question of jurisdiction, so that, if judgment of conviction of crime is not void on its face, it will stand as against collateral attack by habeas corpus, though errors on trial might be shown.

2. HABEAS CORPUS ⊂⊃85(1)—PRESUMPTIONS—ACTION OF COURT—WITNESSES.

On habeas corpus to secure release from imprisonment where record of trial is not before court, presumption is that action of court in refusing to bring into court witnesses regularly subpœnaed and defaulting in appearance did not involve an abuse of discretion.

3. HABEAS CORPUS ⊂⊃4 — CONVICTION OF CRIME—MATTERS NOT REVIEWABLE.

That judge trying prosecution refused to compel witnesses to appear for petitioner, and that magistrate who held preliminary examination refused to compel physical examination of person against whom petitioner was alleged to have committed offense, were points which, if reviewable at all, could be reviewed only on appeal and not in habeas corpus proceeding.

4. INDICTMENT AND INFORMATION ⊂⊃137(5)—GROUND FOR SETTING ASIDE—REFUSAL OF PHYSICAL EXAMINATION.

That magistrate who held preliminary examination of defendant accused of the crime against nature refused to compel physical examination of the victim was not legal ground for setting aside the information.

In the matter of the application of Alfred Jacobs for writ of habeas corpus. Application denied.

Alfred Jacobs, in pro. per.

HART, J. The petitioner, now confined in the Folsom state prison, claiming that he is being restrained of his liberty by the warden of said prison without warrant or authority of law, has made this application to me, to the end that the cause of his imprisonment may be inquired into and thereupon

his restraint declared illegal and that he consequently be discharged therefrom.

An examination of the petition for the writ has readily convinced me that no legal ground is therein stated for the issuance thereof and that the application will therefore have to be denied.

Ordinarily, an opinion setting forth the reasons for the denial of an application for a writ of habeas corpus is not deemed necessary; the mere order denying the same being sufficient. In this instance, however, the petitioner, who is not an attorney, makes the application himself, or in propria persona, and, inasmuch as he is not a lawyer and acquainted with the remedial function or scope of the writ of habeas corpus, at least so far as that writ is invokable where the claim is that a citizen is deprived of his personal liberty by virtue of some process issued by a state tribunal purporting to act under some local law of the state, I think it is but fair to the prisoner to reduce to writing the grounds upon which his application must be and is denied.

[1] In the first place, I may remark that the statement in the petition that the writ of habeas corpus is a writ of error, or a mode whereby errors of law occurring at a trial may be reviewed, is erroneous, at least so far as this state is concerned. The sole function or the full scope of the inquiry which is authorized to be prosecuted through the instrumentality of that writ is the question of jurisdiction. If therefore a judgment of conviction and sentence in a criminal case is not void upon its face, it will stand as against a collateral attack, such as is the attack upon such a judgment through the writ of habeas corpus, even though it might be shown, if it were proper to show it in a proceeding on habeas corpus, that during the trial culminating in such judgment many egregious errors, prejudicial to the rights of the prisoner, had been committed.

The petitioner here was convicted by a jury in the superior court of Sonoma county on the 6th day of December, 1916, of a crime against nature, and, on the 12th of the same month, was sentenced therefor to a term of 12 years in the state penitentiary. As grounds for the petitioner's release from the custody of the warden, the petition states, in substance, that the judge who presided at the trial in the superior court refused to compel two certain witnesses, named in the petition, to appear in court and testify in petitioner's behalf; that the magistrate, who held the preliminary examination of the petitioner on the charge of which he was subsequently convicted and committed him for trial on said charge in the superior court, refused to compel the examination by a physician of the person upon whom the crime charged against petitioner was alleged to have been committed for the purpose of determining whether the act constituting the crime charged had actually been committed upon such person; that, "because of such refusals," the petitioner was deprived of an opportunity to prove his innocence of the crime of which he was convicted and for which he is now being restrained of his personal liberty.

[2-4] It is not made clear in the petition just what is meant by the complaint that the judge of the superior court refused to compel certain witnesses to appear and testify for the petitioner. If it is meant that the witnesses failed to appear in court after having been regularly subpœnaed and that the court refused to issue the proper process for compelling them to obey the subpœnas and so made to appear in court, one ready reply is that the record of the trial is not before us, and in such case, even upon appeal, the presumption would be and is that the refusal to take steps to bring the defaulting witnesses into court did not involve an abuse of judicial discretion. But, in any event, it is, of course, readily obvious to the legal mind that the grounds above set forth are wholly insufficient to justify the issuance of a writ of habeas corpus. In other words, the points therein involved, even if reviewable under any circumstances, may only be reviewed on appeal and not in a proceeding on habeas corpus. As to the action of the magistrate above mentioned, even if such action were a legal ground for setting aside the information (and obviously it is not), the only way in which it could be reviewed by this court, if at all, would be upon appeal upon a proper and timely record made with respect thereto in the superior court.

Manifestly, the application for the writ must be denied, and it is so ordered.

---

38 Cal. App. 477

## NAPA VALLEY ELECTRIC CO. v. CALISTOGA ELECTRIC CO. (Civ. 2529; S. F. 8193.)

(District Court of Appeal, First District, California. Oct. 18, 1918. On Rehearing in Supreme Court, in Bank, Dec. 16, 1918.)

1. ELECTRICITY ⊂=1—ILLEGALITY OF SALE OF PROPERTIES OF PUBLIC UTILITY—STATUTE.

A contract between two electric companies for the sale of its properties by one to the other, not approved by the Railroad Commission as required by Public Utilites Act, §§ 51, 76, was void and unenforceable, as in violation of statutes for the protection of the public.

2. EQUITY ⊂=15—JURISDICTION—DECREE DEPENDENT ON APPROVAL OR REJECTION OF OTHER BOARD.

A court of equity will never assume jurisdiction to prepare a decree dependent for its effi-

cacy on approval or rejection of some other co-ordinate or inferior board or tribunal, but only when the court can itself enforce its decree.

3. CONTRACTS ⊂=105 — CONDITIONS PRECEDENT—OBTAINING PERMITS.

When within its constitutional powers the Legislature has sought by statute to provide that certain contracts may be made only after obtaining certain permits, the obtaining of the latter are conditions precedent to the making of enforceable contracts.

4. CONTRACTS ⊂=138(1)—ILLEGALITY—ACTION TO ENFORCE.

When fact is called to attention of court that contract sought to be enforced is illegal, court will refuse plaintiff any relief, and will leave the parties where it finds them.

On Rehearing in Supreme Court.

5. SPECIFIC PERFORMANCE ⊂=55 — SALE OF PROPERTIES OF PUBLIC UTILITY — PERMISSION OF RAILROAD COMMISSION.

In view of Public Utilities Act, § 51, one electric company could not have the equitable remedy of specific performance to compel another electric company to convey its properties, on which it had given an option, where neither of the companies had secured from the Railroad Commission an order authorizing the sale.

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by the Napa Valley Electric Company, a corporation, against the Calistoga Electric Company, a corporation. From judgment for defendant, plaintiff appealed to the District Court of Appeals, which affirmed, and plaintiff applies for hearing in the Supreme Court. Application denied.

U'Ren & Beard, of Napa, for appellant.

Asher, Meyerstein & McNutt and Joseph C. Meyerstein, all of San Francisco, and H. L. Johnston and L. E. Johnston, both of Napa, for respondent.

STURTEVANT, Judge pro tem. The plaintiff brought this action against the defendant to compel it to convey to plaintiff its properties on which it had given the defendant an option. The lower court sustained a demurrer to the plaintiff's amended complaint, the plaintiff elected not to amend, judgment was entered in favor of the defendant, and the plaintiff has appealed on the judgment roll. The plaintiff is a public service corporation serving electric energy to the inhabitants of St. Helena, and the defendant is the same kind of a corporation serving the inhabitants of Calistoga. December 31, 1914, each corporation executed to the other an option to sell to the other. The plaintiff first sought to exercise its option, and, as the defendant failed to comply, this action in specific performance was commenced. In its amended complaint the plaintiff does not allege that either the plaintiff or the defendant has "secured from the Railroad Commission of the state of California an order authorizing the defendant to sell to the plaintiff." The defendant claims such an allegation is a prerequisite to a cause of action in such a case. The plaintiff urges: (1) That if such is the law, then no contract to sell a public utility plant can be enforced; and (2) that the objection is premature. We shall consider these contentions together. Subdivision "a" of section 51 of the Public Utilities Act (St. 1911 [Ex. Sess.] p. 44) provides:

"No * * * electrical corporation * * * shall henceforth sell, lease, assign, mortgage or otherwise dispose of or incumber the whole or any part of its * * * line, plant or system, necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, nor by any means whatsoever, direct or indirect, merge or consolidate its * * * line, plant or system, or franchises or permits or any part thereof, with any other public utility, without having first secured from the commission an order authorizing it so to do. Every such sale * * * made other than in accordance with the order [and approval] of the commission authorizing the same shall be void. * * *"

Section 76 of the same statute (page 61) provides:

"Any public utility which violates or fails to comply with any provisions * * * of this act, * * * is subject to a penalty of not less than five hundred dollars nor more than two thousand dollars for each and every offense."

[1-4] It needs no citation of authority to the effect that said statute was enacted primarily in behalf of the public rather than the owners of public utilities. It is a settled rule that a contract will not be enforced if the contract is in violation of the provisions of a statute enacted for the protection of the public. Levinson v. Boas, 150 Cal. 185, 193, 88 Pac. 825, 12 L. R. A. (N. S.) 575, 11 Ann. Cas. 661. It will be noted that the language of the Public Utilities Act is not only prohibitory, but a penalty is provided for violations thereof. Such a statute must be construed as being prohibitory, and a contract made in contravention of the terms thereof is void and is unenforceable. Berka v. Woodward, 125 Cal. 119, 127, 57 Pac. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31; State v. Wilson, 73 Kan. 343, 84 Pac. 737, 80 Pac. 639, 117 Am. St. Rep. 479, and extended notes. A court of equity will never assume jurisdiction to prepare a decree dependent for its efficacy on the approval or rejection of some other co-ordinate or inferior board or tribunal, but only when the court can enforce its decree. 3 Pom. Eq. Juris. § 1405; Senter v. Davis, 38 Cal. 450, 455. Furthermore, when, acting within the scope of its

constitutional powers, the Legislature has sought by statute to provide that certain contracts may be made only after obtaining certain permits so to do, such permits become conditions precedent to the making of enforceable contracts. Gardner v. Tatum, 81 Cal. 370, 22 Pac. 880; Jacks v. Taylor, 24 Cal. App. 667, 674-675, 142 Pac. 121; State v. Wilson, 73 Kan. 343, 84 Pac. 737, 80 Pac. 639, 117 Am. St. Rep. 506, 507. In the instances mentioned above the purported contract is illegal. When that fact is called to the attention of the court, the court will refuse the plaintiff any relief, and will leave the parties where it finds them. Such action is taken not to help the defendant, but not to help the plaintiff, not for the sake of either party, but for the sake of the law itself. Union v. Buckman, 150 Cal. 159, 164, 165, 88 Pac. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164, 11 Ann. Cas. 609; O'Brien v. Shea, 208 Mass. 528, 95 N. E. 99, 22 Ann. Cas. 1030, 1033.

The judgment should be affirmed; and it is so ordered.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

On Rehearing in Supreme Court.

PER CURIAM. The application for a hearing in this court after decision in the District Court of Appeal of the First Appellate District is denied.

[5] In denying the application we deem it proper to say that we do so upon the theory that in view of the matters stated in the opinion the equitable remedy of specific performance is not available to the plaintiff. In view of such a conclusion it is unnecessary to decide whether the attempted agreement was absolutely void, and we are not to be understood as expressing any opinion thereon.

---

(38 Cal. App. 497)

Ex parte GERMINO. (Cr. 458.)

(District Court of Appeal, Third District, California. Oct. 24, 1918.)

CRIMINAL LAW ⊜977(3), 993—RESENTENCE—TIME.

Although the provisions of Pen. Code, § 1191, fixing the time for the passing of sentence after verdict of guilty in a criminal case, are mandatory, they do not apply to a judgment merely irregular in form, and, where a prisoner has been erroneously sentenced under the Indeterminate Sentence Law, for a crime committed prior to its passage, he may be resentenced under the previous law, although the time limited by the statute has elapsed.

Application by Louis Germino for a writ of habeas corpus. Denied.

Louis Germino, in pro. per.

HART, J. Petitioner was convicted of the crime of rape in the superior court of Fresno county, alleged to have been committed in said county on the 9th day of April, 1917, upon a certain female of the age of 12½ years. On the 15th day of February, 1918, he was sentenced by said court to a term of not less than five years. Thereupon, and in due time after the pronouncement of said sentence, the petitioner was delivered into the custody of the warden of the state prison at San Quentin, upon a commitment duly issued upon said judgment of sentence. On the 19th day of April, 1918, the superior court of said county, after declaring that the sentence so pronounced, being under the Indeterminate Sentence Law (Pen. Code, § 1168, as added by St. 1917, p. 665), was invalid, by reason of the fact that the crime for which the petitioner was so sentenced was committed prior to the time at which the law authorizing and requiring judgments of sentence in criminal cases to be indeterminate as to the term of sentence, went into effect, made an order in legal form for the return of the prisoner before said court, then and there to receive a sentence upon said conviction, "according to the law of the state existing at the time of the commission of said offense," etc. In pursuance of said order, the prisoner was brought before said court on the 1st day of May, 1918, and, after due legal formalities, was sentenced by the court to a term of five years in the Folsom state prison.

The petitioner, who is not represented by an attorney, but appears in his own behalf (for which reason we depart from our usual practice of filing no opinion giving our reasons for denying an application for an alternative writ or an order to show cause), contends that the court below lost jurisdiction to impose the second sentence, and that therefore said judgment of sentence is void. No argument or points and authorities accompanied the application for the writ, but we conjecture that the specific ground upon which the petitioner maintains that the court was without jurisdiction to resentence him is that the time within which, under section 1191 of the Penal Code, sentence is required to be pronounced after a plea or a verdict of guilty in a criminal case, had passed when said sentence was imposed. There is, in our judgment, no merit in the contention.

In People v. Booth, 174 Pac. 685, a situation similar to the one here arose, and therein we held that the court did not lose jurisdiction to pronounce a proper or valid judgment.

In the case of People v. Gonzales, 173 Pac. 407, the judgment of sentence fixed the maximum penalty for robbery, of which the defendant was convicted, at 15 years; the crime having been committed after the Indeterminate Sentence Law went into effect.

---

⊜For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

This court properly held that the judgment of sentence should have been in accord with the provisions of the Indeterminate Sentence Law, and that, not being so, it was informal, and for that reason the judgment was reversed and the cause remanded, with a direction to the trial court to pronounce a proper and valid judgment.

In People v. Mendosa (Sup.) 173 Pac. 998, the trial court, in sentencing the defendant, who was convicted of a crime committed after the Indeterminate Sentence Law went into effect, sentenced the accused to imprisonment "for a period of not less than one nor more than five years." The sentence so pronounced was obviously contrary to the provisions of section 1168 of the Penal Code, requiring indeterminate sentences to be pronounced in criminal cases, and the judgment was reversed for that reason only, the court holding:

"Where an erroneous judgment is pronounced for failure to comply with the provisions of the Indeterminate Sentence Law, it is not necessary to have a new trial, but the superior court directed to pronounce a proper judgment."

The significance of the above-mentioned cases in their application to the case before us is that, in each of them, the time fixed by section 1191 of the Penal Code for the passing of judgment of sentence after a plea or verdict of guilty had gone by when the defendants were resentenced. Of course, it cannot logically be contended that there is in principle any difference between the fact that an appellate court may order the trial court to resentence the defendant and the fact that the trial court, having discovered that it had pronounced an erroneous or informal judgment, upon its own motion again arraigns the defendant upon the verdict of conviction and thereupon sentences him in accordance with the law. In other words, the jurisdiction of the superior court again to pronounce judgment of sentence according to the requirements of the law can no more be lost by lapse of time in the one case than in the other.

It is true that the provisions of section 1191 of the Penal Code are mandatory; but we do not conceive that they were intended to be applied to a case where, as in the present case, a judgment of sentence is merely irregular in form. The sentence of imprisonment in the case above referred to and in this case is the real gist or substance of the judgment of sentence, and the error in fixing or attempting to fix therein a definite term of imprisonment, where the Indeterminate Sentence Law applies, is a mere irregularity. Indeed, that part of the judgment fixing a specific term of years of imprisonment in such a case is surplusage, and, in our opinion, ought to be disregarded as of no consequence in its effect upon the judgment. And where the Indeterminate Sentence Law does not apply, the omission to fix the term of imprisonment in the judgment of sentence is likewise a mere irregularity. In either case, there can be no just reason for holding that the irregularity is not subject to correction without offending section 1191, either in its letter or spirit. This really would not, in legal effect, result in the rendition of a new judgment, but only the amendment of a judgment already rendered.

The petition for the writ will have to be denied, and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

---

38 Cal. App. 486

## PEOPLE v. EPPERSON. (Cr. 449.)

(District Court of Appeal, Third District, California. Oct. 23, 1918.)

1. INDICTMENT AND INFORMATION ⟸125(20) —SEPARATE OFFENSES—"FURNISH"—"SELL" —"GIVE."

Information based on Wyllie Local Option Law, § 13, and charging that defendant did "sell" and "furnish" alcoholic beverages, does not necessarily state two separate and distinct offenses, since, whether a person sells or gives to another intoxicants, he necessarily furnishes liquor, "furnish" being broader than the words "sell" and "give" as used in such statute.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Furnish; Give; Sell.]

2. CRIMINAL LAW ⟸1186(4) — ERRONEOUS OVERRULE — HARMLESS ERROR — "MISCARRIAGE OF JUSTICE."

Overruling demurrer to information charging that defendant did "sell" and "furnish" alcoholic beverages, and not requiring district attorney to elect, *held*, in view of convincing proof of defendant's guilt, not a "miscarriage of justice" within Const. art. 6, § 4½, as to reversal for such errors only.

3. CRIMINAL LAW ⟸772(2)—SEPARATE OFFENSES—INSTRUCTION.

Instruction that Wyllie Local Option Law makes it a crime to sell, give away, or furnish to another any alcoholic liquors in no-license territory, was not subject to objection that it stated that defendant was being tried on both charges in the information, since charge in information that defendant "did sell and furnish" involved but the statement of a single offense.

4. CRIMINAL LAW ⟸798(½) — DUTY OF JURY—INSTRUCTIONS.

That part of defendant's requested instruction to effect that jury should consult with one another about the case, the evidence, etc., and in case of difference of opinion talk over the case carefully, etc., involved a mere commonplace, and its refusal was not error, especially where court charged to that effect.

---

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

5. Criminal Law ⊜829(19)—Instruction Already Given—Reasonable Doubt.

That part of defendant's requested instruction to effect that each juror should adhere to their own opinion until convinced beyond reasonable doubt was covered by instruction that jury would not be justified in finding verdict of guilty, unless they were convinced by the evidence beyond a reasonable doubt.

6. Criminal Law ⊜829(18)—Refusl of Instruction—Reasonable Doubt.

Refusal of instruction that, if two conclusions can be drawn from testimony, one favoring defendant's innocence, and the other tending to establish his guilt, it is the duty of the jury to adopt the former, was not prejudicial, since it merely involved an amplification of the rule of reasonable doubt, sufficiently covered by given instructions.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

N. E. Epperson was convicted of selling whisky in no-license territory, and he appeals. Affirmed.

James M. Lee, of Red Bluff, for appellant.
U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. Defendant was convicted, in the superior court of Tehama county, upon an information which charged that he "did willfully and unlawfully sell and furnish to one C. H. Tolley, whisky, an alcoholic beverage containing one per cent. or more by volume of alcohol," in the city of Red Bluff, which was then and there "no-license territory." From a judgment imposed upon him of imprisonment in the county jail, defendant appeals.

The first point made by appellant is that the information charges two separate and distinct offenses, to wit, "selling whisky" and "furnishing whisky," which should have been separately stated. This point was raised upon demurrer to the information, by a motion that the district attorney should "set out his separate counts," by a motion that the district attorney should elect which of the two charges defendant would be tried upon, upon a motion for a new trial, and by a motion in arrest of judgment.

It is further claimed that the court erred to the serious detriment to the substantial rights of the accused in its action in giving and refusing to give certain instructions.

The facts need not be stated in detail, it being sufficient to say that the defendant was seen and caught by the officers in the act of selling or furnishing one Tolley with a bottle of whisky, in the city of Red Bluff, which, as the information states, is situated in "no-license" territory, on the 8th day of December, 1917. The evidence against the defendant was apparently so convincingly indicative of his guilt that the verdict, so far as the evidence is concerned, appears to be the only one that could justly have been returned.

In support of the point that the information charges two separate and distinct offenses, without separately stating them, and that the order overruling the demurrer on that ground and the denial of his motion for an order requiring the district attorney to make an election of the particular offense of the two charged upon which he intended to rely for a conviction were erroneous and prejudicial, the defendant cites the case of the People v. Plath, 166 Cal. 227, 135 Pac. 954. In that case, the defendant was charged by an indictment with violating all the provisions contained in six different subdivisions of section 337a of the Penal Code. The ultimate design of said section was to penalize and thus put a stop to pool selling on horse races and other sports usually played for money or on wagers; but each of the subdivisions thereof, which are connected by the disjunctive "or," describes an act or acts different from that or those described in the others as constituting a crime, although all have ultimate relation to pool selling. In other words, as was held in Ex parte Roberts, 157 Cal. 472, 108 Pac. 315, said section contains a description of as many different offenses as there are subdivisions thereof, and the several offenses so described "are apparently as distinct and independent of each other as if they had been enacted in separate sections." Hence, it was held in the Plath Case that the order of the trial court sustaining the demurrer to the indictment upon the ground that more than one offense was improperly charged therein was sound, and could therefore not be disturbed.

[1] The information in this case is based on section 13 of the statute of 1911, commonly known as the "Wyllie Local Option Law" (Stats. 1911, p. 602). The language of said section, so far as it is pertinent to the present inquiry, is:

"It shall be unlawful for any person * * * to sell, furnish, distribute or give away any alcoholic liquors except as provided in section 16 hereof."

The foregoing section of the Local Option Law is, it will be observed, wholly dissimilar to section 337a of the Penal Code. It does not, like the Code section, contain an enumeration, in different subdivisions, of a number of entirely different and dissimilar acts, each of which of itself constitutes an offense lacking the essential elements of any one of the other acts enumerated and penalized as public offenses. The charge in the information under review that the defendant did sell and furnish alcoholic liquor to said Tolley does not necessarily involve the statement of two separate and distinct offenses.

To furnish a person with any article is to supply or provide him with such article (Webster's Dictionary), and, therefore, whether a person sells or gives to another alcoholic liquor, he at the same time necessarily furnishes such person with such liquor. The object of the so-called Wyllie law is to put a stop to the trafficking in alcoholic liquors in any manner or form or degree in those subdivisions of the state that have regularly adopted its provisions, and to that end section 13 of said act specifically enumerates the various ways in which a transfer of such liquors may not be made by one to another. The word "furnish" is broader than the words "sell" and "give," as they are used in the statute, and if said word has been the only one used in the statute as it now otherwise reads—that is, if the words "sell" and "give" were not therein used and in their place the word "furnish" was alone employed—it would not for a moment be doubted that a person who had sold or given any alcoholic liquor to another could be convicted of a violation of the statute by thus furnishing to the other person such liquor, if he were charged in the indictment or information with furnishing such liquor to another.

The above construction of the information here harmonizes with that given the accusatory pleading in People v. Harrold, 84 Cal. 567, 24 Pac. 106, where an indictment for forgery charged that the defendant did "make, alter, forge and counterfeit a certain bill of sale," etc.; in People v. Gosset, 93 Cal. 642, 29 Pac. 246, where it was charged that the defendant "did deal, play, carry on and conduct" a certain prohibited game; and in People v. Faust, 113 Cal. 172, 45 Pac. 261, where the charge was that the defendant "did willfully and unlawfully sell and furnish intoxicating liquor, to wit, whisky, to two Indians."

[2] But assuming, merely for the sake of argument, that in a legal sense it was wrong to charge that the accused sold and furnished the alcoholic liquor to Tolley, still it cannot be held that the defendant was prejudiced thereby. The primary and important rule in criminal pleading is to charge a public offense in such clear language as to enable the accused readily to understand and know, upon his arraignment thereunder, the charge to which he must answer and against which he must prepare to defend. In this case, the defendant could not have experienced the slightest difficulty in understanding, upon reading the information, or having it read to him, that thereby he was charged with furnishing in some manner or under certain circumstances alcoholic liquor to another in no-license territory, and, whether he sold or otherwise furnished it to the other party, he could just as readily prepare to defend against the charge in the one case as in the other. We therefore think that, even if justly it may be held that it was error not to sustain the demurrer to the information on the ground that it is obnoxious to the objection that it charges two distinct offenses without separately stating them, and that the court further erred in not requiring the district attorney to elect and declare upon which of the two offenses he intended to rely for a conviction, it cannot be said, in view of the convincing proof of the defendant's guilt, that a miscarriage of justice resulted from said errors. Const. art. 6, § 4½.

[3] In instructing the jury, the court declared that the "Wyllie Local Option Law" makes it a crime for any one to sell, give away, or furnish to another, any alcoholic liquors in what is termed no-license territory. It is here argued that said instruction is erroneous and was prejudicial to the accused inasmuch, so it is declared, as the court thus told the jury that "the defendant was being tried on both charges in the information." There was no error in giving the instruction. The instruction merely repeats the language of the law declaring it to be unlawful for any one to dispense in the manner described therein alcoholic liquors in no-license territory. The statute as read was the basis of the charge upon which the defendant was being tried, and it was obviously the duty of the court to enlighten the jury upon the question. As to the effect of the instruction with respect to the specific averments of the information—that is, whether from it the jury could have concluded, and perhaps did conclude, that the defendant could properly be convicted if he was shown to have furnished Tolley with intoxicating liquor either by selling or giving it to him—the reply is that, as above declared, the charge that he "did sell and furnish," etc., involved the statement of but a single offense under the statute.

[4, 5] It is next contended that the disallowance of defendant's requested instruction No. 34 involved error and was prejudicial, since, so it is said, the propositions therein stated were correct and pertinent and were not covered by the court's charge. The instruction, if given, would have told the jury that, upon retiring, after the submission of the case to them, it would be their duty to consult with one another about the case, the evidence, etc., and that, if there arose any difference of opinion between them as to what the verdict should be, it would "be their duty to talk over the case carefully," etc.; that "if, after such consultation and discussion, * * * any one or a number of the jurors should be of the opinion that the defendant has not been proved guilty by the evidence in the case to a moral certainty and beyond a reasonable doubt, those sustaining that opinion should vote in favor of a verdict of not guilty, and should adhere to their own opinion until convinced beyond a reasonable doubt that they are wrong."

The first part of said instruction involved a mere commonplace, in that it would have told the jury to do that which they should know without being told, viz. to consider the evidence carefully and consult with each other if a difference of opinion arose between them as to the effect or probative value of the evidence. Moreover, the court in its charge (instruction No. 16) instructed the jury that it was their duty to consider the evidence with care and consult with each other upon all questions thereupon arising. As to the second part of the instruction, the proposition therein stated was covered by the instruction that the jury would not be legally justified in finding a verdict of guilty unless they were convinced by the evidence beyond a reasonable doubt that the defendant was guilty. This instruction was sufficient to inform any person of sufficient intelligence to serve as a trial juror that it was his duty to adhere to his conviction if he had a reasonable doubt of the defendant's guilt, notwithstanding that the other jurors might be of the opinion that the defendant's guilt had been established by the requisite degree of proof.

Instruction No. 33, requested by defendant, stated the rule as declared in section 2052 of the Code of Civil Procedure, to wit:

"A witness may * * * be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony," etc.

The court refused said instruction on the ground that the proposition announced thereby was "substantially given elsewhere." The court read to the jury an instruction based on section 2051 of the Code of Civil Procedure, and we think that that instruction sufficiently covered the principle declared in the rejected instruction, although we are of the opinion that the latter instruction ought to have been allowed.

[6] The court refused the following instruction, proposed by the defendant:

"You are instructed that, if the testimony in this case in its weight and effect be such as that two conclusions can equally be drawn from it, the one favoring the defendant's innocence, and the other tending to establish his guilt, it is the duty of the jury to adopt the former and find the defendant not guilty."

The refusal to allow said instruction was not prejudicial. It merely involves an amplification of the rule of reasonable doubt, which the court in its charge declared and explained to the jury in language which could not be misunderstood.

No other questions are presented here for consideration.

The judgment and the order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

38 Cal. App. 466

## CITY OF ALBANY v. UNITED STATES FIDELITY & GUARANTY CO.

(Civ. 2436.)

(District Court of Appeal, First District, California. Oct. 17, 1918. Rehearing Denied by Supreme Court Dec. 16, 1918.)

1. BONDS ⟸61—TERMINATION OF LIABILITY—DEATH OF PRINCIPAL.

Where the grantee of a franchise for a street railroad began work within the time fixed, so that he became absolutely entitled to the franchise, and it could not be divested by the municipality save for failure to complete the railroad within three years, *held* that, though the grantee died before the expiration of the three-year period, without building the railroad, the municipality had a right of action on the bond given by the grantee to secure completion.

2. PRINCIPAL AND SURETY ⟸91—DEATH OF PRINCIPAL.

Where a franchise for a street railroad was granted to one, his heirs, successors, and assigns, the franchise cannot be deemed personal to the grantee and to have expired on his death so as to free from liability the surety on the bond given by the grantee to secure completion of the road.

3. STREET RAILROADS ⟸24(2)—FRANCHISE—RAILROAD CARRYING FREIGHT.

A municipal corporation, unless forbidden by the state statutes, may grant a franchise for a street railroad intended to carry freight as well as passengers.

4. STREET RAILROADS ⟸24(2)—FRANCHISE—CARRIAGE OF GOODS.

As Civil Code, pt. 4, tit. 3, pp. 454–494, relating to railroads, in section 465 thereof, which enumerate the powers of a railroad corporation, specifies the power to carry persons and property and receive tolls, and Title 4, relating to street railroads, provides in section 497 that municipalities shall have power to grant franchises therefor, while section 510 declares that they shall be governed by the provisions of Title 3, *held*, that a municipality might grant a franchise to a street railroad to carry property as well as persons.

5. EMINENT DOMAIN ⟸119(2)—STREETS—ADDITIONAL SERVITUDES.

A railroad in a street which carries freight as well as passengers imposes no additional servitude.

6. STREET RAILROADS ⟸22(3)—FRANCHISES—RIGHT TO QUESTION.

Whether a railway might under a franchise to use city streets carry freight, express, and mail in connection with passenger service can only be raised by a resident or property owner of the city.

7. STREET RAILROADS ⟸24(3)—FRANCHISE—VALIDITY.

A provision in a franchise for a street railroad that the poles and wires should be placed at a height so that they would not obstruct the ordinary use of the streets *held* not to render

the franchise invalid, on the theory that it would create a condition where one class of bidder would be favored over another.

8. Street Railroads ⊂=24(3)—Franchise—Validity of Condition.

A provision in a franchise for street railroad requiring the grantee to maintain lights of a certain candle power, etc., *held* not to render the franchise invalid.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action by the City of Albany against the United States Fidelity & Guaranty Company. From a judgment for defendant, after an order denying new trial, plaintiff appeals. Reversed.

Ostrander, Clark & Carey, of Oakland (W. H. Morrissey, of San Francisco, of counsel), for appellant.

Thomas, Beedy & Lanagan, of San Francisco, for respondent.

LENNON, P. J. In this case judgment was rendered for the defendant; plaintiff moved for a new trial; the motion was denied; and plaintiff appeals from the judgment. The facts of the case, in brief, are as follows:

The city of Albany, proceeding under the provisions of the Broughton Act (Stats. of 1905, p. 777), duly granted to E. A. Gowe, his heirs, successors, and assigns, a franchise for the construction and maintenance of a street railway over a right of way approximately one-half mile in length, all within the boundaries of that city. Gowe, as required, thereafter furnished a bond in the sum of $5,000, executed by the respondent herein, a corporation for such purposes and receiving premiums therefor. This bond recited the grant of said franchise to the parties aforesaid, its terms and conditions, and guaranteed the faithful performance of each and every condition upon the part of said Gowe.

Gowe commenced work within the time limited, and actually completed about 100 feet. He died. Thereafter no further work was performed, and the railway was never completed. At the expiration of the three-year period within which the work was to have been accomplished—no further time having been granted therefor—the city of Albany, appellant herein, brought this action against respondent to recover upon its bond.

Respondent contends that the giving of the bond was without consideration, not that it did not receive its premium therefor, but that the franchise itself was void for want of capacity in the city to grant a franchise which provided:

(1) That the railway might carry freight, mail, and express as well as passengers.

(2) What the fare should be from the city limits of Richmond to the city of Albany if the owner of the franchise granted should ever operate a road to the former place as a connection or extension of the Albany road.

(3) For the furnishing of electric lights of 2,000 candle power for each block of the streets covered by the franchise whenever required by the board of trustees of the city of Albany.

(4) For the placing of poles used in connection with the railway inside of curb lines and of wires at sufficient heights to avoid obstruction of ordinary use of such streets.

(5) For restricting competition and favoring one bidder over another.

Respondent also contends that the condition of the bond was not broken because Gowe died before he was required to begin work under the terms of the franchise.

The latter contention may be discussed and disposed of first. Gowe evidently took the franchise in good faith, went to work expeditiously, accomplished the laying of about 100 feet of the road, and died well within the period of time when, by the terms of the franchise, work upon the road was to have been commenced.

[1] At the instant of the grant of the franchise the franchise became an irrevocable contract and the property of E. A. Gowe, of which he could not be divested by the city of Albany for a period of four months, during which time he was to commence work. By his own activity in commencing operations he made a forfeiture at the expiration of four months an impossibility and secured to himself, his heirs, successors, and assigns, the absolute right to a time limit of three years from the date of the grant to complete the work—a right which the city of Albany could not gainsay, and which effectually prevented any action on its part toward obtaining railroad accommodations for its citizens along these thoroughfares.

At Gowe's death, his rights vested in his heirs and his estate. The work could have been completed by them, or by his legal representatives, or by his bondsmen. They elected not to do so. They are bound by that election. The franchise is lost to them, but the liability on the bond remains for the benefit of the city of Albany as a compensation for the damage it has suffered.

[2] It cannot be considered that this contract was one personal to Gowe, or that it required his personal skill, and none other to complete it. It was made expressly running to himself, his heirs, successors, and assigns. At the time of the trial respondent could not have seriously considered that the intention was to secure the individual services and particular skill of Gowe; otherwise it is to be presumed that evidence would have been introduced to show the need of a particular skill for that piece of work over,

above, and beyond that required in the very ordinary construction of railways. No such showing having been made, we cannot conceive that the court should take it upon itself to supply that deficiency.

[3] Considerable space has been devoted by counsel for both appellant and respondent in an attempt to make an exact and uncompromising definition of a street railway or street railroad and a railroad, and to draw a dividing line so sharply that further construction of the term will never again be necessary. Counsel have cited cases—each to sustain his own view. The courts have not been able to adopt a fixed rule of construction, and each case has therefore been decided upon its own particular set of facts and circumstances. We must do so in this case.

Counsel have cited the case of Railroad Commissioners v. Market St. Railway Co., 132 Cal. 677, 64 Pac. 1065, wherein the carrier was determined to be a street railway and outside the province of the Railroad Commissioners, and, as a matter of fact, under its charter carrying only passengers. Who will have the temerity to say that, when it carried the United States mail, it ceased to be a street railway and became a railroad? Assuredly not this court.

In that case the question as to whether or not it could have been licensed to carry freight was not in issue. The fact was stated that it carried passengers only, and we may presume it was limited by the terms of its franchise to that alone. But in no sense can it be deemed to be a case in point except that one part of its reasoning is significant, "that the entire people of the state were interested in the great corporations engaged in the carrying of freight and passengers from one portion of the state to another, or from sister states into or through the state," but that the entire people of the state were not "interested in the rates for carrying passengers within the corporate limits of a town or municipality." And the court said: "It was the policy of the Constitution that such matters as concerned the inhabitants of a particular subdivision of the state or county should be governed, as far as practicable, by local laws"—not inconsistent with the state laws, of course. This same reasoning would lead us to the conclusion that, if the city of Albany wished to have a railway within its confines which should carry passengers, freight, express, and mail, so long as it did not contravene any statute of the state, it might with propriety do so.

[4, 5] It remains, therefore, only to be seen whether there is anything in our statutes which expressly prohibits such a railway service.

We find that title 3, pt. 4, div. 1, of the Civil Code, is directed to the subject of railroads, and that section 465 thereof, in enumerating the powers of a railroad corporation, says:

"8. To carry persons and property on their railroad, and to receive tolls or compensation therefor."

Title 4, Id., is devoted to street railroad corporations, and recognizes the rights of municipalities in which they are located to special recognition when their streets and highways are to be used, and provides that they must grant the franchise therefor, and, in section 497, says that they "shall have power to impose such terms, restrictions and limitations as to the use of streets and the construction and mode of operating such electric and other roads as may, by such board or body, be deemed for the public safety or welfare," and provides further, in section 510, that "street railroads are governed by the provisions of title 3 of this part, so far as they are applicable, unless such railroads are therein specially excepted."

There is nowhere to be found in said title 3 any exception of street railroads in the matter of carrying freight in the general power given in subdivision 8 of section 465, Civil Code. And that the provisions for the carrying of freight by railroads in general are easily applicable to the conditions of street railways is seen very clearly to-day in the numerous instances where such freight is actually being carried in conjunction with passengers on such street railways.

The Legislature which enacted the Broughton Act is presumed to have had in mind the trend of the decisions of the courts as to the scope of the service to be rendered by street railways to municipalities and to have contemplated their continuance and extension.

As early as 1894 the Supreme Court of this state, in refusing to grant damages to an abutting owner on the theory of additional servitude being placed upon the street by the operation of a railroad under a grant by the council, quoted with approval the following language:

"It has the power to authorize their appropriation to all such uses as are conducive to the public good, and do not interfere with their complete and unrestricted use as highways."

The court further said:

"We are at a loss * * * to see why the transportation of freight by modern and improved methods is not equally entitled to encouragement with the transportation of passengers. The essential wants of the citizen demand the former equally with the latter. * * * Yet we are told in effect that, so far as modern methods are concerned, so far as ease, speed, and economy are involved, improvements are to be limited to the transportation of passengers; that cars with wheels adjusted to move upon fixed tracks, when applied to the transportation of passengers, are within the contemplated objects in view in opening the road or street, and therefore add nothing material to the burden of the servitude of the abutting landowner, while a precisely similar structure adapted to the transportation of freight adds an additional

burden of a different character to the servitude, and cannot be tolerated without compensation to the abutting owner. * * * We fail to appreciate the philosophy of the distinction. On the contrary, we affirm that when a public street in a city is dedicated to the general use of the public, it involves its use subject to municipal control and limitations for all the uses and purposes of the public as a street, including such methods for the transportation of passengers and freight as modern science and improvements may have rendered necessary, and that the application of these methods, and indeed of those yet to be discovered, must have been contemplated when the street was opened and the right of way obtained. * * * The thirteenth subdivision of section 862 of the municipal government act of this state authorizes the boards of trustees of municipalities of the sixth class [of which the City of Albany is one] 'to permit, under such restrictions as they may deem proper, the laying of railroad tracks and the running of cars drawn by horses, steam, or other power thereon * * * in the public streets.' The world moves. Legislation in recent times has kept pace with the progress of the age."

And this case further declared that the trend of judicial opinion is that the streets should be subject to all the varied wants of the public. Montgomery v. Santa Ana & Westminster Railway Co., 104 Cal. 186, 37 Pac. 786, 25 L. R. A. 654, 43 Am. St. Rep. 89.

Lewis on Eminent Domain (3d Ed.) p. 286, cites with approval the text of the opinion in Kinsey v. Union Traction Co., 169 Ind. 563, 81 N. E. 922, and refers to the Montgomery Case, above quoted.

In the Indiana case the court said (169 Ind. at page 612, 81 N. E. at page 940):

"Undoubtedly the chief business of a street car is the carrying of passengers, but there appears in the law of the highway no objection to its carrying light and package freight. It has, perhaps, always been the custom in Indianapolis to carry, for its passengers, hand baggage, filled and unfilled market baskets, tool boxes, baby carriages, clothes baskets, and all manner of small articles and packages that may be conveniently handled from the platform; also to carry, without an accompanying passenger, the United States mail from the central office to the various substations of the city; likewise a large number of packages of newspapers from downtown offices, and depots receiving consignments from St. Louis, Cincinnati, and Chicago, to the hundreds of distributing points throughout the city. Repair and construction materials, and perhaps some private freight, are hauled through the city in the local company's cars, and no complaint is heard, nor inconvenience manifested. Besides, what general principle can be advanced in condemnation of the inclosed, reasonably sized, neatly constructed freight or express car? Was not the transportation of property over the roads and streets as deeply seated in the dedicatory purpose as the passage of persons? Plainly the reasons that justify the one support the other. The heavy drays and wagons employed in handling the commerce of the city are a greater obstruction to the street, and menace to the safety of those using it, than the number of pedestrians. Therefore a suitable car, comparatively noiseless, confined to a fixed track four or five feet wide, in the center of the street, to which track vehicles may be safely adjusted by keeping to the right, and which car will carry twentyfold more freight or express than a wagon occupying the same amount of space in the street, and meandering in an irregular track, cannot, for any sufficient reason, be declared a nuisance, or an improper use of the street. No use should be held improper that produces no extra hazard, and makes the way easier, safer, and more convenient as a passageway for the public in common."

If the reasoning in these cases be correct, and there is no servitude on the street superimposed because of such use of the street, the only possible objection to such use could be overcome by the police regulations which remained unalienated by the franchise.

[6] As we view the case, the question whether the railway might or might not carry freight, express, and mail, in conjunction with its passenger service, could only be raised by a citizen or resident or property owner of the city of Albany; and as to whether or not, after this lapse of time, lack of objection, and opposition to the grant of the franchise, such an objector could have been heard, is not pertinent for us to decide at this time, as no such objector is before this court.

If it were possible for the state to maintain an action through the Attorney General, would it not be limited to an action to subjugate the road to the jurisdiction of the state and its Railroad Commissioners? It surely could not be for the abrogation of the franchise granted by the city of Albany, from which city, even in the event of an adverse decision by the court in such a supposititious case, Gowe or his successors would have to obtain the franchise for the use of its streets. For, the grant having already been made, it could not be repudiated by the city, and Gowe's property confiscated. In what other material way than the fixing of rates for the service, other than the passenger service, would a railway wholly within the confines of a city be affected if it were under the jurisdiction of the Railroad Commission?

The contract for the service to be rendered by the road is a severable one, because it is certainly possible to operate for passenger service alone. Inasmuch as we are of the opinion that the grant of the franchise for the carrying of passengers, as well as commodities, was within the power of the city, it is not necessary to consider the questions of the severability of the contract, except to remark that the franchise by its wording has made clear that parts of it are to be considered separately and as a condition subsequent, to wit, the rate of fare in the event of a remote contingency of the same ownership of an extended line; the furnishing of certain electric light whenever, if ever, required by the city; the height of poles and

the stringing of wires, if wires and poles are used in connection with the service.

[7, 8] We do not follow counsel's reasoning that the regulation of the height and the placing of poles and wires, or the fixing of fares, if attempted to be enforced, would create a condition where one class of bidder would be favored over another. The requirement of a certain candle power to be furnished is a proper and usual requirement, and is intended to be and is only a fixing of the maximum amount of light which a contractor will be required to furnish. That candle power and that lighting could be furnished by any person whether he intended to run a horse car or one propelled by liquified air, or by any motive power hereafter to be invented. It is immaterial to the city as to how it is produced, but it does not leave the city in a position to arbitrarily demand either an amount of light or a kind of current which would place an untoward burden upon the bidder.

Those minor provisions were evidently deemed to be for the safety and welfare of the public, and, as such, were within the power of the city to exact.

For the reasons above stated, the judgment should be reversed, and it is so ordered.

We concur: STURTEVANT, Judge pro tem.; BEASLY, Judge pro tem.

---

38 Cal. App. 480

## ELLS v. BOARD OF SUP'RS OF SAN DIEGO COUNTY. (Civ. 2762.)

(District Court of Appeal, Second District, California. Oct. 21, 1918.)

1. CONSTITUTIONAL LAW ⟸278(2)—DUE PROCESS—IRRIGATION DISTRICT—NOTICE.

Deering's Gen. Laws 1915, Act 1726, § 2, providing for organization of irrigation districts, through its requirement of publication of petition, provides sufficient legal notice to persons legally interested to comply with Const. art. 1, § 13, and Const. U. S. Amend. 14, relating to due process.

2. CONSTITUTIONAL LAW ⟸318 — DUE PROCESS—NOTICE—FINDING OF ADMINISTRATIVE BODY.

The Legislature cannot destroy the effect of the essential due process requirements of notice to persons legally interested in the formation of an irrigation district, as provided by Deering's Gen. Laws 1915, Act 1726, § 2, by the provision of section 4 that the finding of a subordinate legislative body, the board of supervisors, that due process has been given, shall be final and conclusive.

3. CONSTITUTIONAL LAW ⟸318 — DUE PROCESS—ADMINISTRATIVE ACTS.

A legislative provision that defects in minute details prescribed for notice in formation of irrigation districts, which are not essential to due process of law, shall not be fatal to proceedings for organizing such districts, is valid.

4. WATERS AND WATER COURSES ⟸216—ORGANIZATION OF IRRIGATION DISTRICTS — NOTICE—STATUTE—VALIDITY.

The Legislature was not bound to require that the names of all persons who signed a petition proposing the organization of an irrigation district should appear in the published notice stating the time of meeting of board for presentation of the petition, and could provide that omission of names therein should not vitiate the proceedings.

5. WATERS AND WATER COURSES ⟸225—IRRIGATION DISTRICTS — PROCEEDINGS — CONSTRUCTION.

Proceedings for the organization of an irrigation district, which do not involve any assessment against property, are not subject to the rule of strict construction.

6. WATERS AND WATER COURSES ⟸225 — IRRIGATION DISTRICTS—ESTABLISHMENT—NOTICE—PUBLICATION OF PETITION.

Where a petition to establish an irrigation district, together with signatures, was published in full, except that it omitted the text of additional sheets attached thereto, which was the same, except for omission of land description, the publication was sufficient, under Deering's Gen. Laws 1915, Act 1726, § 2.

Petition for writ of certiorari by Agnes G. Ells against the Board of Supervisors of San Diego County. To review proceedings and orders establishing the Cardiff Irrigation District. Orders affirmed.

O'Melveny, Millikin & Tuller and Roy V. Reppy, all of Los Angeles, for petitioner.

W. F. Schuermeyer, Dist. Atty., and C. G. Selleck, Deputy Dist. Atty., both of San Diego, for respondents.

Crouch & Chambers and Lane D. Webber, all of San Diego, amici curiæ.

CONREY, P. J. On the 15th day of November, 1915, there was presented to the board of supervisors of San Diego county a petition for the formation of an irrigation district under the provisions of an act entitled "An act to provide for the organization and government of irrigation districts," etc., approved March 31, 1897, and the amendments thereto (Act No. 1726 of the 1915 Edition of Deering's General Laws of California), such district to be known as and called "Cardiff Irrigation District." Thereafter, in attempted compliance with the statute, such proceedings were had that on the 20th day of March, 1916, the board of supervisors, by order entered upon its minutes, declared that the territory described therein was thereby duly organized as an irrigation district under the name above stated. In this proceeding, wherein a writ of review has been issued and upon which return has been duly made,

the petitioner seeks to have judgment that said order of March 20, 1916, and the orders made in said matter by said board of supervisors prior thereto, be annulled.

The statute provides that a petition proposing the organization of an irrigation district must be signed by a majority in number of the holders of title or evidence of title to lands susceptible of irrigation from a common source and by the same system of works and representing a majority in assessed value of said lands. Section 2 of the act contains the following provisions:

"The petition may consist of any number of separate instruments. * * * Said petition shall be presented at a regular meeting of said board and shall be published for at least two weeks before the time at which the same is to be presented in some newspaper of general circulation printed and published in the county where said petition is presented, together with a notice stating the time of the meeting at which the same will be presented. * * * When contained upon more than one instrument, one copy only of such petition need be published, but the names attached to all of said instruments must appear in such publication. * * * When said petition is presented, said board of supervisors shall hear the same and shall proceed to determine whether or not said petition complies with the requirements hereinbefore set forth and whether or not the notice required herein has been published as required. * * * No defect in the contents of the petition or in the title to or form of the notice or signatures, or lack of signatures thereto, shall vitiate any proceedings thereon; provided, such petition or petitions have a sufficient number of qualified signatures attached thereto. The determination of the board shall be expressed by resolution."

Section 3 provides that:

"Upon the final hearing of said petition or said matter, the board of supervisors shall make an order re-affirming its conclusions as to the genuineness and sufficiency of the petition and notice hereinbefore provided for. * * * Said order shall be entered in full upon the minutes of said board."

Section 4 reads as follows:

"A finding of the board of supervisors in favor of the genuineness and sufficiency of the petition and notice shall be final and conclusive against all persons except the state of California upon suit commenced by the Attorney General. * * *"

The first nine pages of the petition as presented to the board of supervisors contain the full text of the petition, followed by 228 names. Following these nine pages are 86 separate sheets of paper, on which are signed the aggregate number of 94 names. On each of said 86 sheets there is typewritten a duplicate of the first nine pages (which we will call section 1), excepting the said 228 signatures thereto, and with one other difference next hereinafter noted. Section 6 of the petition in section 1 states that:

"The lands intended to be included within the boundaries of the said proposed irrigation district are situated in the county of San Diego, state of California, and described as follows, to wit."

The description is then given. Section 6 of the petition, as printed on all of the other sheets, reads as follows:

"The lands intended to be included within the boundaries of the said proposed irrigation district are situated in the county of San Diego, state of California."

Section 1 and all of the other sheets, as presented to the board, were attached together as one document.

Petitioner claims that the board of supervisors was without jurisdiction to make the orders attacked in this proceeding, by reason of two alleged irregularities in the publication of the notice required to be given before the presentation of the petition to the board of supervisors. These irregularities are said to consist, first, in failure to set out in the publication the text of the form of petition as shown on the 86 sheets with individual signatures; and, second, the omission from the publication of the names of 7 signers of the petition. The notice as published contained a complete copy of the petition as shown in section 1, without showing that the petition had been signed in separate sections, or that any of them were in any respect different from the text of the petition as contained in section 1. The notice of the petition as published contained all of the 228 names signed to section 1, together with 87 of the 94 names signed to the other sections. The petition was presented to the board of supervisors on the 15th day of November, 1915, and the hearing thereon was continued to November 19, 1915. On that day the board of supervisors in due form adopted the resolution, which, among other things, declared that the petition contained a majority in number of the names of holders of title in the proposed district, as shown by the equalized assessment rolls, and a majority in value of lands assessed against the signers of the petition, and that the petition and notice of hearing had been published for two weeks prior to the date of hearing thereon, in a newspaper of general circulation published in the city of San Diego, as required by said act. In due time, an election having been held and the result thereof having been ascertained in the form required by law, the board made its order of March 20, 1916, purporting to declare the described territory duly organized as an irrigation district. In its order made at the final hearing on the petition, when the election was called, the board of supervisors reaffirmed its conclusions as to the genuineness and sufficiency of the petition and notice.

[1] In order to satisfy the requirement that jurisdiction, over a proceeding leading

to the organization of a public corporation such as an irrigation district, must be obtained by due process of law, it is necessary that the statute provide for some kind of reasonable notice to persons legally interested in the subject-matter of the proceeding. In providing for such notice, the Legislature must require all that is essential to constitute "due process of law" as that phrase is used in the Fourteenth Amendment of the Constitution of the United States and in section 13 of article 1 of the Constitution of this state.

[2, 3] It is not within the power of the Legislature to destroy the effect of such essential requirements by providing that a finding by a subordinate legislative body that due notice has been given shall be final and conclusive. But in providing for notice of proceedings like those here under consideration, the Legislature may go beyond those things which are absolutely necessary and may prescribe in detail, according to its will, the form and manner in which the notice shall be given. As to such minutiæ, as the Legislature might omit them altogether without affecting the validity of the proceeding, so also it may provide that defects or failures to comply shall not be fatal, and may give finality to findings which determine that those conditions of the statute have been fulfilled. The principle on which we here rely was fully stated and discussed in Chase v. Trout, 146 Cal. 350, 80 Pac. 81, wherein the court said that:

"A curative statute or clause may preclude all investigation except the single inquiry whether, in the case presented, the effect of applying the statute is to deprive the party of his property without due process of law."

[4] Applying to the present case the rule thus ascertained, there is no difficulty in finding that the Legislature was not bound to require that the names of all persons who sign a petition for the purpose of proposing the organization of an irrigation district shall appear in the published notice stating the time of the meeting at which the petition will be presented to the board of supervisors, and that if the Legislature did make such requirement, it might also provide that errors in names, or omissions of names, in the notice, shall not vitiate the proceedings. Imperial Water Co. No. 1 v. Board of Supervisors, 162 Cal. 14, 22, 120 Pac. 780.

[5, 6] It may also be noted that the proceedings challenged here have relation only to the organization of the district, and do not involve any assessment against property, and that such proceedings are not subject to the rule of strict construction. Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825. Under a reasonably liberal construction of the terms of the statute, which provide that the petition shall be published with the notice, we consider that the petition presented in the proceeding now under review was published as completely as the law requires. Everything contained in the petition as set forth in the sheets additional to section 1 was contained in section 1, which was published. There was, therefore, no failure to give public notice of every statement contained in the text of the petition.

Counsel for plaintiff suggests, finally, that the publication did not disclose the fact that 94 persons signed papers which gave no description of the district. This is really a claim that those persons did not sign a valid petition. There is, however, no evidence that the 86 sheets, or any of them, were circulated and signed separately from the first pages (section 1), to which they were found attached, all forming apparently one document, in the petition as filed. At all events, a valid petition was presented, of which we hold that due notice was given.

The said order of March 20, 1916, and the orders prior thereto, made by the board of supervisors of San Diego county, are affirmed.

We concur: JAMES, J.; SHAW, J.

---

38 Cal. App. 500

## McCLURE et al. v. BOARD OF EDUCATION OF CITY OF VISALIA.

(Civ. 1882.)

(District Court of Appeal, Third District, California. Oct. 24, 1918.)

1. Schools and School Districts ⟸72—Use of School House—Statutes—Dancing — "Recreation"—"Activity"—"Recreational Activities."

"Recreational activities," within the meaning of Civic Center Act, establishing a civic center in every public school house, includes dancing; "recreation" meaning refreshment of strength or spirits after toil, and "activity" meaning a physical or gymnastic exercise, an agile performance.

[Ed. Note.—For other definitions, see Words and Phrases, Recreation.]

2. Schools and School Districts ⟸72 — Use of School House—Dancing.

Civic Center Act, establishing a civic center in every public school house, and vesting the management of such center in a board of trustees or board of education, authorizes a board of education in its discretion to permit under proper supervision dancing in the schoolhouse as a form of recreational activity.

3. Schools and School Districts ⟸72 — Use of Schools—Power of Board of Education.

Pol. Code, § 1617, subd. 18, providing that, in case grant of use of school building will necessitate removal of furniture, board of trustees may be instructed by qualified electors, has reference only to county schools, and board of education in city is not bound by the limitation.

---

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

4. SCHOOLS AND SCHOOL DISTRICTS ⟸72 — POWERS OF BOARDS OF EDUCATION—CONTROL BY ELECTORS.

St. 1899, p. 99, § 798, investing boards of education with the management of school buildings, in case of a city of the fifth class, is not limited by Pol. Code, § 1617, subd. 18, authorizing school meetings to instruct school trustees.

5. SCHOOLS AND SCHOOL DISTRICTS ⟸72 — USE OF SCHOOL BUILDINGS — PRIVATE USES.

A board of education has no authority to grant the use of a school building to any citizen as an exclusive privilege.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Suit by B. F. McClure and others against the Board of Education of the City of Visalia for an injunction. Judgment for defendant on demurrer and plaintiffs appeal. Affirmed.

E. I. Feemster, of Visalia, for appellants.

Power & McFadzean, Frank Lamberson, and P. D. Nowell, all of Visalia, for respondent.

BURNETT, J. The vital point in the case is whether the board of education of the city of Visalia is authorized to permit a social dance in the high school building. The question here is, manifestly, one of power and not of policy. If we find that under any reasonable interpretation of the law such right exists, then we cannot interfere with the contemplated action of the board. It is the claim of respondent that the authority to permit such use has been conferred under proper restriction by the provisions of what is known as the Civic Center Act (Stats. 1913, p. 853) and division 4 of section 1617 of the Political Code.

[1] Said Civic Center Act provides:

"There is hereby established a civic center at each and every public school house within the state of California, where the citizens of the respective public school districts * * * may engage in supervised recreational activities."

Dancing would seem to be a form of "recreational activity" within the recognized meaning of that phrase. This court would hesitate to proclaim itself an authority on the subject, but it is bound to accord due weight to the opinions of those who have given careful consideration to such diversion. Our attention is called to the fact that "recreational" means, "of, pertaining to or conducive to recreation." Century Dictionary. "Recreation" means:

"Refreshment of strength and spirits, after toil; relief from toil or pain, diversion, amusement in sorrow or distress." 34 Cyc. 764, note 14; Corey v. Bath, 35 N. H. 530.

Upon the word "activity" the dictionary sheds the following light:

"The state of action, doing; an exercise of energy or force; an active movement or operation; a physical or gymnastic exercise, an agile performance."

We are inclined to believe with respondent that dancing is an "amusement." If it were not, we very much doubt that it would be so popular. That it requires an "active movement" or "operation" and involves "physical" or "gymnastic" exercise, and that it frequently amounts to an "agile" performance, we think no one will dispute, who has witnessed a modern terpsichorean festival. Planting itself, therefore, on the definition of the terms used, respondent is not without warrant in asserting that this very diversion is one of the things contemplated by the Legislature in its formulated and expressed vision of the public school house as a "civic center" for the social and educational activities of the community. We consider the foregoing a distinct provision of said act, and we do not regard it as limited or confined by the following clause:

"And where they may meet and discuss from time to time, as they may desire, any and all subjects and questions which in their judgment, may appertain to the educational, political, economic, artistic and moral interests of the citizens of the respective communities in which they may reside."

It is not unreasonable to hold that by the use of these co-ordinate clauses the Legislature had in view two distinct phases of human activity, one pertaining primarily to physical recreation and development in which children might participate, and the other, to the mental and moral aspect of human life, which would particularly appeal to the more mature mind.

As to the exercise of the power, it is well to observe that the Legislature has provided in the act:

"That such use of said public school house and grounds for said meetings shall in no wise interfere with such use and occupancy of said public school house and grounds as is now, or hereafter may be required for the purposes of said public schools of the state of California."

We may add that there is no contention that there has been or will be any interference herein with the ordinary purposes of the school. It is to be observed further that said act commits the management, control, and supervision of these special activities to the board of education in the following language of section 3:

"The management, direction and control of said civic center shall be vested in the board of trustees or board of education of the school district. Said board of trustees or board of education shall make all needful rules and regulations for conducting said civic center meetings and for such recreational activities as are provided in section one of this act."

[2] This act constitutes the last expression of the legislative will on the subject, and it is not a strained construction to hold that thereby respondent was clothed with discretion to permit, under proper supervision, the form of "recreational activity" that is involved herein.

[3] Looking further for legislative authority for the action of the board, we find it in an earlier statute constituting section 1617 of the Political Code, which, as far as material, is as follows:

"The powers and duties of trustees of common school districts, and of boards of education in city school districts, are as follows: * * * Fourth. To rent, etc., school property. * * * To grant the use of school building or grounds for public, literary, scientific recreational or educational meetings, or for the discussion of matters of general or public interest, upon such terms and conditions as said trustees or boards of education may deem proper: Provided, however, that said use shall not be inconsistent with the use of said buildings or grounds for school purposes nor interfere with the regular conduct of school work; and provided, further, that no privilege of using said buildings or grounds shall be granted for a period exceeding one year, such privilege being renewable and revocable in the discretion of said trustees or boards of education."

It is the claim, though, of appellants that this grant of power is circumscribed and limited by subdivision 18 of said section, providing that—

"Boards of trustees may, and upon a petition signed by a majority of the heads of families resident in the district, must call meetings of the qualified electors of the district," etc. "A meeting so called, shall be competent to instruct the board of trustees: (1) In regard to the location or change of location of the school house, or the use of the same for other than school purposes; provided, that in no case shall the school house be used for purposes which necessitate the removal of any school desks or other school furniture."

The complaint alleges that such removal of the furniture was necessary in the present instance in order to facilitate and promote the dance. Thus, it is claimed, has the board clearly transgressed and will continue to transgress this statutory limitation upon its authority. But it seems that the Legislature has made a distinction in this respect between the city and country schools. The general authority extends to the "trustees of common school districts" and "boards of education in city school districts." Subdivision 18, however, is confined to "boards of trustees." It is the "board of trustees" that such meetings shall be competent to restrict. Respondent suggests this reason for the distinction:

"Common schools are most frequently located in the smaller rural communities, and are often only one or two room buildings without auditorium or assembly place, the seats are often screwed to the floor and any removal of the desks or furniture would be apt to be done by inexperienced hands and result in damage to the floor; the desks might be piled up or taken out of doors, or hauled to the outbuildings or to the house of some person in the district, thus suffering damage. On the other hand, city schools are more often housed in larger buildings of many rooms with a central place of assembly. Janitors are employed who devote all of their time to their occupation, and furniture is often arranged for ready removal without damage or inconvenience. The rule of subdivision 18 would be unnecessary in such instances."

[4] Neither do we find such limitation of the power of the board of education in the municipal act providing for cities of the fifth class, to which Visalia belongs. Section 798 (Stats. of 1899, p. 99) of said act provides:

"The board of education shall have power: * * * Sixth. To purchase, receive, lease and hold in fee, in trust for such city, any and all real estate and personal property that may have been acquired, or may hereafter be acquired, for the use and benefit of the schools of such city; provided, that no real estate shall be bought, sold, or exchanged, nor any expenditure incurred for the construction of new school houses, without the approval of the board of trustees; and provided further, that the proceeds of any such sale or exchange of real estate shall be exclusively applied to the purchase of other lots for the erection of school houses."

This constitutes, manifestly, a larger grant of power to the city board as to the management and control of the school property than is conferred upon the trustees of common school districts. The particular limitation as to the use of the building, to which we have referred, applies to the latter but not to the former.

However, the school house, whether in the urban or rural district, must, of course, be used for a public purpose and that purpose must have some relation to the educational or recreational needs of the community. It is manifest though, that within the limits of said statutory provisions there is room for the exercise of a wise discretion on the part of the board of education.

[5] It is equally plain that the board would have no authority to grant an exclusive privilege to any of the citizens to use said building. Plaintiffs probably had this principle in mind when they alleged that "a private" dance was contemplated by the board. They concede, however, that this is rather a conclusion, and is open to the objection raised by the special demurrer. Hence we treat the case upon the broad ground of the power of the board to permit this particular form of diversion.

As to the cases cited, they must, naturally, be regarded in the light of the provisions of the statute in the various states wherein said opinions were rendered. It was pointed out in the opinion of the trial judge Hon. W.

B. Wallace, that, in the states having no laws permitting the school houses to be used for other than school purposes, the courts have held such other uses to be illegal:

"Thus the following uses have been enjoined: In Connecticut, Sunday schools and religious meetings; in Kansas, various society meetings whereby the rooms were overcrowded and the furniture injured; in Pennsylvania, religious meetings, lyceums and private schools. In Louisiana, a theater conducted as a business; in Ohio, private schools; in Wisconsin, regular meetings of the Sons of Temperance.

"Other states have laws permitting the electors to vote on the question of using a public school house for other than school purposes and courts in these states have sustained the following uses after elections favorable therefor: In Iowa, Indiana and Illinois, meetings for religious purposes; in Missouri, for a literary society; in Arkansas and Illinois, as a lodge room for a secret society; in Vermont, for a private school; in Maryland, at a nominal rent as headquarters for a regiment of the national guard."

In Appeal of John W. Barnes, 6 R. I. 591, it was held that the trustees of a school district may, subject to the control of the district meeting, lawfully permit the district school house to be used, out of school hours, for the purpose of private instruction in vocal music of the district scholars and others residing in the district. The decision was grounded upon the principle that such use tended to promote public education and that the trustees were acting within the spirit of their trust.

In Townsend v. Hagan, 35 Iowa, 194, it was held that—

"The electors of a school district may legally permit the school houses in the district to be used for the purposes of religious worship and Sunday schools."

The court was called upon to construe the provision of the statute permitting the electors when legally assembled "to make such disposition of the school houses as they may deem right and proper." The court concluded that such use was within the spirit and intent of said provisions.

The decision in Lagow v. Hill, 238 Ill. 428, 87 N. E. 369, upholding the action of the board of school directors in permitting certain fraternal organizations to hold meetings in one room of the school building, was based upon the following provision of the school law of that state:

"They [the board of directors] shall have the control and supervision of all school houses in their district, and may grant the temporary use of school houses when not occupied by schools, for religious meetings and Sunday schools, for evening schools and literary societies, and for such other meetings as the directors may deem proper."

In Spencer v. Joint School District, 15 Kan. 259, 22 Am. Rep. 268, the action was to restrain the use of the school buildings for other than school purposes. The decision was by Justice Brewer, afterward justice of the United States Supreme Court, and he treated the subject with his characteristic force and persuasive reasoning. He declared:

"We are fully aware of the fact that all over the state the school house is, by general consent, or at least without active opposition, used for a variety of purposes other than the holding of public schools. Sabbath schools of separate religious denominations, church assemblies, sometimes political meetings, social gatherings, etc., are held there. Now, none of these can be strictly considered among the purposes for which a public building can be erected, or taxation employed. * * * The public school house cannot be used for any private purposes. The argument is a short one. Taxation is invoked to raise funds to erect the building; but taxation is illegitimate to provide for any private purpose. Taxation will not lie to raise funds to build a place for a religious society, a political society, or a social club. What cannot be done directly, cannot be done indirectly."

The conclusion was undoubtedly sound. But, as before suggested, we are dealing with a public use and with a statute somewhat enlarging the public educational purposes for which a school house may be used.

We may leave the citations with the case of Lewis v. Bateman, 26 Utah, 434, 73 Pac. 509. Therein the court stated:

"The only question involved in this case is: Have the trustees of a school district the legal right and power to permit a public school house, which is the property of such district, and which is used for school purposes, to be used for holding public and private dances—a use which is in no way connected with the school, and which would not promote or advance its interests, but on the contrary, the effect, if any, would necessarily be inimical and detrimental to schools?"

It was rightfully held that the private use, which it was thus proposed to make of the public school building, was unauthorized and contrary to public policy, and the use for either public or private dances would be in violation of a plain provision of the statute of Utah prohibiting the removal of the furniture from the school room. It is thus apparent that in its facts the Utah case differs from this.

There is some intimation that a moral question is involved herein. Of course, the board of education should not tolerate an indecent or immoral use of the school house, but it cannot be said that they contemplate anything of the kind. It is clear that there is a difference of opinion among well-informed people as to the moral effect of dancing. As said by the trial judge:

"There are many excellent, intelligent, and pious people who are opposed to modern social dancing as being fraught with harm to the participants and to the community. To the contrary, there appears to be a much larger number, equally excellent and intelligent, including

many pious people, who dance and teach their children to dance. * * * Some people abuse the privilege of dancing by their manner of dancing and sometimes by their mode of dress. Those who are coarse and immodest often express those qualities in the ballroom when dancing, and all public dances should be supervised. On the other hand, people of fine instincts and feelings, and proud of their willingness and ability to do right at all times, will reflect their modesty and fine character on the dancing floor."

Even the most fastidious would certainly distinguish between the joyful and reverential dance of Miriam and the voluptuous and wanton dance of the daughter of Herodias, which led to the beheading of John the Baptist.

We must indulge the presumption herein that respondent contemplates a "recreational" activity free from any immodesty and which may be conducive to the social and educational advancement of the community. We must, also, assume that it is not an exclusive function, but open to all on equal terms. Indeed, the probabilities are that it is designed to afford the various classes of the high school an opportunity to meet for social intercourse, and to promote the grace of movement and charm of physical development that are supposed to result from a wholesome and properly supervised dance.

At any rate we think the question was for the school authorities to determine, and such an abuse of discretion has not been shown as to warrant the extraordinary writ of injunction.

In our opinion, the demurrer to the complaint was properly sustained, and the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

---

38 Cal. App. 445

## HOWARD v. D. W. HOBSON CO.

(Civ. 1870; Sac. 2639.)

(District Court of Appeal, Third District, California. Oct. 17, 1918. On Rehearing in Supreme Court, in Bank, Dec. 16, 1918.)

1. JUDGMENT ⊜251(1) — FINDINGS TO SUPPORT—FINDINGS OUTSIDE ISSUES.

Rule that, where findings are not waived, no judgment can stand on findings wholly outside issues made by pleadings, is subject to qualification that where case has been tried on theory of both parties that some vital question, not pleaded, has been made an issue by proof addressed thereto, judgment on findings as to such issue may stand.

2. PLEADING ⊜34(1)—CONSTRUCTION—STATUTE.

By Code Civ. Proc. § 452, in construing a pleading to determine its effect, its allegations must be liberally construed, with a view to substantial justice between the parties, a rule that should be invoked if averments may be held clearly to imply or state an essential fact.

3. JOINT ADVENTURES ⊜5(2) — ACTION FOR DIVISION OF PROFITS—"RECEIVED."

In action by realty broker for half of the profits realized by other broker from sale of land under option procured by first broker, complaint alleging second broker agreed to divide amount received *held* not to seek one-half gross profits and therefore not to support judgment for half net profits; "received" meaning the amount in excess of purchase price which parties were entitled to retain.

[Ed. Note.—For other definitions, see Words and Phrases, First Series, Received.]

4. APPEAL AND ERROR ⊜1170(5)—HARMLESS ERROR—VARIANCE—STATUTE.

Where variance between contract declared on and that shown and found could not have misled defendant to its prejudice in maintaining its defense on merits, such variance is immaterial, by Code Civ. Proc. § 469, and cannot overthrow judgment for plaintiff.

5. APPEAL AND ERROR ⊜1033(7)—HARMLESS ERROR—VARIANCE.

Variance in evidence and findings showing and finding agreement looking to division between defendant and plaintiff, realty brokers and partners, on basis of net profits, complaint alleging agreement calling for division on basis of gross profits, *held* harmless to defendant.

6. INTEREST ⊜19(1)—AGREEMENT TO DIVIDE PROFITS — STATUTE — "LIQUIDATED DEMAND."

Where plaintiff procured for defendant an option on land under defendant's agreement to divide profits realized on sale, amount due plaintiff after sale by defendant at profit constituted "liquidated demand" on which plaintiff was entitled, by Civ. Code, § 1917, to legal interest from date of sale of land.

7. VENDOR AND PURCHASER ⊜18(½)—"OPTION."

An "option" is neither a contract of sale nor an agreement to sell land, or other property, being a contract by which the owner of property invests another with exclusive right to purchase it at a stipulated sum within a limited or reasonable time, imposing no obligation to purchase.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Option.]

8. JOINT ADVENTURES ⊜1 — JOINT VENTURE BY REALTY BROKERS—PURCHASE OF OPTION AND SALE OF LAND—NECESSITY FOR WRITING—STATUTE.

Agreement between real estate brokers that one should secure option on land of third person, other to sell such land, and both to divide profits, was not required to be in writing by Civ. Code, § 1624, subd. 6.

9. VENDOR AND PURCHASER ⊜18(3) — PAYMENT UNDER OPTION—EFFECT.

Where optionee paid, and owner accepted, $100 on purchase price, payment operated as exercise of optional right, and option agreement

as such became inoperative, also became contract for sale of land, and agreements extending time for payment were without reference to term of option agreement, but only to time to which payment of balance of price was deferred.

10. JOINT ADVENTURES ⊂⊃4(1)—REALTY BROKERS—AGREEMENT TO SHARE PROFITS—EXTENSION OF TIME FOR PAYMENT.

Where realty brokers agreed to share profits from sale of land on which one should secure option for the other, the first's right to his share of profits was not affected, after exercise by the other of option on land procured by the first, by any agreement between other and landowner extending time for payment.

11. JOINT ADVENTURES ⊂⊃4(1)—REALTY BROKERS—SHARING PROFITS—POSTPONEMENT OF RIGHT OF PARTY.

By contract between plaintiff and defendant, realty brokers, to share profits realized on sale by defendant of land on which plaintiff was to procure option, plaintiff's right to payment *held* not postponed until mortgage debt given for price of land before resale was extinguished.

On Rehearing in Supreme Court.

12. BROKERS ⊂⊃43(2)—REALTY BROKER—EMPLOYMENT TO OBTAIN OPTION—WRITING—STATUTE.

Supreme Court is not prepared to hold that Civ. Code, § 1624, subd. 6, requiring agreement authorizing or employing agent or broker to purchase or sell realty for compensation or commission to be in writing, is not applicable in case of simple contract between such agent or broker and a proposed purchaser to obtain option for purchase of realty.

Appeal from Superior Court, Sacramento County; Chas. O. Busick, Judge.

Action by J. W. Howard against the D. W. Hobson Company, a corporation. From judgment for plaintiff, defendant appealed to the District Court of Appeal, which affirmed, and defendant applies for hearing in the Supreme Court. Application denied.

Devlin & Devlin, of Sacramento, for appellant.

C. E. McLaughlin and B. F. Driver, both of Sacramento, for respondent.

HART, J. The second amended complaint in this action is in four counts. In the first count it is alleged that D. W. Hobson Company is a corporation having its principal place of business in San Francisco; that, prior to the 6th day of November, 1912, Maud Moore was the owner of a certain tract of land in Colusa county; that, in March, 1912, "plaintiff informed said defendant and its agents that he could obtain an option giving him the exclusive right to purchase said land for the sum of $25,000, and said defendant, then and thereby and through its authorized agents, agreed to and with plaintiff that, if plaintiff would secure the option from said Maud Moore for the purchase and sale of said land for the sum of $25,000," defendant would endeavor to sell said land, "and in the event of such sale would divide the amount received for said land in excess of $25,000 equally with plaintiff" and would pay to plaintiff "one-half of said excess sum over said $25,000 as his commission and share of the profits accruing under said option as aforesaid"; that, in March, 1912, plaintiff, pursuant to said agreement, procured from said Maud Moore an agreement in writing whereby, for the sum of $100 paid to her, she granted to defendant a 90-day option to sell said land; that plaintiff procured extensions of said option and that it was in full force and effect on the 6th of November, 1912; that, on said last-mentioned date, defendant purchased the property from said Maud Moore for the sum of $25,000 and sold the same to one Chester Von Grafen for $33,890; that, under and pursuant to said agreement between the parties hereto, defendant promised to pay to plaintiff one-half of said profits, amounting to $4,445; that demand was made upon defendant for the payment of said sum, which remains unpaid.

In the second cause of action it is alleged that defendant received from Chester Von Grafen the sum of $4,445 for the use of plaintiff, which has not been paid.

It is alleged in the third cause of action that, in May, 1912, "plaintiff and defendant entered into an agreement by the terms of which defendant agreed that, if plaintiff would procure from the owners of that certain ranch commonly known as the 'A. W. Campbell Ranch,'" in the county of Yuba, "an option contract to purchase said ranch at a price not to exceed $60 per acre and would assign said contract to defendant, defendant would pay plaintiff for his services in procuring said contract the sum of $200." It is then alleged that plaintiff secured said option contract and assigned the same to defendant, that he demanded of defendant the payment of $200, but that said sum remains due and unpaid.

In the fourth cause of action the allegation is that defendant received $200 for the use of plaintiff on account of the option contract mentioned in the third count.

The answer denies the allegations of the first and second counts of the complaint; admits the procurement by plaintiff of the option set forth in the third count of the complaint, but alleges that plaintiff acted in the premises as the agent and employé of the defendant and held all rights under the contract as trustee for defendant; denies that defendant agreed, upon the assignment of said option by plaintiff to defendant, to pay him $200; and denies that said or any other sum is due plaintiff by reason of the

facts alleged; and denies the averments, contained in the fourth cause of action, that defendant received the sum of $200 for the use of plaintiff.

The court found that the allegations of the complaint were true and that the denials in the answer were untrue. It was then found, in the exact language of the complaint, that plaintiff procured an option from Maud Moore pursuant to agreement with defendant, assigned the same to defendant, and that defendant sold the property to Von Grafen. It was next found that defendant, "in making said sale, expended and paid out" $1,786.24; "that the profit derived by said defendant in making said sale is the difference between $25,000 and $33,890, less $1,786.24, the total of said expenses, making a net profit received by defendant in making said sale of $7,103.76; that one-half of said profits is the sum of $3,551.88," which sum "was received by defendant in making the sale of the said premises and from Chester Von Grafen for the use and benefit of plaintiff." The findings then follow the allegations of the complaint with reference to the option for the sale of the Campbell ranch.

Judgment was entered in favor of plaintiff for the sum of $3,751.88, with interest on $3,551.88 from the 6th of November, 1912. The appeal is from the judgment.

The record discloses evidence sufficient to support the findings: (1) That the defendant employed the plaintiff to secure for it options giving it the exclusive right to purchase both the Moore and Campbell properties, and that, as to the Moore ranch, the defendant agreed with the plaintiff to reimburse him for the services performed in securing the option to purchase the same by the payment to him of a sum equal to one-half of the net excess over the amount which the defendant was required to pay the owner of the land for it, and that for obtaining for it the option to purchase the Campbell property the defendant agreed to pay the plaintiff the sum of $200. (2) That the plaintiff did procure said options for the defendant, and the properties involved in said options were subsequently sold by the defendant for amounts, respectively, in excess of those for which they were purchased from the owners.

But it is contended that the judgment cannot be upheld for these several reasons, viz.: (1) That there is a material variance between the findings and the issues joined; that the findings are conflicting and contradictory, and are insufficient to support the judgment for the asserted reason that, while the contract pleaded is for one-half of the gross profits which might be obtained from the sale of the Moore ranch, the judgment is for one-half of the net profits found to have been realized from said sale. (2) That the court erred in allowing interest on the sum of $3,551.88, which sum was found to be one-half of the profits realized from the sale of the Moore ranch. (3) That the court erred in allowing testimony of the oral employment of the plaintiff by the defendant to procure the options mentioned, in refusing to strike out such testimony, and in refusing to grant defendant's motion for a nonsuit on the close of plaintiff's case, the grounds of such objection and motions being that the employment of plaintiff as above indicated was oral or not in writing, as is required (so it is contended) in such cases by section 1624, subd. 6, of the Civil Code. (4) That the uncontradicted evidence shows that the employment of the plaintiff was oral or not by a writing, hence such purported employment of the plaintiff for the purpose stated was void and consequently the finding of a contract of employment is contrary to the evidence. (5) That the contract alleged in the complaint related only to the "original term of option," and, the option having been extended by the owner of the property, a new contract, entirely independent of and distinct from the original option as obtained by the plaintiff, thereupon arose with which contract the plaintiff had no connection. There are some other propositions advanced under this head, to which due attention will be given in the course of the discussion to follow.

[1] Obviously, where findings are not waived, no judgment can stand where the findings are wholly outside the issues made by the pleadings. This is the general rule, which, however, has a limited qualification and which is applied in those instances where a case has been tried upon the theory, without objection from either party, that some vital question, not in fact made an issue by the pleadings, has nevertheless been made an issue by the introduction of proof addressed thereto.

[2] The rule in this state with respect to the construction of a pleading, for the purpose of determining its effect, is that its allegations must be liberally construed, with a view to substantial justice between the parties. Code Civ. Proc. § 452. It is not to be assumed from that rule of construction, however, that by construction there may be inserted in a pleading vital pretermitted averments, or averments which are neither directly set forth therein nor reasonably within the fair import of the language of those which are set forth. But if the averments themselves may, without a strained construction, or without doing violence to language, be held clearly to imply or state a fact essential to the statement of a cause of action or to the support of the theory upon which reliance must be had to make out a case or a defense, then the rule of the Code should be invoked and the pleading construed with a view to the promotion of substantial justice between the parties to the action.

[3] By the light of the rule thus stated, the complaint here must be considered, and, so viewing it, we cannot agree to the proposition that it is obnoxious to the objection made against it by the defendant. It will be observed that the allegation with respect to the compensation of plaintiff for procuring the Moore ranch option is that it was agreed by and between plaintiff and defendant that the defendant, in the event of a sale by it of said ranch, "would divide the amount received for said land in excess of twenty-five thousand dollars equally with plaintiff."

Nowhere does the complaint directly or expressly allege that the division was to be upon the basis of the gross profits realized from the sale of the land. Indeed, it is not therein stated whether the division shall be of gross or net profits, but merely of the amount in excess of $25,000 so received by the defendant on the sale. The word "receive," or "received," is, like many words in our language, a relative term, and its meaning or signification may be different, according to the circumstances under which and the connection in which it is employed. In this case it seems to us to be manifest that the word "received," as used in the pleaded agreement, has reference to the amount of money in excess of the purchase price of the Moore ranch which the parties are entitled to retain for their own use and benefit; that is to say, that sum of the excess which remains after all expenses necessarily incurred in negotiating and consummating a sale of the land by the defendant have been paid. If a broker, in selling land or other property, incurs expenses and pays the same, it cannot be said that he has received for his services the sum or sums which he has been compelled to expend in the liquidation of the expenses so incurred. Therefore we conclude that what the complaint means, by stating that the defendant agreed to divide equally with the plaintiff the amount in excess of the purchase price of the Moore ranch which the defendant received, was that the division should be upon the basis of the net, and not upon that of the gross, excess realized from the sale; that is, that the plaintiff should receive for his services one-half of what was actually earned as a result of the transaction, and in what is actually earned by the defendant cannot reasonably be included money paid out to carry out the transaction. That this is the correct interpretation of the word "received" as used in the complaint, and that said word was intended by plaintiff to bear that meaning in describing in the complaint his agreement with the defendant, is indubitably shown by paragraph 6 of that pleading, wherein it is alleged:

"That said purchase and sale of said real property as set forth in the last preceding paragraph of this complaint was made pursuant to said agreement between plaintiff and defendant and whereby defendant agreed and promised to pay plaintiff one-half of the profit resulting from the purchase and sale of said real property, * * * and the profit resulting from said purchase and sale and which in said agreement * * * was to be divided equally between them was and is the sum of eight thousand eight hundred and ninety dollars," etc.

The word "profits," says the Supreme Court in People v. Savings Union, 72 Cal. 199, 202, 13 Pac. 498, 499, "signifies an excess of the value of returns over the value of advances," or, as the word is defined in Connolly v. Davidson, 15 Minn. 519 (Gil. 428), 2 Am. Rep. 154, it means "the excess of receipts over expenditures," or in Eyster v. Centennial Board of Finance, 94 U. S. 500, 24 L. Ed. 188, it is "the receipts of a business, deducting current expenses; it is the equivalent to net receipts."

[4, 5] But it does not necessarily follow from the fact that the plaintiff asked in his complaint for more than the court found that he was entitled to under the agreement that a variance thus arises between the contract pleaded and the one found by the court. The gist of the agreement is that the defendant thereby employed the plaintiff to secure an option for the purchase of the Moore ranch and agreed and promised to pay plaintiff for that service, and assuming, for the purpose of the argument only, that the plaintiff sued for one-half of the gross excess, the situation which developed at the trial with reference to that contract is simply this: That the proof showed that, in stating in his complaint the amount due him from the defendant by virtue of the terms of said contract, he made a claim for a larger sum than the court found, upon sufficient evidence, that he was actually entitled to thereunder; that is, under the very contract declared upon. The difference thus arising between the agreement declared upon and the evidence and the findings could not have misled the defendant to its prejudice in maintaining its defense upon the merits, and therefore the variance, if variance there be, is immaterial and cannot be made to operate to overthrow the judgment. Code Civ. Proc. § 469; Taylor v. Morris, 163 Cal. 717, 724, 127 Pac. 66; Doolittle v. McConnell, Ex'r, etc., 174 Pac. 305. Indeed, far from misleading the defendant, the fact that a difference in the amount claimed by the plaintiff and the amount found to be actually due him under the pleaded agreement was brought out by the defendant itself. It is to be further suggested (again assuming that the complaint sets up an agreement which calls for a division upon the basis of the gross amount of the excess) that the finding that the sum due the plaintiff is considerably less than that so claimed by him is favorable to the defendant, and thus it is obvious that the latter in

point of fact suffered no prejudice from the alleged variance.

It results from the foregoing that the findings, having followed the averments of the complaint, are neither conflicting nor contradictory, nor variant in any material aspect from the issues joined. Nor, it should be added, do we find anything in the cases cited by the defendant upon the point under present consideration which supports its objection that the findings are materially at cross-purposes with the issues as tendered by the complaint or with the contract as so declared upon.

[6] 2. We think the court was right in allowing legal interest on the share of the plaintiff in the "excess amount" for which the Moore ranch was sold by the defendant from the 6th day of November, 1912, the day on which the latter sold said ranch. Civ. Code, § 1917. It is, among other things, provided by that section that, unless there is an express contract in writing, fixing a different rate, interest is payable at the rate of 7 per cent. per annum on moneys, after they have become due, "received to the use of another and detained from him." In this case, the money coming to the plaintiff as his share of the profits realized from the sale of the ranch became due on the day the sale was made by the defendant. It is argued, however, that the one-half of the money received by the plaintiff for the ranch in excess of the purchase price thereof "was not plaintiff's money received by defendant as a collector to be turned over to plaintiff, but on plaintiff's own version of the contract the excess sum was merely to be taken as a measure of the compensation which he was to have, and, according to the findings of the court, that measure remained unknown until the amount of net profits was ascertained. The unsupported and repugnant finding that the money was received to plaintiff's use being rejected," proceeds the argument, "nothing remains but the finding of an unliquidated demand due to plaintiff." And it is added that interest is not allowable on unliquidated demands, citing Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164, and Swinnerton v. Argonaut Land Co., 112 Cal. 375, 44 Pac. 719.

As above stated, the moment that the sale of the ranch was fully effected and completed by the defendant, that moment the latter became indebted to the plaintiff in an amount equal to one-half of the net sum received by the defendant over and above that paid for the property to the owner of the ranch; and at that moment of time the amount due the plaintiff became certain and definite or capable of becoming readily so by the simplest of arithmetical calculations by the defendant of the difference between the "excess amount" and the amount of the expense which it was necessary for it to incur to negotiate and consummate the sale. The defendant, of course, knew precisely what the expense of selling the ranch amounted to, and, of course, knew the "excess amount" received by him from the sale over the purchase price. The amount due the plaintiff, therefore, constituted, within the meaning of the law, a liquidated demand.

The sole reason given by the cases for the denial of interest on unliquidated demands is "that the person liable does not know what sum he owes, and therefore can be in no default for not paying." Cox v. McLaughlin, 76 Cal. 60, 67, 18 Pac. 100, 9 Am. St. Rep. 164. See, also, Courteney v. Standard Box Co., 16 Cal. App. 600, 613, 614, 615, 117 Pac. 778; McCowen v. Pew, 18 Cal. App. 482, 123 Pac. 354; Robinson v. American Fish Co., 17 Cal. App. 212, 119 Pac. 388; Fairchild v. Bay Point Ry. Co., 22 Cal. App. 328, 134 Pac. 338; Meyer v. Buckley, 22 Cal. App. 96, 133 Pac. 510. The reason of the rule disallowing interest on unliquidated demands has no application to the facts of this case, since, as above shown, the defendant knew precisely what sum it owed to the plaintiff.

The case cited by the defendant, Swinnerton v. Argonaut Land Co., supra, was an action on a quantum meruit for professional services performed by an attorney at law, and is not in point here. In all cases founded on implied contracts, or on express contracts for that matter, where the amount due cannot be ascertained except upon an accounting, or where (on implied contracts) it cannot be ascertained except upon evidence showing the reasonable value of services rendered or goods sold, the reason of the rule denying interest upon the amount thus ascertained to be due applies with peculiar pertinency, for the demand in such cases is unliquidated in the strictest sense. But, as we have shown, this is no such a case. Nor does it become one merely because the plaintiff was required to appeal to the courts for the enforcement of the terms of the agreement. As stated, the amount due plaintiff under the agreement was fixed and certain, and it was only the refusal of the defendant to comply with its plain provisions which necessitated, as may be true in the case of the payee or holder of a promissory note or that of an obligee of any other obligation, definite and certain in its terms, including that of the amount due, a resort to a judicial proceeding to enforce compliance with its terms.

[7, 8] 3. Both points 2 and 3, in the order in which they are above given, involve, so far as is concerned the premise thereof, the same proposition, viz.: That the authority of the plaintiff to negotiate for and secure the option for the purchase of the Moore ranch for the defendant was void because not in writing. The theory upon which these points are advanced is that the employment of the

plaintiff by the defendant for the purpose of securing the option in question came within the terms of section 1624, subd. 6, of the Civil Code, which provides that "an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission" is invalid "unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent." Section 1973 of the Code of Civil Procedure contains a like provision in subdivision 6 thereof.

Both the plaintiff and the defendant were, at the time of the transactions upon which this action is founded, real estate brokers in the city of Sacramento. The contract entered into between the parties with respect to the Moore ranch described in the complaint was not for the sale or purchase of real property. All that the plaintiff was required or expected to do under the agreement was to secure an option for the purchase of the land to which the agreement related for the defendant. An "option" is neither a contract of sale and purchase nor an agreement to sell and purchase land or other property. An "option" is a contract by which the owner of property invests another with the exclusive right to purchase such property at a stipulated sum within a limited or reasonable time in the future, and, unlike an agreement to sell and purchase, imposes no obligation to purchase upon the party to whom it is given. Menzel v. Primm, 6 Cal. App. 204, 209, 91 Pac. 754, and authorities therein cited. As above stated, there was no obligation imposed on the plaintiff by the agreement in question to negotiate for the purchase of the property referred to for the defendant. He was simply employed to induce the owner of the ranch to give the defendant the right to purchase the property within a certain time—a right which it was wholly optional with it to exercise or not exercise, as it saw fit. Such being the nature of the agreement between the parties as to the Moore property, there was no legal necessity for reducing it to writing. In other words, such an agreement does not come within the provisions of section 1624, subd. 6, of the Civil Code, nor, to be valid, is it required by any provision of our statute of frauds to be in writing and "signed by the party to be charged," etc. But we may go further and hold that, even if it were necessary to concede that the agreement in question in effect involved the employment of the plaintiff to purchase the Moore property for the defendant, still, since said agreement was between real estate brokers and not between a broker and the owner of the land, it was not necessary, to make it valid, that it should have conformed to the formalities prescribed by subdivision 6 of section 1624 of the Civil Code.

The evidence shows, as above pointed out, that both the plaintiff and the defendant were real estate brokers, and it is undisputed that the commissions for the sale of the land had been received by the defendant. Therefore there existed a fund out of which the defendant could have paid the commissions which the court found the defendant had promised to pay to the plaintiff.

In Gorham v. Heiman, 90 Cal. 346, 27 Pac. 289, the action was by certain real estate brokers against other persons engaged in a like business for a certain commission alleged to be due the plaintiffs for the sale of a mine under an oral agreement. There, as here, it was contended that the agreement upon which the action was based was void because it was not in writing and signed as required by section 1624 of the Civil Code. The Supreme Court, by the late Chief Justice Beatty, in reply to that proposition, said:

"But, reading the whole complaint together, it is apparent that the contract alleged was merely to buy and sell as brokers, and there is no statute of frauds requiring such contracts to be in writing. Besides, there is enough in the complaint to show a cause of action against the appellants, independent of the contract of partnership. It shows an agreement to co-operate in obtaining authority to sell, and in selling, a mine for an equal share of the commissions. It shows that the agreement was acted upon. It shows performance on the part of plaintiffs, collection of the commissions by appellants, and refusal to divide. Certainly this establishes a cause of action if the agreement was valid, and we know of no ground upon which it can be held invalid. Counsel seem to rely on section 1624 of the Civil Code, subdivision 6. But, clearly, that provision was only designed to protect owners of real estate against unfounded claims of brokers. It does not extend to agreements between brokers to co-operate in making sales for a share of the commissions. It may be, as counsel argue, that the allowance of such claims as plaintiffs and interveners make in this action, unsupported, as they are, by any written evidence of the contract, opens the door to frauds of as gross a nature as were ever perpetrated by real estate brokers under pretense of oral employment by the owners to make sales; but, if so, the evil is one which the Legislature alone can remedy. It might be as plausibly argued that contracts should generally be held void if not in writing; but the law is otherwise. Civ. Code, § 1622."

The foregoing is decisive of the point under present consideration, assuming, though not conceding, that the purpose of the agreement referred to here was to employ and authorize the plaintiff to purchase real estate for the defendant. A careful analysis of the following cases cited by the appellant will show that they do not modify or qualify or in any way change the rule as it is declared in Gorham v. Heiman: Aldis v. Schleicher, 9 Cal. App. 372, 99 Pac. 526; Casey v. Richards, 10 Cal. App. 58, 101 Pac. 36; Saunders v. Yoakum, 12 Cal. App. 543, 107 Pac.

1007; Johnston v. Porter, 21 Cal. App. 97, 131 Pac. 69; Sellers v. Solway Land Co., 31 Cal. App. 259, 160 Pac. 175.

[9-11] 4. The propositions last discussed in the briefs involve, among others, the question whether the purchase of the Moore ranch by the defendant was under the option procured by the plaintiff or under an option secured subsequently by the defendant itself without the aid of the former.

It appears that the Moore option was executed and dated April 19, 1912, and was to run for 90 days from said date. As a consideration therefor, the defendant paid the owner of the land the sum of $50. The option provided that the first payment on the purchase price of the land ($24,950) should be the sum of $1,950. On July 17, 1912—two days before the expiration of the time limited by the option—the defendant paid the owner and the latter accepted the sum of $100 on account of the first payment to be made thereunder. At the same time, the time for the payment of the balance on the first payment was extended by Mrs. Moore to October 19, 1912, and on the latter date it was further extended to November 1, 1912. These extensions, together with the acknowledgment of the receipt of the $100 payment, were indorsed in writing on the back of the original written option, and signed by Mrs. Moore. In evidencing the second extension of time—that is, from October 19 to November 1, 1912—the words "October nineteenth" were erased and the words "November first" inserted by interlineation in lieu thereof; the indorsement "M. M." (the initials of the owner Maud Moore) being subjoined thereto.

The specific contention is that the contract as alleged and proved related entirely to the original term of the option, and that "there is no evidence of any agreement covering extended time or new options"; that, since "it was a condition precedent under the contract as alleged and found that an excess or profit should be realized by the defendant on exercising the option and reselling the property at an advanced price," it was necessary to prove that that condition had been fulfilled; and that there was a failure of proof that said condition had been fulfilled, it "appearing that the purchase was not made under the option, but was made after it ceased to have any legal or binding effect."

It is not necessary to restate here the argument advanced by appellant in support of the above-stated propositions. We deem it sufficient to say that our opinion is that the purchase of the Moore land by the defendant was under the option procured for it by the plaintiff. The payment by the defendant of $100 on account of the first payment required to be made by the option agreement upon the exercise by the defendant of its right of option thereunder was made before the term of the option, as procured by the plaintiff for the defendant, had expired. The act and fact of the payment by the defendant and the acceptance by the owner of the $100 on the purchase price of the ranch operated, ipso facto, as an exercise by the defendant of its optional right and the option agreement as such thereupon became functus officio, and likewise became a contract for the sale of the ranch mutually binding upon Moore and the defendant. Smith v. Bangham, 156 Cal. 359, 104 Pac. 689, 28 L. R. A. (N. S.) 522; Menzel v. Primm, 6 Cal. App. 205, 91 Pac. 754. There being then no option agreement in existence, the extensions referred to, when made, could not have related to the "term" of the option agreement, but had reference entirely to the time to which was deferred the payment of the balance of the first payment required by the option agreement to be made upon the exercise by the defendant of its optional right thereunder. Of course, it will not be denied that the defendant and Mrs. Moore, after the former had accepted or exercised its optional right, or upon the exercise thereof, could make such further or different arrangements as they pleased as to the terms of payment of the purchase price, and, if they did do so, it cannot well be said that the effect thereof was to create a new option agreement. Such arrangements would simply mean that new or different terms had been introduced into the contract of sale obtained by the exercise by the defendant of its optional right secured to it by the option agreement as procured for it by the plaintiff. In other words, Mrs. Moore had the right to waive any default as to the first payment, if default there was, or to extend the time of such payment upon the acceptance of the optional right by the defendant, and such action on her part could not affect the right of the plaintiff to claim as against the defendant the stipulated compensation for his services in procuring for it the option agreement from and under which it obtained from Mrs. Moore the contract of sale and purchase.

The proposition, presented in connection with those last above considered, that the finding of an excess or profit on the sale by the defendant of the Moore ranch is not supported, because it appears from the evidence that the "defendant remains liable for $12,000 of the mortgage debt given for the purchase price," and therefore "it cannot yet be told that there will be any excess or profit," is devoid of merit. The predicate of the argument in support of this point is that, under the agreement declared upon by the plaintiff, one of the conditions upon which the plaintiff was to be paid one-half of the excess or profit realized from the sale of the ranch was that the fund from which the plaintiff was to be so paid was to be that created by such excess or profit and actually

received by the defendant. We do not so read the pleaded agreement. As to that proposition, the complaint alleges that the defendant agreed:

"That, if plaintiff would secure the option from said Maud Moore for the purchase and sale of said land for the sum of $25,000, defendant * * * would under said option endeavor to effect a sale of said land for a sum in excess of $25,000, and in the event of such sale would divide the amount received for said land in excess of $25,000 equally with plaintiff, and it was then and there agreed * * * that if plaintiff procured the option as aforesaid from said Maud Moore * * * said defendant would upon the sale of said land for any sum in excess of $25,000 pay to said plaintiff one-half of said excess sum * * * as his commission and share of the profits accruing under said option."

Thus it will be noted that there is no provision in the agreement that the payment of plaintiff's share of the profits on the sale of the ranch was to be postponed or deferred beyond the time at which the sale of said ranch was actually effected or completed. As before suggested, the amount of the excess and plaintiff's share thereof could be known immediately upon the sale being made. The defendant could not require the plaintiff to wait for the payment of his one-half of the profits realized from the sale until the mortgage debt was extinguished, unless there was a covenant in the agreement to that effect, and, as seen, there was no such covenant in the agreement. Moreover, the defendant had received all but $12,000 of the sum for which it sold the land to its grantee, and had paid out of the profits it derived from the sale the expenses incurred in negotiating and completing the sale. Therefore, as above stated, it is manifest that it was not only in possession of the fund from which the plaintiff's share was to be paid, but, obviously, knew precisely how much the excess or profit amounted to.

The option on the Campbell ranch was in writing and to the plaintiff, who assigned it by writing to the defendant, under a preceding oral agreement by the defendant that plaintiff, upon procuring said option for it, would be paid by it the sum of $200. What has been said herein with respect to the oral agreement between the parties for the procurement of the option on the Moore property applies with equal pertinency and force to the oral agreement between them for the procurement by the plaintiff of the option on the Campbell property.

The several assignments of alleged error involving objections to rulings admitting certain testimony are connected with the questions above discussed, and further consideration thereof herein is, therefore, unnecessary.

The judgment appealed from is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Rehearing in Supreme Court.

PER CURIAM. The application for a hearing in this court after decision in the District Court of Appeal of the Third Appellate District is denied.

[12] In denying the application, we deem it proper to say that we are not prepared to hold that subdivision 6 of section 1624 of the Civil Code is not applicable in the case of a simple contract between a real estate agent or broker and a proposed purchaser to obtain an option for the purchase of real estate by the purchaser. The opinion clearly shows that this was in substance a joint venture on the part of plaintiff and defendant for the sale of real property of a third party and the distribution of the profits between them. The District Court of Appeal was clearly right in concluding that subdivision 6 of section 1624 of the Civil Code does not extend to agreements between brokers to co-operate in making sales for the sake of the commission or profits and that this was substantially such a case.

---

38 Cal. App. 508

EMIGH-WINCHELL HARDWARE CO. v. PYLMAN et al. (Civ. 1582.)

(District Court of Appeal, Third District, California. Oct. 26, 1918. Rehearing Denied by Supreme Court Dec. 23, 1918.)

1. MECHANICS' LIENS ⟸281(2)—COMPLETION OF BUILDING—EVIDENCE.

Evidence *held* not only to show a constructive completion under Code Civ. Proc. § 1187, but also an actual completion not later than May 2d, so that claim for lien for materials filed August 8th following was too late.

2. MECHANICS' LIENS ⟸132(7)—"CONSTRUCTIVE COMPLETION" OF BUILDING — WHAT CONSTITUTES.

Under Code Civ. Proc. § 1187, as to mechanics' liens, any of the three circumstances mentioned constitutes constructive completion, and cessation from labor need not be added to the other circumstances to constitute constructive completion.

3. MECHANICS' LIENS ⟸132(4) — TIME FOR FILING.

If owner does not file notice of completion, he, by virtue of Code Civ. Proc. § 1187, waives 30-day limitation given materialmen within which to file claims, but materialman must nevertheless file claims within 90 days as provided by concluding clause of said section.

4. MECHANICS' LIENS ⟸48, 132(8) — TIME FOR FILING—DETERMINATION.

Where hinges were never used in the building, they could not furnish the basis for a lien,

and consequently the time when they were delivered cannot be taken into account in determining question whether lien was filed within statutory period.

5. MECHANICS' LIENS ⊜132(11) — TIME FOR FILING—DETERMINATION.

Where order for hinges was a separate, distinct, and independent contract or order from the other orders given, it could not affect in any way the right to file a lien for the other materials.

6. MECHANICS' LIENS ⊜132(11) — TIME FOR FILING—DETERMINATION.

Hinges, delivered but never used, must be eliminated in determining question whether lien for materials was filed within statutory period; payment in full having been made and accepted.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by the Emigh-Winchell Hardware Company against Amos Pylman and others. Judgment in favor of defendant named, and plaintiff appeals. Affirmed.

Devlin & Devlin, of Sacramento, for appellant.

White, Miller, Needham & Harber, of San Francisco, for respondent.

BURNETT, J. Appellant makes the mistake of assuming that this is a case for the application of the section of the Code relating to the condition wherein there has been not an actual completion of the building, but a mere cessation from labor. If that were true, the building would not be deemed completed until 30 days after such cessation.

But, as pointed out in our former opinion, the evidence and the finding were to the effect that the building was actually completed on May 2, 1914. If respondent, Pylman, had relied upon the circumstances of the cessation of labor, regardless of actual completion, as the starting point for the statutory period within which a claim for lien must be filed, then there might be some merit in appellant's contention that its lien was filed in time. We have, however, no such case, and there is no occasion to invoke such provision of the Code. The language of the statute seems entirely too plain to permit of serious disagreement. Unless we are to disregard its unequivocal mandate, that the lien must be filed in any event within 90 days of the completion of the building, we must hold that appellant was too late. To the authorities cited in our former opinion we may add these two late decisions by our Supreme Court, in which the 90-day period of limitation is emphasized: Bird v. American Surety Co., 175 Cal. 631, 166 Pac. 1009; Hogan Lumber Co. v. Nichols, 170 Pac. 1106. As to the latter decision is may be said that Sunset Lumber Co. v. Batchelder, 167 Cal. 572, 140 Pac. 35, Ann. Cas. 1916B, 664, cited therein, involved work done under the old statute when both occupancy and cessation from labor were required to constitute constructive completion in the sense of the statute.

We adhere to the views expressed in our former opinion as follows:

"The action was against the owner and the contractor of a building for materials furnished for the use of said building, and for foreclosure of a mechanic's lien. Plaintiff recovered judgment against the contractor for the amount of the claim, but judgment for costs was entered in favor of defendant Pylman, from which the appeal has been taken. The court found that the work on the building was begun in the month of October, 1913, 'and was completed on May 2, 1914, * * * and was then and there occupied by said owner as completed, and at the same time the said defendant Pylman and his family moved into and occupied said building and began then and there openly and publicly to use and occupy the same as their place of residence, and they ever since have continued to so use and occupy said premises and to reside thereon.'

"It was also found that the owner had fully paid the contractor, and that the material was furnished by plaintiff at the instance and request of said contractor, but 'that no materials furnished by the plaintiff were used in said building after the 2d day of May, 1914,' although on the 10th of July following, plaintiff sent to said building four special hinges of small value which had been previously ordered by the contractor, and they were afterward paid for by the owner. It was also found that plaintiff filed its claim of lien for record on August 8, 1914. Indeed, it was so alleged in the complaint and not denied. The court concluded 'that the time to file liens for labor or materials furnished in the construction of said building began to run on the 2d day of May, 1914, and the time to file liens thereon expired on the 31st day of July, 1914, and prior to the filing of plaintiff's alleged lien.'

[1] "As to the finding in reference to the completion of the building, there can be no possible doubt of the sufficiency of the evidence in its support. It was stipulated at the trial that the Pylmans were living in the house on April 28, 1914, and from that time continuously. Nellie Pylman testified that on the 28th day of April the contractor had everything done with the exception of putting on a few hooks on the screen doors and a very few little necessary things, and that this was attended to within a few days and that the building was then accepted by them. It appears, also, that on April 13th the owner and contractor had a settlement and at that time agreed to eliminate certain work from the contract, and deductions were made for the things omitted. This was in accordance with the provisions of the contract between the parties, and the evidence shows that the contract, as thus modified, was completely executed.

"We have therefore not only constructive but actual completion of the building not later than May 2, 1914. As to the circumstances of occupation and acceptance of the building, section 1187 of the Code of Civil Procedure pro-

vides that: 'In all cases any of the following shall be deemed equivalent to a completion for all purposes of this chapter:' (1) 'The occupation or use of a building, improvement or structure by the owner,' or (2) 'the acceptance by said owner of said building, improvement or structure.' Hence, it is entirely clear that we cannot question the finding of the court that said building for all the purposes of filing a mechanic's lien was completed on May 2, 1914.

"In reference to certain facts which the law declares to be sufficient to support the conclusion that the building for the purpose of a lien has been completed, it may be stated that the statute has undergone certain changes, which are pointed out in various decisions of the courts. From 1887 to 1897 said section of the statute limited the operation of the occupation or use and acceptance to those cases wherein there was a duly recorded contract, the Legislature having provided 'and in case of contracts, the occupation,' etc. In the latter year the section was amended so as to make occupation and acceptance apply to all cases, but a further amendment was added to the effect that either must be coupled with cessation from labor for 30 days in order to constitute constructive completion. These changes are fully discussed in Robison v. Mitchel, 159 Cal. 586, 114 Pac. 984, and we need not dwell upon them further.

[2] "Then comes the amendment of 1911, which applies to cases wherein the contract has not as well as those wherein it has been recorded; and, as clear as language can make it, the section now provides that any of the three circumstances shall constitute constructive completion, namely: (1) Occupation of the building; (2) acceptance of the building by the owner; and (3) cessation from labor for 30 days.

"By a sort of metaphysical refinement, appellant seeks to make it appear that cessation from labor for the period of 30 days must still be added to the other circumstances above mentioned to constitute completion, but the section is too plain to admit of discussion. Indeed, it is pointed out in Hughes Mfg. Co. v. Hathaway, 174 Cal. 48, 161 Pac. 1159, that the phrase 'completion of the building,' as used in the last clause of said section, 'must be understood to mean either the actual completion, or the completion by cessation of labor for thirty days upon the building, etc., or completion by occupation or acceptance, as the case may be.'

"The case is virtually as strong upon the theory of actual completion, as constructive by occupation or acceptance, since it was competent for the parties to provide for changes in the plans, and to so alter the contract, and thus have a completely executed agreement. White v. Soto, 82 Cal. 654, 23 Pac. 210; Gilliam v. Brown, 116 Cal. 454, 48 Pac. 486; Anderson v. Johnston, 120 Cal. 657, 53 Pac. 264.

"Nor is there any doubt as to the conclusion that plaintiff's claim of lien was filed too late.

"It is to be observed that the materialman has 30 days after he ceases to furnish materials within which to file said claim, and, upon the pretense of having furnished said hinges on July 10th, plaintiff claims to have brought itself within this provision. But the concluding portion of said section requires 'that all claims of lien must be filed within ninety days after the completion of any building, improvement or structure,' etc.

[3] "Appellant contends that this time limit was waived for the reason that no notice of completion was filed by the owner. As to this, appellant is in error.

"Said section 1187 does indeed provide: 'In case such notice be not * * * filed then the said owner and all persons deraigning title from or claiming any interest through him shall be estopped in any proceedings for the foreclosure of any lien provided for in this chapter from maintaining any defense therein based on the ground that said lien was not filed within the time provided in this chapter.' This refers to the completion of the contract under which the material was furnished or to the labor done, and if notice of such completion is not filed by the owner he waives the 30-day limitation. Hughes v. Hathaway, supra.

"But the 90-day limitation applies to all cases. The concluding clause of the section makes this plain: 'Provided that all claims of lien must be filed within ninety days,' etc.

"Such is, also, the view taken by the courts. In the Robison Case, supra, referring to the foregoing clause, the court said: 'This would seem to fix a time limit within which all claims must be filed, regardless of whether the owner has filed his notice of completion or not.'

"In the Hughes Case, supra, it is declared: 'If no notice of completion is filed, the claimant is only required to see that his claim is filed before the expiration of the period of 90 days after the completion of the building, that is, of the building as a whole, as provided in the last clause of the section.'

"National Lumber Co. v. Kennedy, 28 Cal. App. 780, 154 Pac. 25, contains this declaration: 'The Legislature deemed such period ample time for otherwise obtaining information as to the time of completion. The provision that "all claims of lien must be filed within ninety days after the completion of any building" could serve no purpose other than to terminate the time within which the claim of lien might be filed. Such is the plain import of the language used.'

"The foregoing ought to set the matter at rest, and no further comment is called for.

[4] "As to the last item furnished by appellant, it should be said further that the hinges were never used in the building, and therefore they did not and could not furnish the basis for a lien, and, if no lien could be claimed for them, it logically follows that the time when they were delivered could not be taken into account in the determination of the question whether the notice of lien was filed within the statutory period.

" 'It is well settled by many decisions in this state that to entitle a materialman to a lien the materials must be furnished to be used and must actually be used in the construction of the building against which a lien is sought to be enforced.' Stimson v. Los Angeles Traction Co., 141 Cal. 32, 74 Pac. 357.

"That the last item when not used in the construction of the building must be disregarded in computing the time is expressly held in P. T. Walton Lumber Company v. Cox, 29 Okl. 237, 116 Pac. 798. Therein, certain doors were ordered and delivered but not used, and the Supreme Court of Oklahoma said that they constituted no proper item of charge on the lien

statement, and that the date of the last item which was used was the one to be considered in the inquiry whether the material was furnished within the 60-day period required by the statute.

[5] "Again, it appears that the order for the hinges was a separate, distinct, and independent contract or order from the other orders given, and therefore it could not affect in any way the right to file a lien for the other materials. The point is considered in the case of Barrows v. Knight, 55 Cal. 155. Other authorities of similar import are Phillips on Mechanic's Liens (3d Ed.) §§ 324, 325, 326 and 327; Lane & Bodley Co. v. Jones, 79 Ala. 156; Maryland Brick Co. v. Dunkerly, 85 Md. 199, 36 Atl. 761; Brunt v. Farinholt, 121 Md. 126, 88 Atl. 42; Cross v. Eyerley, 86 Neb. 516, 125 N. W. 1085.

[6] "It seems equally plain that the hinges must be entirely eliminated from consideration, for the reason that payment in full was made for them and accepted. But to avoid confusion, we deem it proper to add that, if the hinges had been used in the building in pursuance of a contract therefor, such circumstance would not save the lien upon the theory that the claim was filed within 30 days thereafter. Indeed, the 30-day requirement was waived, as we have heretofore seen. But if the hinges had been so used, such use might have been regarded as extending the time of the completion of the building so as to avoid the bar of the 90-day period. In other words, under the circumstances suggested, the court would not permit the owner to say that the building had been completed prior to the use of said material, and therefore that the notice of lien was filed too late.

"In the final brief, for the first time, appellant claims that the judgment must be reversed 'for the failure of the court to find that the lien was not filed within 90 days after the plaintiff had ceased to furnish materials.' In view of the fact that it does appear from the findings that said notice of lien was not filed within 90 days after the completion of the building, the said consideration would be immaterial.

"However, appellant is in error in the statement. The court specifically finds when the materials were furnished, including the date of the last item, as appears in paragraphs 5 and 6 of the findings, and, also, when the notice of lien was filed. Thus is the point covered.

"It seems hardly necessary to notice the cases cited by appellant, as they are so easily distinguished from the one before us; but we may refer to them briefly.

"In Yost v. Roux, 27 Cal. 307, 149 Pac. 781, the materials for which the lien was claimed were actually used in the building, and the notice of lien was filed within 90 days of the completion of the building, as found by the court. In fact, it was properly held by this court that, as to the materialman, the building was not completed until his materials were used; the main contention there being as to whether the lien should be filed within 30 days of the completion of the building or of the time when the claimant 'ceased to furnish materials.'

"Schwartz v. Knight, 74 Cal. 432, 16 Pac. 235, has no similarity to the case at bar. Therein, the filing of the notice of lien was held to be premature because the building had not been completed. Under the provisions of said section 1187, as it existed at that time, it was held that, as the plaintiffs were not original contractors, 'the law required them to file their lien within thirty days after the completion of the building.'

"In Willamette Steam Mills Lumbering & Mfg. Co. v. College Co., 94 Cal. 229, 29 Pac. 629, several interesting questions growing out of the Mechanic's Lien Law are learnedly discussed, but the decision has no particular bearing upon the question involved herein. What was said in reference to said section 1187 of the Code of Civil Procedure must be regarded with the recollection of the fact that it was amended before the action was brought. Therein, it was held that, in the case of a contract not recorded, a laborer or materialman in order to perfect his lien must file it within 30 days after the completion of the building, or after there had been a cessation of labor for 30 days upon the unfinished building.

"In the case of Boscus v. Waldmann, 31 Cal. App. 245, 160 Pac. 180, decided by this court, it appears that the notice of lien was filed within 90 days after the completion of the building, and the discussion in reference to the notice to be given by the owner was addressed to the 30-day provision of the statute."

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

---

38 Cal. App. 519

GLOBE GRAIN & MILLING CO. v. WALKER CONST. CO. (Civ. 2606.)

(District Court of Appeal, Second District, California. Oct. 29, 1918.)

SALES ⊂=359(2) — ACTION FOR PURCHASE PRICE—EVIDENCE.

In an action to recover the purchase price of rolled barley, where plaintiff showed that the barley when sacked had been weighed, and that those weights were the ones charged against the defendant, it made out a prima facie case, which was not disturbed by testimony that rolled barley would shrink, where it was not shown to what extent it would shrink, or that the shrinkage would be more than nominal.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by the Globe Grain & Milling Company against the Walker Construction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

B. D. Noel, of El Centro, for appellant.
Herbert L. Iasigi, of El Centro, for respondent.

JAMES, J. This appeal is taken from a judgment entered in favor of the plaintiff awarding a sum of money found to be due on an account for merchandise sold by the plaintiff to the defendant.

But one point is made upon the appeal. It is claimed that plaintiff did not sustain the burden of proof by showing that the grain alleged to have been sold and delivered to defendant was of the weight for which charge was made. We think that there is nothing in the point. The evidence showed that a course of dealing had been had between the plaintiff and defendant for a number of years, during which time it was the custom of the defendant to send its drivers to the warehouse of the plaintiff with orders for grain, consisting mainly of two kinds, whole barley and rolled barley. Duplicate invoices were prepared at the time of delivery, showing the items of merchandise delivered and the weights thereof, copy of which was received by each driver with the grain so purchased. Plaintiff's witnesses testified that the rolled barley was sacked 75 pounds to the bag being correctly weighed at the time of the sacking thereof; that as to the whole grain, that was weighed out when sold. That the grain sold to defendant was handled in this manner, the rolled barley being delivered as of weight 75 pounds to the sack, and the weight of the whole grain ascertained at the time the drivers received it. On cross-examination of plaintiff's witness, defendant asked as to whether it was not a fact that after rolled barley was sacked it would shrink in weight by being stored, and the witness replied that it might do so; he further testified that he did not know how long this rolled barley which the defendant received had been sacked prior to delivery; that possibly it might have been sacked several weeks. No attempt was made by defendant to show what the shrinkage in weight would amount to—whether of considerable amount or nominal. Neither was it shown how long this particular barley had remained in storage. We think that where the plaintiff showed that the rolled barley when sacked had been accurately weighed, and that those weights were the ones charged against the defendant, it made out a prima facie case. It was not shown by the cross-examination, as we have noted, that any shrinkage over any length of time, long or short, would be more than nominal, and hence, in our opinion, nothing appeared before the court in evidence which is sufficient to disturb the prima facie case so established in plaintiff's behalf.

For the reasons given, the judgment appealed from is affirmed.

We concur: CONREY, P. J.; MYERS, Judge pro tem.

179 Cal. 379

WATTERSON et al. v. CRUSE. (L. A. 4530.)

(Supreme Court of California. Dec. 7, 1918.)

1. APPEAL AND ERROR ⟸110—ORDERS APPEALABLE—DENIAL OF NEW TRIAL.

Since the amendment of 1915 to Code Civ. Proc. § 963, an appeal cannot be taken from an order denying a new trial.

2. MINES AND MINERALS ⟸24, 25—LOCATION OF MINING CLAIM—EFFECT OF ABANDONMENT OF MILL SITE.

Where locator of a mill site under the first division of Rev. St. U. S. § 2337 (U. S. Comp. St. 1916, § 4645), ceases by reason of abandonment or forfeiture to be the proprietor of the vein or lode, the right to the associated mill site is also ended.

3. MINES AND MINERALS ⟸26 — RELOCATION—MILL SITES.

Where a locator of a mining claim abandoned or forfeited the same, together with the mill site, under Rev. St. U. S. § 2334 (U. S. Comp. St. 1916, § 4642), a relocator, under section 2322 (section 4618), had the right of possession and enjoyment of buildings and improvements which had been so affixed to the land by the original locator as to become a part of it.

4. MINES AND MINERALS ⟸24, 25—ABANDONMENT OR FORFEITURE OF LOCATION — FIXTURES.

The status of a locator of a mining claim is not that of a mere licensee, his possession having the attributes of a title in fee; and hence there is no implied agreement that he has a reasonable time after forfeiture or abandonment to remove fixtures.

5. FIXTURES ⟸9—RIGHT OF REMOVAL.

While things affixed to the soil ordinarily belong to the owner of the soil, there may be a right of removal arising from the agreement of the parties or their relation. Civ. Code, §§ 660, 661, 1013, 1019.

6. FIXTURES ⟸24—RIGHT OF REMOVAL—LICENSEE.

One who has affixed improvements to land under license from the owner is generally held to have a right to remove them within a reasonable time after the termination of the license.

Department 1.

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Action by W. W. Watterson and another against W. D. Cruse. Judgment for plaintiffs, and defendant appeals. Reversed, with directions.

L. C. Hall, of Bishop, for appellant.
A. H. Swallow, of Bishop, for respondents.

SLOSS, J. On July 2, 1912, Southern Belle Mines Company, a corporation, was the owner and in possession of three mill sites which had been located and used in connection with certain lode mining claims theretofore located by said mining company. On the mill sites there had been erected a quartz mill, a dwelling house, and a boarding house. A barn and office building stood on one of the mining claims. On said day the corporation sold the quartz mill and the other buildings to the plaintiffs, with the right to remove the structures in the future. During the year 1913 the Mines Company performed no labor and made no improvements upon said mining claims or mill sites. On January 1, 1914, the defendant and one Sproul (whose interest was subsequently transferred to defendant) made discovery of a mineral bearing lode, and located thereon a lode mining claim. On March 31, 1914, defendant made a similar discovery and location of a second claim. Everything necessary to constitute a valid mining location was done in each instance. The boundaries of the claims thus located included the ground occupied by the mill and other buildings above mentioned. In May, 1914, the defendant commenced to remove some of the buildings, whereupon plaintiffs brought this action, seeking an injunction to restrain the defendant from so doing, or from preventing the plaintiffs from removing the structures. The court gave judgment, declaring the plaintiffs to be the owners of the improvements, and allowing them to remove the same within two months. The decree also enjoined any interference with such removal during the two months' period.

[1] The defendant appeals from the judgment. His attempted appeal from the order denying a new trial is nugatory; the order having been made after the amendment of 1915 to section 963 of the Code of Civil Procedure. Gray v. Cotton, 174 Cal. 256, 162 Pac. 1019.

[2] There is no controversy over the facts, which are here stated as they were found by the court. The only question is whether the ownership and right of possession of the buildings was in the plaintiffs or the defendant. These buildings stood in part upon mining claims and in part upon mill sites. No legal distinction can be drawn in this regard; the case being the same as if it involved improvements upon mining claims alone. Under the mining law mill sites may be located either in connection with the ownership of a vein or lode or independently of the ownership of a mine by the owner of a quartz mill or reduction works. Rev. St. U. S. § 2337 (U. S. Comp. St. 1916, § 4645). The findings in this case expressly declare that the mill sites in question were located and used in connection with lode mining claims owned by the Mines Company, "and not otherwise." The company's right was therefore founded upon the first provision of section 2337, the one permitting the location of a mill site as an adjunct to a lode claim. Where the locator of such a site ceases, by reason of abandonment or forfeiture, to be the proprietor of the vein or lode, the right to the associated mill site is also ended. 2 Lindley on Mines (3d Ed.) § 564.

[3] By the failure of the Mines Company to perform labor or make improvements during 1913, its mining locations (and the connecting mill sites) became open to relocation (Rev. St. U. S. § 2334 [U. S. Comp. St. 1916, § 4642]), and, upon a valid location by others, the right of the original locator to the occupancy and use of the land embraced within the boundaries of the new locations was forfeited. Thereupon the relocator was clothed with "the exclusive right of possession and enjoyment of all the surface included within the lines of the location." Rev. St. U. S. § 2322 (U. S. Comp. St. 1916, § 4618). This carried with it the right of possessing and enjoying everything which had been so affixed to the land as to become a part of it. Mr. Lindley states the rule thus:

"Such improvements or betterments as have been placed upon the property by the original locator, if they fall within the class designated as fixtures, become a part of the realty, and the subsequent appropriation of the land carries with it, necessarily, whatever may be affixed to it. Prior to the determination of his estate by the perfection of a relocation, it cannot be doubted that the prior locator may sever and remove all machinery, buildings, and other improvements which, by the manner of their attachment to the soil, have become a part of the freehold. But his right of entry for that purpose ceases when his estate is terminated." 2 Lindley on Mines (3d Ed.) § 409.

Notwithstanding the respondents' vigorous attack upon this passage, we are satisfied that it is a correct statement of the law.

[4-6] That the structures here involved constituted fixtures, as that term is defined in our Code (Civ. Code, §§ 660, 661), is conceded. This does not finally determine which of the contending parties is entitled to them. While things affixed to the soil ordinarily belong to the owner of the soil, there may be a right of removal arising from the agreement of the parties or their relation. Civ. Code, §§ 1013, 1019. Thus, he who has affixed improvements to land under a license from the owner is generally held to have a right to remove them within a reasonable time after the termination of the license. Bronson on Fixt. §

106; 19 Cyc. 1056. An agreement for such right of removal is implied from the circumstances. The respondents seek to apply this rule to the case at bar. But there is no real analogy between the status of the locator of a mining claim and that of a mere licensee. While the paramount fee remains in the government until it has issued its patent, yet as to every one else—

"the estate acquired by a perfected mining location possesses all the attributes of a title in fee, and so long as the requirements of the law with reference to continued development are satisfied, the character of the tenure remains that of a fee." 2 Lindley on Mines (3d Ed.) § 539; Merritt v. Judd, 14 Cal. 59; Hughes v. Devlin, 23 Cal. 501; Buchner v. Malloy, 155 Cal. 253, 100 Pac. 687.

The interest of the locator is treated as a vested estate. Hughes v. Devlin, supra; Clipper M. Co. v. Eli M. Co., 194 U. S. 220, 24 Sup. Ct. 632, 48 L. Ed. 944. It is true that the right may be forfeited by failure to do the required work, followed by a relocation. But such forfeiture is in no way similar to the revocation of a license. It may much more aptly be compared to the termination of the right of a vendee or option holder for failure to comply with the covenants or conditions upon which his right of possession and purchase depend. In such case the fixtures belong to the vendor, and the defaulting vendee or optionholder has no right to remove them. Pomeroy v. Bell, 118 Cal. 635, 50 Pac. 683; Hemenway v. Cutler, 51 Me. 407; Westgate v. Wixon, 128 Mass. 304; 10 Cyc. 1061. In Pomeroy v. Bell, supra, the court explains the rule, saying, in effect, that no agreement for removal can be implied where fixtures are annexed by a vendee, because such vendee, unlike a tenant, makes the improvements in contemplation of becoming the owner of the land. So here, at the time the Southern Belle Mines Company attached the improvements to the land, it was vested with the right to hold the land so long as it did the annual work required, and thereafter until a valid location was made by another. The loss of its right resulted from its own failure to meet the conditions which, as it knew, were imposed by the law. It placed the improvements upon land in which it had an interest, and in which, presumably, it expected to acquire an estate in fee. These circumstances preclude the inference of any agreement that it should be allowed to sever and remove the buildings after its rights in the land had terminated.

When the defendant made the locations under which he claims, the interest of the former locator came to an end. By his locations, the defendant acquired the exclusive right of possession and enjoyment of the land, and this necessarily included everything that was a part of the land. The plaintiffs could not, of course, by their purchase from the Mines Company, acquire any better title than their grantor had.

There was therefore no foundation for the decree giving to the plaintiffs a right of removal of the fixtures, or for the adjudication that the plaintiffs were the owners thereof. Upon the facts found, the plaintiffs were not entitled to any relief.

The judgment is reversed, with directions to enter judgment in favor of the defendant.

We concur: VICTOR E. SHAW, Judge pro tem.; RICHARDS, Judge pro tem.

---

(38 Cal. App. 533)

JACUZZI v. JACUZZI et al. (Civ. 1846.)

(District Court of Appeal, Second District, California. Oct. 31, 1918.)

1. Work and Labor ⟸22—Action—Sufficiency of Complaint.

In action for compensation for work and labor performed, complaint must allege nonpayment.

2. Trial ⟸397(1)—Findings—Nonpayment—Necessity.

In action for compensation for work and labor performed, court's failure to make findings as to defendant's nonpayment of compensation was ground for reversal notwithstanding insufficiency of defendant's evidence to show that payment had been made; such insufficiency merely entitling plaintiff to a finding in his favor on issue of nonpayment.

3. Trial ⟸404(1)—Action for Compensation—Cross-Complaint—Findings.

In action for compensation for services performed at defendant's request, in which defendant filed cross-complaint, where facts alleged in cross-complaint were not inconsistent with those alleged in complaint, being merely an offset in part, court's finding of indebtedness due plaintiff necessarily involved a consideration of the claim in the cross-complaint.

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst, Judge.

Action by Rauchens Jacuzzi against Frank Jacuzzi and another. Judgment for plaintiff, and defendants appeal. Reversed.

Rose & Scoville, of Los Angeles, for appellants.

Ernest M. Torchia, of Los Angeles, for respondent.

JAMES, J. Plaintiff sued defendants for a sum of money, alleging that the debt was incurred by defendants for work and labor performed at defendants' request. Appellant Remington filed an answer denying the

indebtedness, and also a cross-complaint to which plaintiff made denial. The court found that plaintiff was entitled to recover, and rendered judgment accordingly. This appeal was taken from the judgment, and is presented on the judgment roll alone.

[1, 2] The contentions of appellant are that the court failed to find on the issue as to the nonpayment of the plaintiff's claim, and also failed to make particular findings on the issues presented by the cross-complaint. It is true that the court failed to make a finding as to the nonpayment of the debt, merely finding that within two years before the commencement of the action labor and services were rendered by plaintiff at the special instance and request of appellant, and that the reasonable value thereof was a certain sum, stating it. The complaint was sufficient in its allegation as to nonpayment, and the answer took issue with it as to that fact. The allegation of nonpayment made in the complaint was essential to the statement of a good cause of action.

"It has been held in numerous cases that a party suing upon a contract to pay money must show a breach of the contract—that is, must allege the nonpayment of the money which he seeks to recover—or his complaint states no cause of action, and may be assailed by a general demurrer. In Richards v. Travelers' Ins. Co., 80 Cal. 506 [22 Pac. 939], the last case in which this rule is declared, it is said: 'The complaint was fatally defective in this respect. It contained no allegation of nonpayment; nor is there any allegation from which such nonpayment can be implied.'" Grant v. Sheerin, 84 Cal. 197, 23 Pac. 1094.

Respondent cites certain cases dealing with the sufficiency of findings where no issue was made by the pleadings. Those authorities are not applicable to the case here. That the trial court is required to make findings upon all material issues seems not to be controverted, and that a failure to make such findings is ground for reversal. Kusel v. Kusel, 147 Cal. 52, 81 Pac. 297. The case is not helped by a consideration of the contention, sustained by authorities (Melone v. Ruffino, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127), that the defense of payment was affirmative on the defendant, and that, in the absence of any finding shown in the judgment-roll determining that issue, it will be presumed no evidence was introduced thereon. Assuming that no evidence was presented by the defendant sufficient to show that payment had been made, this fact would only have aided the plaintiff to the extent of entitling him to a finding in his favor on the issue.

[3] As to the failure to make findings on the issues presented by the cross-complaint, we agree with respondent's counsel when he says:

"The facts alleged in the cross-complaint are not inconsistent with those alleged in the complaint, being merely an offset in part, and the finding of indebtedness due plaintiff necessarily involves a consideration of the claim in the cross-complaint."

In Stewart v. Hollingsworth, 129 Cal. 177, 61 Pac. 936, the court said:

"In the absence of any bill of exceptions or other showing that evidence was given upon the issues presented by the cross-complaint, the omission of the court to make findings upon such issues is not a ground for the reversal"

—there being added in the opinion the statement which is set forth in substance by counsel for respondent and which we have quoted from his brief.

The judgment is reversed.

We concur: CONREY, P. J.; MYERS, Judge pro tem.

---

38 Cal. App. 542

## EVANS v. WIXOM. (Civ. 2603.)

(District Court of Appeal, Second District, California. Nov. 4, 1918.)

1. False Imprisonment ⟸20(1)—Sufficiency of Complaint—Legal Warrant.

Complaint for false imprisonment did not state a cause of action, where it did not allege that plaintiff's arrest was not under a legal warrant.

2. Malicious Prosecution ⟸51 — Complaint—Termination of Prosecution.

A complaint for malicious prosecution of proceeding in which plaintiff was charged with being an insane person was insufficient, where it did not allege that the proceeding to determine plaintiff's sanity had terminated.

3. Appeal and Error ⟸1170(3)—Review—Harmless Pleading.

Failure to draw complaint so it was clear whether action was for malicious prosecutions or for false imprisonment, and insufficiency of complaint to state cause of action on either theory, was not rendered harmless by Const. art. 6, § 4½, providing that judgment will not be reversed for error in pleading not resulting in a miscarriage of justice.

4. Appeal and Error ⟸1170(3)—Review—Harmless Error — Construction of Statute.

Const. art. 6, § 4½, providing that judgment will not be reversed upon ground of error as to any matter of pleading not resulting in miscarriage of justice, will be liberally construed, but will not be permitted to destroy pleading as a necessary element in legal procedure.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Jesse Evans against Alexander Wixom. Judgment for plaintiff, and defendant appeals. Reversed.

Childers & Bruce, of El Centro, and Walter H. Sprague, of Los Angeles, for appellant.

Dan V. Noland, of El Centro, D. L. Ault, of Calexico, and Walter B. Kibbey, of El Centro, for respondent.

CONREY, P. J. [1, 2] Appeal from a judgment entered in favor of the plaintiff. The plaintiff brought this action to recover damages caused by certain wrongful acts of the defendant. The complaint is so drawn that it is not clear whether the plaintiff intended to allege a cause of action for false imprisonment or a cause of action for malicious prosecution of a certain proceeding in the superior court whereby the plaintiff herein was charged with being an insane person. If we consider the action as one for false imprisonment, the complaint does not state a cause of action, since it does not show that the plaintiff's arrest by the sheriff in the former proceeding was not under a legal warrant. If we accept the other alternative theory of the action, the complaint does not state a cause of action, since it does not appear therefrom that the proceeding to determine the question of the plaintiff's sanity has yet terminated.

Defendant's appeal comes before the court upon the judgment roll alone. The record shows that the defendant demurred to the complaint and the demurrer was overruled; whereupon the defendant answered, and the case went to trial before a jury, which rendered a verdict in favor of the plaintiff. The judgment conforms to that verdict.

Appellant contends for a reversal of the judgment upon the ground that the complaint did not state a cause of action. Counsel for respondent have not attempted to defend the complaint. On the contrary, they say that—

"For the purpose of this argument, we are willing to concede that there was an error in pleading."

They endeavor to sustain their judgment by contending that under section 4½ of article 6 of the Constitution of this state, as amended in November, 1914, the judgment must be affirmed unless after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice; and that this cannot be ascertained on an appeal from the judgment roll alone.

[3, 4] If we are to agree with respondent's position on this matter, we will be required to presume something far beyond the lines established by the presumption that the facts alleged in the complaint were determined in favor of the plaintiff by the jury. We must also presume that any other facts, though not within the issues raised by the pleadings, were actually tried and determined if such determination was necessary to make out a cause of action for the plaintiff. We are satisfied that the constitutional provision above mentioned was not intended to carry the protection of judgments to any such extreme length. The phrase, "any error as to any matter of pleading," in said section 4½, is entitled to very liberal construction, but not to a construction which will destroy pleading as a necessary element in legal procedure.

The judgment is reversed.

We concur: JAMES, J.; MYERS, Judge pro tem.

---

38 Cal. App. 528

## KENGEL et al. v. STUART et ux.

(Civ. 2586.)

(District Court of Appeal, Second District, California. Oct. 30, 1918.)

BOUNDARIES ⊂⊃47(2)—ESTOPPEL—REPRESENTATIONS.

Where K., owning 5.10 acres, conveyed the "east 2 acres" to T. and the "west 3 acres" to G., who built a fence on boundary of the three acres, a representation by G. to S., who was about to purchase from T., that such fence was the correct boundary, was not estopped to afterwards claim the .10 acres, where K. subsequently quitclaimed the whole piece to him except the "east 2 acres."

Appeal from Superior Court, Los Angeles County; Willis I. Morrison, Judge.

Action by Anna Kengel and husband against John Stuart and wife. Judgment for defendants, and plaintiffs appeal. Reversed.

Harry W. McNutt and Delphin M. Delmas, both of Los Angeles, for appellants.

Trusten P. Dyer and N. B. Nelson, both of Los Angeles, for respondents.

JAMES, J. This is an appeal presented on the judgment roll and is taken by the plaintiffs from a judgment entered in favor of defendants, quieting title to a small parcel of land. It is contended that on the findings of fact made by the court the judgment cannot be maintained. The findings are somewhat prolix and in some portions thereof, particularly in paragraphs VIII, X, and XI, the land is misdescribed; the word "east" being used twice instead of "west." As this misdescription is plainly an error and as other portions of the findings correctly state the terms of description, it may be taken that there is no dispute in regard to that matter.

Abstracting the facts found by the court, the case may be briefly stated: In the year

1897, one Knutson was the owner of a rectangular plot of ground containing 5.10 acres. On April 24, 1897, Knutson deeded to one Tasker the "east 2 acres" of said land, and on August 8, 1904, Tasker, by same deed description, conveyed the said two acres to defendants here. It will be seen, then, that after the conveyance to Tasker there remained of the plot of ground in the ownership of Knutson the west 3.10 acres. However, in 1899, Knutson conveyed to one Gresenthwaite by deed the "west 3 acres" of the land then owned by him, and in December, 1905, Gresenthwaite conveyed to plaintiffs, by same deed description, the said west 3 acres. Knutson retained title to an intervening strip between the east 2 acres and the west 3 acres, consisting of .10 of an acre. On the 26th of November, 1913, Knutson, by quitclaim deed, transferred all of his title in the entire tract of land to the plaintiffs, excepting in his deed the east 2 acres, which he had in 1897 transferred to Tasker. The result of this quitclaim conveyance was prima facie to give title to plaintiffs in the .10 of an acre of land constituting the narrow strip lying between the easterly and westerly portions of the plot. It is this narrow strip that is made the subject of this suit, as to which plaintiffs sue to quiet their title. Gresenthwaite, in 1903, erected a fence on the easterly boundary of the west 3 acres, which fence divided the 3 acres from the easterly portion of land and immediately divided the west 3 acres from the strip in controversy. At the time of and prior to the purchase by the defendants of the east 2 acres from Tasker, defendants were told by Gresenthwaite that the fence was correctly located and marked the boundary line between the two properties. Upon that representation the defendants relied and made their purchase from Tasker. Defendants paid the taxes levied and assessed on the east 2 acres and the plaintiffs on the west 3.10 acres. It would appear from the findings, however, that the plaintiffs did not claim the ownership of the .10 of an acre composing the strip in dispute, until after they received the quitclaim deed from Knutson in November, 1913. This action was brought in May, 1914. As we gather from the findings upon which judgment was entered in favor of defendants, the trial judge concluded that, by reason of the statements of Gresenthwaite to defendants that the fence which he had erected was located upon the correct line of division, the plaintiffs, Gresenthwaite's successors in interest, were estopped from making any claim to the disputed strip. The findings also recite that prior to the building of the fence the boundary line was uncertain, this finding evidently being made for the purpose of determining in favor of defendants an additional issue as to an agreed boundary line, so as to bring the case within the ruling made in Young v. Blakeman, 153 Cal. 477, 95 Pac. 888, and Grant's Pass Land, etc., Co. v. Brown, 168 Cal. 456, 143 Pac. 754.

There is no finding from which it can be deduced that Knutson in making his conveyance did not intend to reserve title to the small strip of land to himself, or, if he did intend to convey it, as to which parcel it was intended to be attached—whether the easterly two acres or the westerly three acres. The bald fact is then apparent that neither the defendants nor the plaintiffs, prior to the making of the quitclaim deed to plaintiffs by Knutson, had any title in the strip of land, unless they had obtained it by adverse possession, which the facts as found do not show. It follows also, necessarily, that when Gresenthwaite stated that the fence which he had erected was on the boundary line, he was altogether correct in that statement, so far as the land conveyed to him was concerned, for between the fence and the westerly line there was 3 acres of ground, all that his deed called for. On the other hand, the defendants also obtained the 2 acres of land called for by their deed, exclusive of the strip in dispute. The court finds that defendants did not pay the taxes upon the strip during any of the time; hence they obtained no title by adverse possession. Under the facts set out in the findings, had Knutson continued to retain title to the strip, instead of quitclaiming to the plaintiffs, and had the defendants brought an action against Knutson to quiet title, it must be apparent that they could not have prevailed. For precisely the same reasons, they were not entitled to judgment against the plaintiffs, who had succeeded to Knutson's title in the disputed land. We have already suggested reasons why the finding as to an estoppel against the plaintiffs is not supported by the facts. At the time the alleged representations were made by Gresenthwaite as to the fence marking the correct boundary line, those statements were true; subsequently the plaintiffs obtained a deed from the true owner, which transferred title to them of the additional strip of land. Their situation as to the ownership of the disputed strip was different after they obtained the quitclaim deed than it was at the time of the making of the alleged representations.

For the reasons given, the judgment appealed from is reversed.

We concur: CONREY, P. J.; MYERS, Judge pro tem.

38 Cal. App. 535

## EQUITABLE TRUST CO. OF NEW YORK v. WESTERN LAND & POWER CO. et al.

(Civ. 1875.)

(District Court of Appeal, Third District, California. Nov. 1, 1918.)

1. CORPORATIONS ⟸642(6)—FOREIGN CORPORATION—"CARRYING ON BUSINESS."

That a foreign corporation in a single instance acts as trustee under a deed of trust for the holders of mortgage bonds, collects interest, takes title to property as security, and otherwise discharges the duty of a trustee, does not constitute "carrying on business" in the state within Civ. Code, § 408.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Carry on Business.]

2. EVIDENCE ⟸158(27) — ADMISSIBILITY — SECONDARY EVIDENCE.

In a foreclosure suit under a deed of trust, evidence by a bondholder that the mortgagor had issued a certain number of mortgage bonds was inadmissible; the bonds themselves, with the proceedings under which they were executed, being the best evidence.

3. APPEAL AND ERROR ⟸1050(1)—REVIEW—HARMLESS ERROR.

In an action to foreclose a deed of trust securing corporate bonds, evidence by a bondholder relative to the number of bonds issued, although inadmissible as not the best evidence, was rendered harmless by testimony as to delivery of the bonds not objected to, and that a copy of such bonds set forth in the complaint was substantially the same as the bonds to which witness referred.

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Suit by the Equitable Trust Company of New York against the Western Land & Power Company, August Anderson, Emily C. Dodge, and others, to foreclose a deed of trust. From a judgment for plaintiff, the two last-named defendants alone appeal. Affirmed.

R. M. Rankin, of Susanville, for appellants.

I. M. Peckham, of San Francisco, for respondent.

CHIPMAN, P. J. This is an action to foreclose a deed of trust or first mortgage on lands in Lassen county made by defendant power company to plaintiff to secure a $500,000 issue of first mortgage bonds of defendant power company, in two series of $1,000 and $500 denominations, respectively, as provided for by deed of trust.

The trust deed was made July 15, 1911, and was recorded August 1, 1911. Pursuant thereto, the power company issued 290 of the $1,000 bonds and 360 of the $500 bonds. The power company failing to pay the accrued interest, the majority bondholders requested the trustee to foreclose, and this action was instituted in compliance with that request.

September 20, 1912, appellant Anderson, having taken judgment against the power company for $671 on certain assigned labor claims, at execution sale thereunder bought the power company's equity of redemption in 280 acres of the land covered by the deed of trust, and, subsequently, April 27, 1914, conveyed an undivided half interest in the land so purchased to appellant Emily C. Dodge.

The action was tried September 1, 1916, and plaintiff had judgment foreclosing said deed of trust, which was entered October 26, 1916. The power company defaulted. Defendants Anderson and Dodge appeal from the judgment.

It is contended by appellants that the evidence is insufficient to support certain findings of fact by the court: That the evidence does not sustain the averment by the complainant, which was denied by the answer, that the power company "made, executed and delivered and issued for a valuable consideration" the bonds described in the complaint.

In establishing its case plaintiff introduced a certified copy of the statutes of the state of New York incorporating the plaintiff corporation and defining its powers and duties; also, a certified copy of the articles of incorporation of the defendant power company on file in the office of the secretary of state. Plaintiff then offered in evidence two sample copies of these bonds, one numbered D 36 for $500 and one numbered M 1 for $1,000. Objection was made as immaterial, irrelevant, and incompetent—"incompetent particularly for the reason that it has not been shown that the plaintiff corporation is entitled to carry on business in the state of California or to acquire the title, the legal title, to any property. Mr. Peckham (plaintiff's attorney): That is not in issue by the pleadings and therefore stands admitted."

After argument, the court overruled the objection and admitted these sample copies of bonds as Exhibits 3 and 4. These samples purport to set forth the facts as to the power company's purpose in issuing the bonds. Sample D 36 recites that—

"This bond (one of the samples) is one of a series of coupon bonds of the Western Land & Power Company, numbered consecutively from D 1 to D 400 and from M 1 to M 300 both inclusive. * * * Subject to the terms of the mortgage or trust deed hereinafter referred to"—the aggregate amount not to exceed $500,000.

Other recitals follow not necessary to be stated. Sample M 1 is to like effect.

Plaintiff holds a charter under the laws of the state of New York; its place of business is in the city of New York, and the character of its business requires that it be there trans-

acted; the bonds in question and the interest coupons are payable there. So far as appears, plaintiff has never transacted any business in this state, unless it can be said that to act as trustee for the holders of the power company's bonds, collect accruing interest, taking title to property as security, and otherwise discharging the duties of trustee can be said to violate section 408 of the Civil Code.

In Roseberry v. Valley Building & Loan Ass'n, 35 Colo. 132, 83 Pac. 637, it was said:

"The only business which plaintiff actually transacted in this state (Colorado) is that involved in this action. There is no averment that it has made any other loan or sold any other stock, and proof of the allegation which is made would be that plaintiff loaned money to defendant and took his mortgage. It has been repeatedly decided in this jurisdiction that a single act of business does not come within the purview of these statutes."

There the statutes are somewhat similar to ours.

The question was quite fully discussed in Ammons v. Brunswick-Balke-Collender Co., 5 Ind. T. 636, 82 S. W. 937, where an act of Congress was involved which required certain things to be done before any foreign corporation shall begin to "carry on business" in the Indian Territory. It was held:

"That a single act of business is not doing or carrying on business within the meaning of the act of Congress."

The rule is similarly stated in 13 Am. & Eng. Ency. of Law, 869, and numerous cases cited in support of the text. It was held, in Wilson v. Peace, 85 S. W. 31, syl. (38 Tex. Civ. App. 234), that—

"The ownership of land (in Texas) by a foreign corporation, and the lease of the same on shares, and the assignment of the rent by it, do not constitute doing business in this state, in such sense as to require such corporation to obtain a permit from the secretary of state."

To like effect is the decision in the case of Louisville Property Co. v. Mayor and City Council of Nashville, 114 Tenn. 213, 84 S. W. 810.

[1] Respondent contends, aside from the decisions above pointed out, that the objection is an affirmative defense, not set up in the answer, and, in the absence of proof of noncompliance, the deed of trust had its usual effect. The legal title vested in the trustee, unless defendant showed from the records of the county the special facts showing it did not. However this may be, the cases seem to hold with much unanimity that an isolated act, such as is here shown, is not carrying on business in the state within the meaning of the statute.

The only objection made to the sample bonds was that plaintiff had not complied with the statute. The objection was properly overruled and the samples became part of the record.

At this point the deposition of Harry H. Gallinger, taken in San Francisco, was opened. Objection to its being read was made on the ground that the time given for taking the deposition was too short and on the further ground that a stipulation had been made to take Gallinger's deposition in New York City. The objection was overruled and the deposition admitted. It appeared that this witness was the holder of a majority of the bonds issued by the power company. Over objection that it was not the best evidence, the witness was permitted to testify, to the direct question, that the power company, on July 15, 1911, at the city of New York, "made and executed 700 first mortgage bonds each of which bore the date of July 15, 1911. * * * The Court: The record is the best evidence. Mr. Peckham: It is evidence of the number of bonds. It would be impractical for us to produce all the bonds issued. The Court: Objection overruled." Counsel handed witness the complaint and asked him to examine the copy of the bond set forth in paragraph VI and to state whether the bonds mentioned by the witness in his previous answer "were substantially in the words and figures of the copy of the bond in the complaint." The witness answered, "Yes, sir." He testified that he had none of the bonds with him: that they were with the Equitable Trust Company of New York and were deposited with the company in June, 1915. The witness, over objection that it was not the best evidence, testified that, after the execution of the bonds, as mentioned by him, and prior to the commencement of the action, the power company, "for a valuable consideration, made, executed, delivered, and issued 290 of the first mortgage bonds of the denomination of $1,000"; and he gave like answer as to 360 bonds of the denomination of $500. Counsel for plaintiff, in support of the questions, remarked:

"It is impracticable to produce every bond issued by this company, and we have sample copies of them before the court. * * * That is one of the bonds before the court, and this is testimony as to the number issued."

The witness then testified, to which there was no objection made, that the plaintiff company accepted the trust involved in the trust deed, dated July 15, 1911, and duly qualified thereunder and ever since has been and now is acting under that deed of trust and mortgage. He testified, also, without objection, that, on June 9, 1915, he presented to plaintiff at its office in New York certain described coupons calling for interest on said bonds and demanded payment; that payment was refused; that on that day the witness was the holder of a majority of the outstanding bonds of said

power company. He was then asked to state whether or not on that date he "requested plaintiff to declare the principal and interest of all bonds secured by that first mortgage or trust deed and then and there outstanding to be due and payable immediately." Objection was made to the question that the demand is by the deed of trust required to be in writing and the writing is the best evidence, and, further, that the question calls for a conclusion of the witness. It appeared that this request was in writing. To the question was added a statement of the purpose of the request, to which like objection was made. At the suggestion of plaintiff's attorney, the objection was overruled, "subject to counsel's motion to strike out." No answer is in the record, but the witness was shown a paper which, the record states, "shows on its face that it is a carbon copy of that written request." The witness stated that it was a true copy of the original signed by him before a notary public. The copy was offered in evidence. Objection was made that this copy is secondary evidence; "that the original is filed with the plaintiff and presumed to be in the plaintiff's possession and is the best evidence * * * and has not been introduced or accounted for." The court seemed to be of the opinion that, as the original paper is in the possession of plaintiff, this copy was inadmissible to establish the fact in question, but "for the purposes of the deposition" the court overruled the objection. "Mr. Rankin (defendants' attorney): That didn't go to the extent of proving the allegation of the complaint? The Court: That is a question in my mind whether it goes that far or not, whether the court would receive it for that purpose. If it is evidence of that fact you have it in the record." The document, Exhibit B, was then read in evidence. Counsel for defendants then made a motion to strike out the answers given by the witness, and, after some remarks, said:

"The copy you offer, is it the demand that the Equitable Trust Company declare all bonds due and payable and so forth, is that the paper you referred to? Mr. Peckham: Yes. Mr. Rankin: Then I am mistaken. The Court: Motion denied."

It is not quite clear what counsel meant by saying he was mistaken; but, followed as it was by the ruling apparently different from the impression the court had of the admissibility of the document, we must conclude that counsel intended to waive his objection.

Mr. Peckham was then sworn as a witness and testified, without objection, that he personally served upon the power company the declaration of the Equitable Trust Company which was received by the power company June 19, 1915. This declaration recites the proceedings set forth in the complaint leading up to the default of the power company; that the holder of a majority of the bonds now outstanding of said company has filed a written request to declare the principal of said bonds due and payable immediately, and closing with the declaration that "the principal of all bonds secured by the said first mortgage or trust deed now outstanding is due and payable." It was then shown that, on June 23, 1915, plaintiff demanded of the power company payment of the principal sum of all outstanding bonds secured by said mortgage of $470,000, together with interest. The refusal of the power company to pay said demand was also shown.

[2, 3] Turning back to certain rulings of the court, we think the testimony of Witness Gallinger that the power company executed 700 first mortgage bonds was inadmissible. The bonds themselves, together with the proceedings of the power company under which they were executed, would be the best evidence. The witness, however, was permitted to testify, without objection, that the copy of these bonds as set forth in the complaint was substantially the same as the bonds to which he had just referred. The sample copies previously admitted recited the facts substantially as testified to by the witness.

A word as to the admission of Witness Gallinger's testimony that the power company executed and delivered to plaintiff the number of bonds in question.

It was held in Dickerman v. Northern Trust Co., 176 U. S. 181, 193, 194, 20 Sup. Ct. 311, 316 (44 L. Ed. 423), that—

"It was sufficient to prove that the bonds were valid and were outstanding obligations of the company, and it was not necessary to show in whose hands they were or to require their production."

It was pointed out that the bonds were often widely scattered, making it impossible to produce them, and that "the practice has been to order a decree of foreclosure and sale without their production." It has been shown that the bonds in the present case are in the possession of the plaintiff for purposes of the trust. A sample copy is in evidence, and, without objection, it was shown that the bonds mentioned in the complaint are substantially in their terms the same as the sample. They import execution, consideration, and validity on their face, and their possession by plaintiff implies that they were delivered. There is sufficient evidence, admitted without objection, to show that the bonds mentioned in the complaint were delivered to plaintiff to be held and dealt with in accordance with the trust imposed upon it, and that the action is but the final step contemplated by all the parties in case of default by the power company.

Conceding error in the rulings above noted, they are not of such gravity as to justify the reversal of the judgment. It appears clearly

enough that under no circumstances could a new trial give superiority to appellants' lien. The sale under which they claim is based upon a judgment entered more than a year after the recording of the deed of trust and mortgage given by the power company and the issuance and delivery of its bonds to the plaintiff for the purposes of the trust.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

---

38 Cal. App. 531

O'BRIEN v. NEW METHOD CO-OP. LAUNDRY CO. (Civ. 2595.)

(District Court of Appeal, Second District, California. Oct. 31, 1918.)

1. NEGLIGENCE ⟸136(14) — QUESTION FOR JURY.

In negligence action, the fact of negligence or the lack of it was for the jury.

2. APPEAL AND ERROR ⟸702(1) — REVIEW — PRESUMPTIONS—SUFFICIENCY OF CHARGE.

Where bill of exceptions does not contain all the instructions given by the court, but only those made the subject of the claim of error, it will be assumed on appeal that the whole charge would show no error, and that imperfections of instructions exhibited were harmonized and a correct statement of the law made.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Agnes O'Brien against the New Method Co-Operative Laundry Company. From a judgment for defendant and from order denying motion for new trial, plaintiff appeals. Affirmed.

James Donovan and John L. McGonigle, both of Los Angeles, for appellant.

Elmer R. McDowell and R. C. Gortner, both of Los Angeles, for respondent.

JAMES, J. Appeal from a judgment in favor of defendant, entered upon a verdict returned by a jury. There is also an appeal taken from an order denying a motion for new trial.

Plaintiff was operating a shirt-ironing machine in the establishment of defendant. The machine was arranged in such a way that, after the shirt was placed upon a board or roller, the board was made, by mechanical means to pass forward and backward underneath hot rollers. The fingers of plaintiff's right hand were caught in the rollers and burned. She alleged that the machine was unsuitable and dangerous in that it would, without warning, act irregularly and "jump" and that because of the "jumping" her hand was caught and her fingers burned and injured. Defendant denied negligence on its part, and alleged, further, "that if plaintiff was injured in the operating of said machinery the said alleged accident was due to plaintiff's carelessness in operating the said shirt polisher." It is first contended that this allegation was insufficient to present the issue of contributory negligence. However, we find, upon examining the statement of the evidence, that testimony without objection was introduced tending to show, and from which the jury might rightly conclude, that in operating the machine plaintiff was habitually negligent in not giving close attention to her work, and that she had been advised that she should be careful and "keep her eye on the work while she was ironing, because the machine was dangerous." There was testimony also by others who operated the machine before and immediately after the accident that it was in good working order, and that it did not "jump," as the plaintiff asserted it did. It is very clear that the parties to the suit considered that the issue of contributory negligence was before the court, and that they tried the case upon that assumption. While there was a demurrer to the answer, it appears not to have been specially pointed to the alleged insufficiency of the plea of contributory negligence.

[1] Counsel for appellant further insist that, on the mere testimony as stated by the plaintiff that the machine worked in an irregular manner, a prima facie case was made out, and that there was no evidence sufficient to overcome that. Suffice it to say that it was for the jury to take the whole case as made by the evidence on behalf of both plaintiff and defendant and determine the fact of negligence or the lack of it.

[2] A number of instructions are referred to as having been given and refused, for which error is claimed. The bill of exceptions does not contain all of the instructions given by the court, but only those the giving of which and refusal to give which are made the subject of the claim of error. In such a state of the record we must assume that were the whole charge of the court before us, it would not show error, but that any imperfections of instructions as are exhibited here were harmonized, and that a correct statement of the law was made. Harris v. Barnhart, 97 Cal. 546, 32 Pac. 589; Churchill v. More, 4 Cal. App. 219, 88 Pac. 290. It necessarily must be said that from such a record this court would not be justified in determining that there had been a miscarriage of justice.

We find nothing in the argument presented upon this appeal which justifies interference with the judgment or order as entered.

The judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; MYERS, Judge pro tem.

---

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

38 Cal. App. 521

## PEOPLE v. BAILEY. (Cr. 611.)

(District Court of Appeal, Second District, California. Oct. 30, 1918.)

1. CRIMINAL LAW ⊜1159(3)—REVIEW—CONFLICTING TESTIMONY.

An Appellate Court cannot interfere with the verdict of a jury made upon conflicting testimony unless the evidence is so unsubstantial as to amount to no proof at all.

2. HOMICIDE ⊜250—MANSLAUGHTER—SUFFICIENCY OF EVIDENCE.

Circumstantial evidence *held* insufficient to support conviction for manslaughter.

3. CRIMINAL LAW ⊜1144(13) — REVIEW — VERDICT.

On reviewing evidence to ascertain if it is so unsubstantial as to justify an appellate court in disturbing verdict of conviction, the evidence for the prosecution must be taken alone and given the strongest interpretation permissible.

4. CRIMINAL LAW ⊜368(2)—EVIDENCE—RES GESTÆ.

In murder prosecution, where deceased was discovered between 3 and 4 o'clock, evidence that defendant's roommate told witnesses between 1 and 3 o'clock that defendant was asleep was not admissible as part of the res gestæ.

Appeal from Superior Court, Imperial County; J. W. Curtis, Judge.

William Bailey was convicted of manslaughter, and he appeals. Reversed.

Conkling & Brown, of El Centro, for appellant.

U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn, Deputy Atty. Gen., for the People.

JAMES, J. Appeal from a judgment directing the imprisonment of the defendant in the state penitentiary.

Appellant was charged by an information of the district attorney with the crime of murder, alleged to have been committed on or about the 15th day of December, 1917, in the county of Imperial. There were two trials, the jury having disagreed at the first, and upon the second returned a verdict of manslaughter, carrying the recommendation that there be imposed "the minimum sentence." In view of the point made by appellant that the evidence was insufficient to sustain the conviction, we will relate the story of the crime, as the evidence shows it, with considerable detail, giving particular emphasis to all of the testimony introduced on behalf of the prosecution which, it is claimed, tends to show the defendant's guilt:

On December 15, 1917, appellant was the owner of a small store at a little place called Rockwood, in Imperial county. The deceased was a friend of the defendant, and resided alone in a small house or cabin a short distance away from the store, just how far does not appear. The deceased took his meals with appellant at the store. Another man, named Curran, was at the time residing with the defendant at the store. No other persons lived at that place. There was an apartment in the rear of the storeroom where there was a bed in which the men slept, and it was also in the rear part of the building that they prepared and ate their meals. At about 12 o'clock on the night preceding the alleged murder, a trapper, named Moore, knocked at the door of the store and awakened appellant. At the request of the trapper, Bailey went out and assisted him in finding a sack which he had brought on the stage with him and which he had mislaid in the darkness. This sack contained some vegetables and two quart bottles of intoxicating liquor, one being corn whisky and the other pure alcohol. The trapper remained through the night and at least through the larger portion of the next day. All of the three men, Curran, Moore, and appellant, were in the habit of using intoxicants to excess, as was also deceased. The three men first mentioned, after the arrival of the trapper, had some drinks, and on the following morning they again partook of the liquor, at least appellant and Curran did. At that time they used the pure alcohol, diluted with water, into which was mixed sugar. At the time for the morning meal on the 15th appellant went to the house of deceased and brought him over to the store to have breakfast. The deceased, it appears, there partook of the liquor. Later on in the morning, at perhaps about 10 o'clock, deceased and Curran went to a ranch owned by the deceased, which was located some distance out of the town of Rockwood. They returned from there between 12 and 1 o'clock, deceased going to his cabin, and Curran returning to the store of appellant. No witness saw Curran or the deceased at the time the latter reached his cabin, and from this point on, up to the time of the discovery of the dead body of deceased in his cabin, between 3 and 4 o'clock of the same afternoon, the story as to the movements of Curran and appellant is somewhat in dispute. It was several weeks after the alleged murder that appellant was arrested and charged with the crime, and up to the time of the first trial Curran was held as a witness in the custody of the sheriff in default of bond. After the first trial he was released, and it appears that he promptly disappeared, and the sheriff was unable to find and subpœna him when the second trial came on. His testimony, as given at the first trial, was read in evidence from the reporter's transcript, and it was this testimony that the prosecution mainly relied upon in the effort to fix the crime upon appellant.

We will proceed to the narrative of this testimony so given by Curran. The witness stated that upon returning from the ranch with deceased he left deceased at the latter's cabin and went on to the Bailey store; that he found Bailey seated at a table in the rear of the store, with the trapper, Moore, with a bottle of whisky before them, a portion of which had been consumed; that he found the empty bottle which he presumed had contained the alcohol lying on the floor, and this he threw away. Curran stated that he was pretty well intoxicated at the time; he felt badly; that he proceeded to the rear of the store, where the bed was, and lay down; that appellant came back where he was and remarked aloud that Curran had gone to bed, and then took a cover of some sort and laid it over him; that Bailey then went toward the front of the store and out; that in front of the store was a chair and a bench; that he (Curran) did not know where appellant went when he disappeared through the front of the store, and did not know whether he left the premises or not; that the witness went to sleep and remained asleep until about 3 p. m., when he awoke and found appellant seated in a chair in front of the store asleep; further, that a revolver was habitually kept about the store; that it was sometimes kept under the store counter, sometimes in a rice barrel, and sometimes under the pillow of the bed; that when he arrived from the ranch at 1 o'clock he noticed that appellant had the revolver stuffed down into his trousers, as he sat at the table with the trapper; that when he awoke in the afternoon he was still feeling badly; that he took a package of cigarettes over to a man working at a milling establishment near by, came back, and talked with appellant; that something was said about the deceased and also about preparing a meal; that he (the witness) went to the cabin of deceased to call him; that he found the deceased lying in a pool of blood dead, upon the floor of one of the rooms; that he immediately returned to the store, informed appellant of what he had found, and was instructed by appellant to call some of the men and notify the officials; that when these arrived, the party, including the witness and appellant, went over to the cabin and viewed the dead body, and they returned to the store; that appellant himself phoned to the sheriff; that the witness noticed some red marks or spots upon the trousers and shoes of appellant and called appellant's attention thereto, whereupon appellant informed him that he had spilled some catsup over them; that the witness told appellant that the spots "looked bad," whereupon appellant took off the trousers and washed his shoes. Other details given by the witness we do not regard as in any way presenting incriminating matter.

An officer who visited the store asked whether any weapons were kept about there, and was told by Curran that there were weapons, including a revolver; that he asked that the revolver be given him, and that Curran went to the bed and took the revolver from under the pillow; that it was a 38-caliber revolver, fully loaded, except that one chamber had been discharged; that there was about the weapon an appearance and smell as though the revolver had been discharged, as the witness said, within a few hours previous. No attempt was made by appellant to destroy or conceal the trousers, and portions of them were later taken for the purpose of having the spots analyzed. One witness, who was engaged in a laboratory in Los Angeles, testified that he had analyzed the coloring matter obtained from some of the spots, and that he had determined that it was human blood.

At no time did appellant make any statements which tended of themselves to incriminate him. Some little contradiction was shown between statements made at the trial, regarding the time when the shot had been fired from the chamber of the revolver and statements made previously. It was shown that the witness had previously stated that the gun had been fired about a month before the alleged homicide, and his statements at the trial showed that it had been fired about a week before. Appellant and the deceased had always been close friends. Appellant testified that deceased had done some favors for him and that he had done many favors for the deceased. The only hint of any quarrel was that relating to an argument which occurred between the two men at a time considerably in advance of the commission of the alleged crime, which argument arose over the refusal of deceased to pay fare to an automobile driver who had brought the two men home from some point. At that time the deceased was objecting to the amount of the fare, and appellant insisted that he should not argue with the driver, but pay it. The fare was paid and the dispute there ended, and from no testimony does it appear that the men were other than upon the most amicable terms thereafter, as they had theretofore been. It was established that deceased was killed by a bullet passing through his head, and a bullet, which was picked up in the room near the body, was of 38-caliber.

[1-4] We have now stated all of the most material evidence offered in the case by which the prosecution claimed that the guilt of appellant was established. The question, then, submitted to us is as to whether this evidence was of such a substantial nature as to justify the conviction, or whether it merely presents a set of suspicious circumstances the sum of which cannot amount to proof of the commission of the alleged crime by appellant. We are not satisfied that the proof made was sufficient to support the ver-

dict of the jury. In expressing this conclusion we have not left out of view the requirement that, before an appellate court can interfere with the verdict of a jury made upon conflicting testimony, the evidence shown must be of such an unsubstantial nature as to amount to no proof at all; and thus do we characterize the case for the prosecution, as shown in this record. The evidence was circumstantial purely, and at best established only a suspicion of guilt; the alleged incriminating circumstances stood alone and formed no completed chain. No witness produced at the trial saw appellant go to the house of deceased on the afternoon referred to, no one saw him at that house, and no one saw him on that day discharge a revolver. Absolutely no motive for the crime was established, and the fact of the conceded friendship between the deceased and appellant is a potent argument against any subtle motive having been aroused in the mind of appellant. The statement of the medical expert that the blood that he found upon the trousers was human blood did not have any direct effect to connect appellant with the alleged murder; and this witness declined to state as to whether the blood that he examined was fresh or old. The opinion of the officer who examined the revolver, to the effect that he believed from the smell and appearance that the chamber had been discharged within a few hours prior to the making of his examination, while also a suspicious circumstance, could not legally be given much weight, unsupported by some proof other than that narrated, such, for instance, as establishing what the prosecution did not establish, that appellant, between the time that deceased returned to his cabin and the time of the discovery of his dead body, had visited the latter's place of abode. It is understood, of course, that in considering the particular question under discussion the evidence for the prosecution must be taken alone and given the strongest interpretation permissible. It may be added, however, that as to each of the matters adverted to, the appellant testified freely and offered plausible explanation. As to the firing of the gun, he stated that, at the time he was first interrogated about it, he did not recall precisely the time that he had fired the gun, but that some days after that time a witness (apparently reputable) had reminded him that about a week before that time he had, in the witness' presence, discharged the gun at a stray dog near the store. He produced this witness, who corroborated the testimony fully. As to the alleged blood spots, he testified that on the day of the alleged homicide he was intoxicated, and that in taking catsup from a bottle he had spilled the contents down the front of his trousers and onto his shoes, and remembered that Curran had called his attention to it, and that at that time he had taken off the trousers and washed one of his shoes to clear it of the stains. He further stated that a day or so before, while wearing the same trousers, he had killed some squabs with a butcher knife, and that, no doubt, blood had dropped upon the trouser legs from the birds; that he knew of no other blood having gotten there, although he said he was in the habit of shooting rabbits and of wearing the trousers while so engaged. He testified further that he was lying down when Curran returned that afternoon, and that he did not get up until later in the day. He flatly contradicted Curran as to the latter having gone to sleep, and stated that he saw Curran behind the counter after the latter arrived from the ranch and saw him there again when he woke up. Another witness, apparently reputable, testified that he saw Curran back of the counter at about 1 o'clock and again at 3. Appellant stated, and there appeared to be no dispute about that, that it was his habit to keep the revolver about the store on account of thieves, who had previously robbed him; that on the day in question he did put the revolver in his trousers for a time, but did that because he found it under the counter and was afraid some one would take it; and that he had put it in his pants, intending to put it under the pillow, but was interrupted at the time. He did not state, however, with clearness as to when the gun had been replaced under the pillow. Upon the evidence introduced on behalf of the people, including all of the alleged contradictions, as shown in the statements made by appellant, we do not think that a sufficient case was made entitling the jury to return a verdict of guilty. Having reached that conclusion, it will not be necessary to give particular attention to the alleged errors assigned by appellant. We may call attention, however, to one of them: The defense produced two witnesses who were ready to testify that between 1 and 3 o'clock on the afternoon of December 15th, when they saw Curran back of the counter at appellant's store, Curran told them that Bailey was asleep. It will be remembered that Curran's testimony was that he himself went to bed, and that he did not know what happened after that until just before the time the body of deceased was discovered in the cabin. That this testimony was most material there can be no doubt; that it was admissible as part of the res gestæ we do not believe. It was purely impeaching testimony, and no foundation had been laid for its introduction in the examination of Curran. We called attention to the fact that Curran had disappeared at the time of the second trial and could not be found; hence his testimony, given at the previous trial, was read in evidence. He was not at that time asked as to whether he had made the statement to these witnesses to the effect that on that afternoon appellant was asleep. It might well be that the defense, as counsel

state, was laboring under a disadvantage because he did not know that there were witnesses available at the first trial who would testify to these facts. But that was a misfortune which could not be made to supply the want of sufficient foundation being laid for the introduction of the testimony referred to.

For the lack of sufficient evidence shown to justify the verdict of the jury, the judgment appealed from is reversed.

We concur: CONREY, P. J.; MYERS, Judge pro tem.

---

38 Cal. App. 544

## PEOPLE v. ALI. (Cr. 622.)

(District Court of Appeal, Second District, California. Nov. 4, 1918.)

1. CRIMINAL LAW ⊜1144(19)—APPEAL—PRESUMPTIONS.

Where record on appeal does not show that an application stating grounds of appeal was filed by appellant as required by Pen. Code, § 1247, and no suggestion was made that record was insufficient, it will be presumed that no such application was filed.

2. CRIMINAL LAW ⊜1071—APPEAL—FILING OF APPLICATION—GROUND OF APPEAL.

The filing of an application stating grounds of appeal required by Pen. Code, § 1247, is mandatory, and upon appellant's failure to so do an appeal will be dismissed.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

M. Ali was convicted of embezzlement, and from the conviction and from order denying new trial he appeals. Appeals dismissed.

O. V. Willson, of El Centro, for appellant.

U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn, Deputy Atty. Gen., for the People.

CONREY, P. J. [1, 2] In the court below the defendant was convicted of the crime of embezzlement. He gave notice of appeal from the judgment and from an order denying his motion for a new trial. A clerk's transcript and a reporter's transcript of all of the evidence received at the trial (excepting a certain exhibit) are on file in this court. The Attorney General objects to any consideration of these appeals for the reason that the record does not show that an application stating the grounds of the appeal was filed by the defendant as required by section 1247 of the Penal Code. This objection was called to the attention of defendant's attorney by the service upon him of respondent's brief more than a month prior to the submission of the case in this court. No suggestion has been made that the record is incomplete, and we therefore assume that appellant failed to comply with the requirements of said section 1247, by neglecting to file the application required by that section. The filing of such application is mandatory. The section itself declares that "if such application is not filed within said time, the appeal is wholly ineffectual and shall be deemed dismissed and the judgment or order may be enforced as if no appeal had been taken." Rhodes v. Sargent, 17 Cal. App. 54, 56, 118 Pac. 727; People v. Measor, 20 Cal. App. 406, 129 Pac. 469.

The appeals are dismissed.

We concur: JAMES, J.; MYERS, Judge pro tem.

---

38 Cal. App. 545

## VON DER KUHLEN v. CLINE, Sheriff.

(Civ. 2804.)

(District Court of Appeal, Second District, California. Nov. 4, 1918.)

SHERIFFS AND CONSTABLES ⊜92—FAILURE TO PROCEED UNDER EXECUTION—EXCUSE.

Action of claim and delivery against sheriff and others by a third party claiming title to automobile levied on, not being one in which court had authority to grant injunction order restraining sheriff from making sale, would not justify him in refusing to proceed, where bond had been given to indemnify him against such third party's claim.

Petition by Charles Von Der Kuhlen for a writ of mandate requiring John C. Cline, Sheriff of the County of Los Angeles, to advertise and sell property levied upon under execution. Granted.

H. L. Sacks and Isaac Pacht, both of Los Angeles, for petitioner.

Ward Chapman and L. M. Chapman, both of Los Angeles, for respondent.

CONREY, P. J. In a certain action in the superior court of Los Angeles county Charles Von Der Kuhlen, as plaintiff, obtained judgment for the recovery of a sum of money against the defendant A. E. Warmington. On an execution issued in that action, the sheriff levied upon and took from the possession of Warmington an automobile, which, under the plaintiff's direction, he had seized as property of Warmington. Thereafter the California Southern Railroad Company filed a third party claim with the sheriff, claiming that the automobile was its property. To indemnify the sheriff against such third party claim, Von Der Kuhlen gave to the sheriff an indemnity bond as provided by law. Nevertheless the sheriff now refuses to proceed under the execution and make sale of the property so left in his custody.

After said indemnity bond had been given,

the California Southern Railroad Company, as plaintiff, filed an action in claim and delivery against the sheriff and others, alleging that said automobile was the property of said plaintiff California Southern Railroad Company, and that, as such owner, it was entitled to the possession thereof. Thereafter in that action the railroad company filed an affidavit and made a motion to the court praying for an injunction to restrain the sheriff from selling the automobile under the execution issued in the case of Von Der Kuhlen v. Warmington. The court thereupon made an order purporting to enjoin and restrain the sheriff from making any sale of the automobile under and by virtue of said execution, until further order of the court. The sheriff's refusal to proceed under the execution is based upon said restraining order. The sheriff having thus refused to proceed, Von Der Kuhlen now petitions this court for a writ of mandate requiring the sheriff to advertise and sell the automobile under said execution.

The action of California Southern Railroad Company against Cline and others was an action at law, and not a suit in equity. It does not appear that the complaint in that action demanded equitable relief or that it stated any facts upon which equitable relief should be grounded. The case was not one in which the court had authority to grant an injunction. It is manifest that, if the railroad company is the owner of the automobile and entitled to possession thereof, the railroad company will be able to obtain adequate relief in damages against the sheriff, and the sheriff in turn is adequately protected by the indemnity bond. A third party claimant may not by an injunction thus obtained interfere with the execution of process under a lawful judgment between other parties. The only exception to this rule must be found in some case of an equitable nature wherein a third party claimant's cause of action itself furnishes ground of equitable relief. The restraining order relied upon by the defendant here does not come within such exception.

The defendant herein has failed to show any valid reason why he should not proceed under the levy and make sale of the property. His duty to so proceed requires the performance of an act which the law specially enjoins upon him as a duty resulting from his office. The plaintiff is entitled to the demanded writ.

On October 31, 1918, immediately after the submission of this matter for decision, the court made its order that the peremptory writ of mandate issue, and stated that an opinion in writing would subsequently be filed. Pursuant to the intention thus expressed, this opinion is now placed on file.

We concur: JAMES, J.; SHAW, J.

177

# CALIFORNIA REPORTER

177 PACIFIC REPORTER

177

179 Cal. 393

## In re SLOAN'S ESTATE. (L. A. 5827.)

(Supreme Court of California. Dec. 11, 1918.)

1. HUSBAND AND WIFE ⊂271—AGREEMENT SETTLING PROPERTY RIGHTS—VALIDITY.

Agreement between husband and wife after separation settling rights in property, all of which was declared to be community property, and relinquishing all rights to inherit from each other, *held* clearly authorized by Civ. Code, § 158, and to bar wife from rights in husband's estate accorded by Code Civ. Proc. § 1465.

2. HUSBAND AND WIFE ⊂271—SETTLEMENT OF PROPERTY RIGHTS — RIGHT TO CHANGE BENEFICIARY IN LIFE POLICY.

Under agreement between husband and wife settling their rights in community estate, husband to have all money and "other securities which he now owns," included insurance policies upon life of husband in which wife had no vested interest, and husband presumably had the right to substitute the name of another for that of wife as beneficiary.

3. HUSBAND AND WIFE ⊂271—SEPARATION AGREEMENT—INVALIDITY.

Agreement between husband and wife relating to alimony and action for divorce made on the same day as agreement settling property rights in community estate *held* distinct and separate from community agreement, so that, conceding invalidity of the former, it would not, under Civ. Code, § 1642, be read in connection with community agreement so as to invalidate it.

4. HUSBAND AND WIFE ⊂271—AGREEMENT SETTLING PROPERTY RIGHTS — CONSIDERATION.

Agreement between husband and wife, relating to alimony and divorce, *held* not to impose any obligation on wife to sue for divorce, so that agreement could be deemed a consideration for another agreement executed on the same day, settling property rights in community estate.

5. HUSBAND AND WIFE ⊂271—AGREEMENT SETTLING PROPERTY RIGHTS—RESCISSION.

In view of Civ. Code, § 1691, where wife neither restored nor offered to restore real property conveyed to her pursuant to agreement with husband settling property rights in community estate, *held* she could not claim the right to rescind and take property rights in her husband's estate accorded by Code Civ. Proc. § 1465.

Department 1.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the Estate of James Harvey Sloan, deceased. From a judgment of dismissal entered against petitioner, Dola Arvilla Sloan, upon sustaining of a demurrer to her second amended petition without leave to amend, she appeals. Affirmed.

Ray L. Chesebro and Edward Winterer, both of Los Angeles, for appellant.

William H. Fuller, of Los Angeles, for respondent.

VICTOR E. SHAW, Judge pro tem. This is an appeal from a judgment of dismissal entered against petitioner, Dola Arvilla Sloan, upon the sustaining of a demurrer to her second amended petition, filed under section 1465, Code of Civil Procedure, without leave to amend.

It appears from the petition that petitioner and James Harvey Sloan were married on the 15th of January, 1894, and lived together as husband and wife until March 16, 1916, on which date he left the family residence and thereafter, without her consent, continued to live separate and apart from her; that on July 25, 1916, the parties entered into an agreement, which, after reciting the fact that they were husband and wife and desirous of settling their rights as to property, all of which, it was declared, was community estate, provided that Dola Sloan should have as her sole and separate property certain described real estate, including the family residence, valued at $6,000, upon which she, on October 5, 1915, had filed a declaration of homestead, together with the furniture and furnishings therein, also all moneys then in her possession and that due to her. As to the husband, it was agreed that he should, as his sole and separate property, retain all moneys then in his possession, and that due him, and also "all stocks, bonds and other securities which he now owns or which he may hereafter acquire," together with his professional library then in possession of the wife, and which she agreed to surrender to him on demand therefor, also all the office furniture, effects, fixtures, and certain described dental appliances. The agreement further provided that:

"All property hereafter acquired and all earnings which may be made or acquired by the parties hereto shall be his or her sole and separate property, respectively, free from all claim of the other party; that each of the parties hereto shall have the right to dispose of his or her property, both real and personal, that may be hereafter acquired by either of them, as fully and effectually as if the parties hereto were not married and had never been married, and that each party hereby releases and relinquishes to the other party, and to his or her heirs, assigns and legal representatives, all claims, demands and interests against or in the estate of the other upon the death of either.

"Ninth. That the parties hereto, and each of them, do hereby waive and relinquish and surrender any and all claims and rights to inherit from the other in case one or both of the parties hereto shall die intestate, which claim and right and all of them said parties and each of them, respectively, do hereby and do now forever relinquish and surrender in favor of all of the heirs of such party so dying and to the exclusion of either and each of the said first or second parties hereto, respectively.

"Tenth. That the parties here to do and have hereby settled and forever adjusted by and between themselves all present and future property rights of every kind and nature, whether community or separate property, wheresoever the same is or may be located, and all other rights and claims which either may have or claim to have against the other so far as their property rights are concerned, and in addition thereto the said parties hereto do hereby settle and adjust, and have settled and adjusted, and forever determined all their respective rights to, of and in any inheritances the one from the other, respectively."

On the same date there was delivered to the wife and recorded at her request, a grant deed, from the husband, conveying to her the property on which she had declared a homestead, the other parcels of the estate having been theretofore conveyed to her. On the same date, to wit, July 25, 1916, another instrument in writing was executed by the parties, whereby, after reciting that differences had arisen between them, "by reason of which it may become necessary that the marriage * * * be dissolved by proper legal proceedings * * * and in order that there may be no controversy between the parties at the time of said event, if it does occur, in reference to alimony and attorney's fees," it was agreed that commencing with August 1st, following, the husband should pay to the wife $40 per month up to April 1, 1917, which payments at said time should cease, except in the event the wife instituted an action for divorce, in which case in addition to $125 to be paid by the husband for attorney's fees and costs, said payments of $40 per month should continue to be paid to the wife for her support, and in lieu of alimony; providing that if she obtained an interlocutory decree by October 1, 1917, the payments should continue for one year thereafter, at the expiration of which time they should cease and the husband be released from further obligation for maintenance and support of the wife. It was further agreed that the wife should not interfere with the business of the husband, and that if he failed to make the payments as agreed she might terminate the agreement, and further agreed that no action for divorce brought by the wife should be based on the grounds of adultery of the husband. On November 1, 1916, the husband died, leaving a will, which was admitted to probate and letters testamentary issued to Chas. E. Putnam as executor.

[1] Appellant's chief contention is that Exhibit B, by which the parties declared that all property owned by them was community estate, which under an executed agreement (section 1661, Civ. Code) was divided, the husband conveying to the wife as her sole

and separate estate real property of an admitted value of upwards of $6,000, the title to which stood in his name, is void on its face. Considered alone, there is no merit in this contention. The contract is clearly one authorized by section 158, Civil Code. Yoakam v. Kingery, 126 Cal. 30, 58 Pac. 324. It was made by parties capable of contracting and upon a sufficient consideration. Conceding at the time of the husband's death appellant was, in the absence of an agreement for a separation, as was the case in Estate of Miller, 158 Cal. 420, 111 Pac. 255, and Estate of Yoell, 164 Cal. 540, 129 Pac. 999, and therefore, as his widow, entitled to the rights and property accorded by section 1465, Code of Civil Procedure, nevertheless, by the terms of the agreement, petitioner in express terms and in language that is most apt for the purpose relinquished all claim and right to his property and estate, thus barring herself from the claims made, just as effectually as such an agreement would bar her right as widow, to administer upon the estate of her deceased husband. Estate of Walker, 169 Cal. 400, 146 Pac. 868.

[2] The subject of the agreement was all the community property of the parties. This though not specifically mentioned other than as securities (Thayer v. Wathen, 17 Tex. Civ. App. 382, 44 S. W. 906; 35 Cyc. 1283), "which he now owns or may acquire," included the insurance policies upon the life of the husband, in which petitioner had no vested interest, and hence, presumably, the assured had the right to substitute for her the name of some other beneficiary.

[3] Petitioner insists, however, that, conceding the agreement, when considered alone, is valid, and constitutes a relinquishment of her asserted rights, nevertheless, it must be read and interpreted in connection with Exhibit C as a part thereof. That the two documents made at the same time must, under section 1642, Civil Code, be deemed one instrument, and, thus considered, it is void on its face, for the reason that it violated good morals, as it shows the design and purpose thereof was to facilitate the procuring of a divorce. Newman v. Freitas, 129 Cal. 283, 61 Pac. 907, 50 L. R. A. 548. We are not impressed with counsel's argument upon this point. Conceding the agreement designated "Exhibit C" to be void for the reason that it was calculated to induce or facilitate the bringing of an action for divorce as claimed by appellant, it relates to a different subject, and is entirely distinct, disconnected, and separable from the valid agreement designated as "Exhibit B."

[4] Moreover, since it imposed no obligation upon the wife to sue for a divorce, it cannot be deemed a consideration for the execution of Exhibit B. No possible cause of action in favor of the husband could have grown out of the wife's failure for any length of time, nor for any cause, to sue him for divorce, nor in case of such suit could the agreement (Exhibit C) control the action of the court in the exercise of its discretion, in allowing her alimony or attorney's fees. No act of omission or commission on the part of either party in violation of the provisions of Exhibit C could affect the acts had and taken under the terms of Exhibit B.

[5] It is next claimed that, assuming the contract on its face to be valid, it is shown to be void by reason of extrinsic matters alleged in the complaint. This contention is based upon a number of grounds, among which it is claimed the purpose thereof was to facilitate a divorce between parties and hence, founded upon an immoral consideration; that it was procured by fraud, consisting in the alleged fact that deceased represented that unless she entered into the agreements he would abandon her forever without support; that he promised that her name as beneficiary in certain certificates of membership in the Bankers' Life Association would not be changed, so that upon his death the proceeds thereof would be paid to her; that a will theretofore made by him in her favor should not be revoked, and that she signed the instruments as the result of coercion and undue influence practiced upon her by deceased. As to all these and other like allegations, in so far as they are sufficient to constitute fraud upon whatsoever grounds based, a sufficient answer thereto, since we hold the contract valid, is that, while petitioner sought a rescission of the agreement under which the community of the couple was divided, and real property of $6,000 in value actually conveyed to her as her sole and separate estate, she neither restored, nor offered to restore, the same, which by section 1691, Civil Code, is made a condition precedent to the maintenance of an action to rescind.

The judgment and order are affirmed.

We concur: RICHARDS, Judge pro tem.; SLOSS, J.

179 Cal. 384

## McDONOUGH v. COOPER. (Sac. 2736.)

(Supreme Court of California. Dec. 10, 1918.)

1. WATERS AND WATER COURSES ⊂231—IRRIGATION — SALE FOR ASSESSMENT — DEED — CONCLUSIVENESS.

St. 1897, p. 271, § 48, makes deed following sale for nonpayment of assessment levied by irrigation district conclusive with respect only to matters not covered by preceding provision, declaring its effect as prima facie evidence.

2. WATERS AND WATER COURSES ⊂231—IRRIGATION — SALE FOR ASSESSMENT — DEED — CONCLUSIVENESS.

Under St. 1897, p. 271, § 48, deed following sale for nonpayment of assessment levied by irrigation district is not conclusive of lawful assessment of property.

3. WATERS AND WATER COURSES ⊂231—IRRIGATION—SPECIAL ASSESSMENT.

Under St. 1897, p. 274, §§ 59, 60, there is no requirement as to how special assessment levied by irrigation district shall be entered on roll, and segregation is not essential.

4. WATERS AND WATER COURSES ⊂231—IRRIGATION—SALE FOR ASSESSMENTS—CERTIFICATE.

Certificate of sale for delinquent assessment levied by irrigation district, though it was not dated on day of sale, and did not specify when purchaser would be entitled to deed, sufficiently met substantial requirements of statute (St. 1897, p. 254).

5. WATERS AND WATER COURSES ⊂231—IRRIGATION—SALE FOR ASSESSMENT—CERTIFICATE.

Formal irregularity of certificate of sale under assessment levied by irrigation district, in that it was not dated on day of sale, *held* cured by curative clause of St. 1897, p. 271, § 48, making deed conclusive evidence of regularity of proceedings.

Department 1.

Appeal from Superior Court, Stanislaus County; W. H. Langdon.

Action by Thomas McDonough against Ida B. Cooper. From a judgment for defendant, plaintiff appeals. Affirmed.

Griffin & Carlson, of Modesto, and Geo. Cosgrave, of Fresno, for appellant.

W. H. Hatton and Hatton & Scott, all of Modesto, for respondent.

SLOSS, J. Action to quiet title to two parcels of land in the city of Modesto. The court gave judgment declaring defendant, Ida B. Cooper, to be the owner of the property. The plaintiff appeals from the judgment.

The plaintiff deraigned title from the United States. The defendant, Cooper, claimed under a deed following a sale for nonpayment of an assessment levied by the Modesto irrigation district for the year 1905.

[1] Section 48 of the act under which the sale was had makes the collector's deed, duly acknowledged and proved, prima facie evidence that the proceedings were regular in seven specified particulars, and then declares that such deed is conclusive evidence of "the regularity of all the proceedings from the assessment by the assessor, inclusive, up to the execution of the deed." St. 1897, p. 271. This conclusive evidence clause differs from section 3787 of the Political Code in that it does not qualify the word "proceedings" by the word "other." Nevertheless, we do not doubt that, as was intimated in Escondido H. S. Dist. v. Escondido Seminary, 130 Cal. 128, 133, 62 Pac. 401, and held in Bruschi v. Cooper, 30 Cal. App. 682, 692, 159 Pac. 728, 734, the legislative intent was that the deed should be conclusive with respect only to matters not covered by the preceding provision declaring its effect as prima facie evidence.

[2] The appellant attacks the regularity and validity of the assessment itself. Under section 48 the deed is prima facie evidence that "the property was assessed as required by law." The Legislature did not, therefore (assuming that it might have done so without violation of constitutional rights), undertake to make the deed conclusive of the lawful assessment of the property.

[3] It appears that in 1905 a special assessment of $43,000 was authorized by election. The board of directors found it necessary to raise an additional sum of $65,525.55 for interest on bonds. They made a levy of $1 on each $100 of property valuation to meet the special assessment, and of $1.55 per $100 for paying the interest. The assessment roll was made up to show, under the head of "total amount of all taxes," the amount of tax figured at the rate of $2.55 per $100 of valuation. The amounts levied on account of the special assessment and the assessment for interest were not separately computed and carried out. Section 39 of the act (Stats. 1897, p. 267) prescribes the method of levying the assessment for the payment of annual interest on outstanding bonds. It then provides that "the secretary of the board must compute and enter in a separate column of the assessment book the respective sums, in dollars and cents, to be paid as an assessment on the property therein enumerated." Sections 59 and 60 (Stats. 1897, p. 274) deal with special assessments. Section 60 declares how the rate of such assessment shall be ascertained, and provides that "the assessments so levied shall be computed and entered on the assessment roll by the secretary of the board, and collected at the same time and in the same manner as other assessments provided for herein." The requirement of the act is merely that the special assessment shall be computed and entered

on the assessment roll by the secretary. It is to be "collected" in the same manner as other assessments, but the statute does not prescribe any particular manner in which it shall be entered on the roll. In the absence of any specific requirement that it shall be separately entered, we see no reason for holding such segregation essential.

[4, 5] The appellant claims, further, that the certificate of sale issued by the collector was irregular in two particulars. The alleged defects are that the certificate is not dated on the day of the sale, and that it does not specify when the purchaser will be entitled to a deed. The facts in these regards are the same as those considered in Bruschi v. Cooper, supra, 30 Cal. App. at pages 693–694, 159 Pac. 728, 734. The court there held that the certificate sufficiently met the substantial requirements of the statute, and with this conclusion we are in accord. Furthermore, it may be pointed out that any irregularity in the certificate is cured by the conclusive evidence clause, since the regularity of the certificate is not one of the matters as to which the deed is made prima facie evidence. The provision for a certificate might have been omitted from the statute altogether without impairing any constitutional right of the property owner. Any irregularity in the form of such certificate may therefore be remedied by a curative clause such as that contained in section 48. Chase v. Trout, 146 Cal. 350, 80 Pac. 81; Baird v. Monroe, 150 Cal. 560, 568, 89 Pac. 352; Bank of Lemoore v. Fulgham, 151 Cal. 234, 90 Pac. 936; Imperial Land Co. v. Imperial Irr. Dist., 173 Cal. 660, 663, 161 Pac. 113.

No other points are made.

The judgment is affirmed.

We concur: VICTOR E. SHAW, Judge pro tem.; RICHARDS, Judge pro tem.

---

179 Cal. 398

## LOS ANGELES COUNTY et al. v. LEWIS et al. (L. A. 5610.)

(Supreme Court of California. Dec. 13, 1918.)

1. JUDGMENT ⊂⊃164—SETTING ASIDE—SUFFICIENCY OF MOTION.

Court, on setting aside default, properly set aside a judgment entered thereon, although the motion did not ask for such relief.

2. JUDGMENT ⊂⊃161 — SETTING ASIDE DEFAULT—SUFFICIENCY OF APPLICATION—"ACCOMPANIED WITH COPY OF ANSWER."

Where defendant served answer after default entered, and clerk kept it without filing it, a notice of motion stating that it would be based upon "said answer and the affidavits attached hereto," no copy of the answer being served with such notice, was "accompanied with a copy of the answer," within Code Civ. Proc. § 473, as amended by St. 1917, p. 242.

3. APPEAL AND ERROR ⊂⊃935(2) — PRESUMPTIONS ON APPEAL—RECORD.

Where the record on appeal from an order setting aside a default was prepared under Code Civ. Proc. § 953a et seq., at the request of plaintiffs, and stipulated as correct by counsel, and settled by the judge, but did not contain a copy of the proposed answer, which accompanied the notice of motion, it must be assumed that the answer was brought to the attention of, and considered by, the court, and that it stated a good defense on the merits.

4. APPEAL AND ERROR ⊂⊃957(1) — SETTING ASIDE DEFAULT — REVIEW — DISCRETION OF COURT.

It is only in very plain case of abuse of discretion that appellate court will disturb action of trial court in overruling motion to set aside default, especially where relief was granted and application therefor was made promptly.

In Bank.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by the County of Los Angeles and others against Walter A. Lewis and others. From an order granting the motion of defendant Lewis to set aside a default, entered for his failure to plead, the plaintiffs appeal. Affirmed.

A. J. Hill, Co. Counsel, and David R. Faries, Deputy Co. Counsel, both of Los Angeles, for appellants.

Geo. L. Sanders, of Los Angeles, for respondent.

ANGELLOTTI, C. J. This is an appeal by plaintiffs from an order granting the motion of defendant Lewis to set aside his default, entered for his failure to plead within the time allowed therefor by law.

[1] By the same order the court vacated the judgment entered upon the default on the day that notice of the motion was filed, although neither the notice of motion nor the motion itself asked for such relief. We agree with the District Court of Appeal of the Second Appellate District, that if the default was properly set aside there no longer existed any basis for the judgment, and the court was warranted in setting aside the same.

The motion was one under section 473, Code of Civil Procedure, and in substance one upon the ground of mistake, inadvertence and excusable neglect. Summons was served in the action on February 1, 1918, and the last day for Lewis to plead was February 11, 1918. The default of Lewis was entered on February 13, 1918. On the last-named day, subsequent to the entry of the default, he served his answer on the plaintiffs and of-

fered the same to the clerk of the court for filing. It was not filed, but the clerk has ever since had it in his custody. No denial as to any of these matters is contained in the counter affidavit filed by plaintiffs on this motion. On February 15th notice of the motion to set aside the default was served and the same, being heard on February 18th, was thereupon granted.

[2] The notice of motion stated that it would be based upon "said answer and the affidavits attached hereto," but no copy of the answer was served with such notice. Section 473, Code of Civil Procedure, as amended in 1917 (St. 1917, p. 242), provides that such an application as was here made "must be accompanied with a copy of the answer, or other pleading proposed to be filed therein, otherwise said application shall not be granted." The principal point made on this appeal is that this application was not "accompanied" by a copy of the answer, within the meaning of this provision, and, therefore, that it was error to grant it. We think that, in view of the facts stated, the application was in substance and effect so accompanied, and that to hold otherwise would be to deny Lewis' right to a hearing on the merits by an unnecessarily strict construction of the provision. The plain object of the provision was simply to require the delinquent party seeking leave to contest on the merits, to show his good faith and readiness to at once file his answer in the event that leave is granted by producing a copy of the proposed answer for the inspection of his adversary and the court. Substantial compliance with the provision of course requires such production in connection with the application for relief. Here admittedly the proposed answer was served (by delivery of copy) on the adverse parties two days before the giving of the notice of motion, and thereupon offered for filing and left in the custody of the clerk. The notice of motion showed that this was the answer that Lewis desired to file and that the motion would be based in part upon the same, and the affidavit of Lewis, a copy of which was served with the notice of motion, showed that the answer desired to be filed was the one served and offered for filing on February 15, 1918, which had ever since that date been in the custody of the clerk. The provision of section 473, Code of Civil Procedure, here involved, like the remainder of the section, must be literally construed with a view to substantial justice, and we are of the opinion that it must be held that, in view of the facts stated, the application for relief was "accompanied" with a copy of the answer proposed to be filed.

[3] The record on appeal, prepared under section 953a et seq., at the request of the plaintiffs, and stipulated as correct by counsel, and settled by the trial judge, does not contain a copy of the proposed answer. There is nothing, however, in the order granting the motion, or in such record, excluding the idea that the proposed answer, which admittedly had been served and offered for filing and was in the custody of the clerk, was brought to the attention of and considered by the court, as the notice of motion indicated it would be, and we think that in support of the action of the court it must be so assumed. We think, likewise, that in support of the action of the court it must here be assumed that such answer stated a good defense on the merits.

[4] We have considered plaintiff's contention that the matters shown in support of the claim that Lewis should be relieved from his default did not make a sufficient case for relief to warrant the action of the court, and have concluded that it may not fairly be held that the learned judge of the superior court was guilty of an abuse of the discretion committed to him in determining that a sufficient case was made to authorize the relief sought. It is only in a very plain case of abuse of discretion that this court will disturb the action of the trial court in a matter of this character, especially where the relief is granted and the application therefor is made as promptly as it was in this case.

In view of what has been said, no other point made requires notice.

The order is affirmed.

We concur: WILBUR, J.; SLOSS, J.; MELVIN, J.; RICHARDS, Judge pro tem.; LORIGAN, J.

---

179 Cal. 387

## SLAKER v. McCORMICK-SAELTZER CO.

(Sac. 2706.)

(Supreme Court of California. Dec. 11, 1918.)

1. MORTGAGES ⊂⊃176—FAILURE TO RECORD—RIGHTS OF SUBSEQUENT PURCHASER.

Civ. Code, § 1214, does not benefit a subsequent purchaser or incumbrancer who took with actual notice of a prior unrecorded mortgage, in view of section 1217.

2. JUDGMENT ⊂⊃562 — RES ADJUDICATA—MERITS.

To operate as a bar, a judgment in a former action must have been on the merits.

3. JUDGMENT ⊂⊃956(5) — RES ADJUDICATA—EVIDENCE.

To determine whether a former judgment is res adjudicata, the entire record of such former action should be examined.

4. JUDGMENT ⊂⊃590(1) — RES ADJUDICATA—MATTERS NOT ADJUDICATED.

Where in a foreclosure suit against the owner and one who had purchased at an execution sale, there was a decree against the mortgagor, which stated that court had no ju-

risdiction to settle priority of claims of mortgagee, and purchaser that "plaintiff have and recover nothing of or from" the purchaser, mortgagee was not estopped to bring action against the purchaser to establish the priority of his mortgage.

Department 1.

Appeal from Superior Court, Shasta County; James G. Estop, Judge.

Action by George W. Slaker against the McCormick-Saeltzer Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Carr & Kennedy, of Redding, for appellant.

Braynard & Kimball, of Redding, for respondent.

SLOSS, J. In May, 1912, Nannie R. Frick executed and delivered to plaintiff, Slaker, a mortgage of real property to secure her promissory note for $1,000. The mortgage was not recorded until January 4, 1916. In the meanwhile, the appellant, the McCormick-Saeltzer Company, commenced an action against Nannie R. Frick and her husband, and levied an attachment on the mortgaged property. It recovered judgment in the action. Execution was issued, and the appellant purchased the property at the execution sale. A certificate of sale was issued to appellant on November 10, 1915, and was recorded prior to the recording of plaintiff's mortgage.

Thereafter plaintiff commenced an action to foreclose his mortgage, making the Fricks and the McCormick-Saeltzer Company parties defendant. The latter appeared, filing an answer and a cross-complaint. The court gave a decree of foreclosure against the Fricks. The decree adjudged "that this court has no jurisdiction to determine in this case the legal question involved as to the priority of the respective liens or claims of the plaintiff and said defendant the McCormick-Saeltzer Company, a corporation, in, upon, and to the premises described in said mortgage," and followed this clause with an adjudication that plaintiff recover nothing from the McCormick-Saeltzer Company, and that the latter recover nothing from plaintiff. Following the trial of the foreclosure suit, this action was brought by plaintiff to establish the priority of its mortgage over the claims of the appellant. Judgment went in plaintiff's favor, and the McCormick-Saeltzer Company appeals.

[1] Passing, for the moment, the questions arising from the prosecution of the foreclosure suit, it is clear that plaintiff's rights were properly held superior to those of the appellant. If appellant had had no notice of plaintiff's unrecorded mortgage prior to its purchase on execution, its certificate, being first duly recorded, would have prevailed. Civ. Code, § 1214; Cady v. Purser, 131 Cal. 552, 63 Pac. 844, 82 Am. St. Rep. 391. But the benefits of the recording statute are not available to a subsequent purchaser or incumbrancer who takes with actual notice of a prior, though unrecorded, instrument. Civ. Code, § 1217; Bell v. Pleasant, 145 Cal. 410, 78 Pac. 957, 104 Am. St. Rep. 61; Robinson v. Muir, 151 Cal. 118, 90 Pac. 521. Here the court found, on sufficient evidence, that the appellant had actual knowledge of plaintiff's mortgage, and of the nonpayment of the note, before it took judgment in its action against the Fricks.

Presenting the point in various forms, the appellant insists that the judgment in the foreclosure suit is a bar to any recovery by the plaintiff in this action. The foreclosure suit was pending when the complaint herein was filed. It had gone to judgment, and the judgment had become final before the trial of this action.

[2-4] The issue of priority as between plaintiff's mortgage and the appellant's certificate was presented in the foreclosure suit. But to operate as a bar or estoppel, the judgment in a former action must have been on the merits. 15 R. C. L. 955; 23 Cyc. 1131; Gray v. Dougherty, 25 Cal. 266; Hughes v. U. S., 4 Wall. 232, 18 L. Ed. 303; Swift v. McPherson, 232 U. S. 51, 34 Sup. Ct. 239, 58 L. Ed. 499. To determine the character and scope of an adjudication, the entire record of the prior action is to be examined. Watson v. Lawson, 166 Cal. 235, 241, 135 Pac. 961; Smith v. Auld, 31 Kan. 262, 266, 1 Pac. 626. Looking merely to the judgment in the foreclosure suit, it is very plain that the court did not therein undertake to pass upon the merits of the controversy between Slaker and the McCormick-Saeltzer Company. What it did was to decline to determine that controversy for the reason that it was without jurisdiction, in that action, so to do. Whether the holding that it had no jurisdiction was sound or erroneous is not a question for consideration here. The essential point is that there was no adjudication of the merits. Having reached the conclusion that it lacked jurisdiction, the court might more appropriately, perhaps, have ordered a dismissal as to the McCormick-Saeltzer Company, instead of adjudging that the plaintiff "have and recover nothing of or from" said defendant. But the mere form of words found in this part of the judgment is not controlling (Dixon v. Sinclear, 4 Vt. 354, 24 Am. Dec. 610), since, upon a reading of the entire decree, it is apparent that the court had no thought of deciding the question now in dispute (see Smith v. Auld, supra). In effect, the former judgment amounted to a dismissal as to the McCormick-Saeltzer Company.

The appellant's claim was that it held a right superior to the plaintiff's mortgage lien. Upon its own theory, the court should have dismissed it from the foreclosure suit. Beronio v. Ventura Lumber Co., 129 Cal. 232, 237, 61 Pac. 958, 79 Am. St. Rep. 118. This, as we have seen, is precisely what was done, and there is therefore no force in the claim that the present controversy should have been litigated in the former action.

The judgment is affirmed.

We concur: RICHARDS, Judge pro tem.; VICTOR E. SHAW, Judge pro tem.

---

179 Cal. 415

Ex parte FRITZ. (Cr. 2209.)

(Supreme Court of California. Dec. 16, 1918.)

1. CRIMINAL LAW ⟸1206(3)—VALIDITY OF SENTENCE—INDETERMINATE SENTENCE.

An indeterminate sentence and a judgment based thereon, where imposed for an offense committed before the Indeterminate Sentence Law took effect, were void.

2. HABEAS CORPUS ⟸22(1)—SENTENCE.

Where prisoner was returned to court after having served 10 months under a void indeterminate sentence, and a sentence of one year imposed, the prisoner was not entitled to release on habeas corpus after two months' imprisonment, the second judgment being the only valid judgment, and the term of imprisonment not commencing to run until delivery of the prisoner at the place of imprisonment under Pen. Code, § 670.

In Bank.

In the matter of the application of Henry Fritz for a writ of habeas corpus. Writ discharged, and petitioner remanded.

Henry Fritz, in pro. per.

U. S. Webb, Atty. Gen., for respondent.

RICHARDS, Judge pro tem. The petitioner aplied for a writ of habeas corpus asking for his release from the state prison. Upon the hearing thereon the following facts were made to appear: The crime for which the petitioner was convicted was committed on February 12, 1917. On the 2d day of November, 1917, by a judgment of the superior court of the county of San Joaquin, he was sentenced to suffer imprisonment in the said state prison for an indeterminate period of not less than one nor more than ten years, under the Indeterminate Sentence Law, which had gone into effect in the month of July of that year. In the month of March, 1918, this court decided the case of In re Lee, 171 Pac. 958, in which it was held that as to offenses committed prior to the date of the taking effect of the Indeterminate Sentence Law (St. 1917, p. 665) that law would be ex post facto, and hence judgments imposing indeterminate sentences upon offenders whose offenses had been committed before such law went into effect would be void. The court in that case, however, indicated the course to be pursued in such cases, viz., that such offenders would not be entitled to their discharge, but should be returned to the superior court in which they had been convicted, for the imposition of a proper sentence. In conformity with this suggested procedure, the petitioner herein was returned to the superior court of San Joaquin county and was therein and on the 18th day of April, 1918, by the judgment of said court sentenced to a term of imprisonment of one year in the said state prison. Having been confined therein for a period of ten months under the former judgment and sentence of said court and having been confined therein for a period of more than two months under the last judgment and sentence thereof, the petitioner now contends that he has fully served the term of one year's imprisonment imposed by said second judgment and sentence, and hence is entitled to his discharge.

[1, 2] We cannot agree with this contention. In accordance with our ruling in the case of In re Lee, supra, the first judgment and sentence under which he was confined was void, and he was therefore entitled at any time to have obtained his release therefrom by a writ of habeas corpus. That judgment and sentence being void, the petitioner was properly returned under the ruling of In re Lee, supra, to the court in which he was convicted for the imposition of a proper judgment and sentence. This judgment and sentence was not an amendment of the former void judgment and sentence, but was an original and the only legal judgment and sentence in his case. In its pronouncement the trial court was entitled to consider and take into account the history of the case from its inception, the nature and enormity of the defendant's crime, the mitigating circumstances, if any, attending or succeeding its commission, the period of time the defendant had already been confined in the county jail or in any other place of incarceration. The court was also entitled to take into consideration the fact that by its former void judgment it had sentenced the defendant to a term in the state prison the minimum of which was one year and the maximum of which was ten years, during the whole of which maximum the defendant might have been required to serve under said first judgment and sentence had the same been legal. The fact that the second judgment and sentence of the court was for the minimum term of one year would seem to argue strongly that the trial court in imposing the same did take these facts into consideration; but, be that as it may, we

can see no reason for holding that the second and only valid judgment and sentence in the case of the petitioner should not speak from the date of its rendition and that the term of imprisonment fixed thereunder should not commence to run upon the actual delivery of the defendant at the place of imprisonment under the express terms of section 670 of the Penal Code.

The petitioner has directed our attention to the cases of In re Silva, 175 Pac. 481, and In re Bouchard, 176 Pac. 692, recently decided by the District Court of Appeal for the First District. It is sufficient to say that we disapprove of the reasoning and conclusion in each of those cases.

The writ is discharged, and the petitioner remanded.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; WILBUR, J.; MELVIN, J.; LORIGAN, J.; VICTOR E. SHAW, Judge pro tem.

---

179 Cal. 401

## LUTZ v. MERCHANTS' NAT. BANK OF SAN DIEGO (McKEE, Intervener).

(L. A. 4490.)

(Supreme Court of California. Dec. 13, 1918.)

1. APPEAL AND ERROR ⊜1032(1)—BRIEFS ON APPEAL—BURDEN OF SHOWING ERROR.

Under the alternative method of appeal requiring appellant by Code Civ. Proc. § 953c, to present in his brief such portions of the record to be considered, and since the passage of the constitutional amendment providing for a vacation of judgment for errors in procedure only where there has been a miscarriage of justice, an appellant must show that the error complained of resulted in a miscarriage of justice to entitle him to a reversal, even in the absence of any brief or appearance by respondent.

2. APPEAL AND ERROR ⊜757(1) — BRIEF ON APPEAL—SUFFICIENCY.

Error in placing the burden of proof on appellant, as against an intervener, in a claim and delivery suit, cannot be considered on appeal, where appellant's brief does not contain any portion of the record showing that the burden was so placed.

3. APPEAL AND ERROR ⊜1056(5)—HARMLESS ERROR — EXCLUSION OF EVIDENCE — EFFECT OF FINDING.

Where the trial court found in an action of claim and delivery for stock, that the stock belonged to intervener, exclusion of evidence that intervener had disposed of purchase-money notes for the stock was not prejudicial, in view of the assumption that the finding of court was justified by the evidence.

4. PARTIES ⊜84(1)—REPLEVIN ⊜22—JOINDER.

In claim and delivery for corporate stock, which had been sold by intervener, it was not error, in the absence of a request, to fail to bring in the holders of notes for the purchase money, although such parties could have been properly joined.

5. APPEAL AND ERROR ⊜1010(1)—REVIEW—QUESTIONS OF FACT — PREPONDERANCE OF EVIDENCE.

Where there is substantial evidence to sustain the findings of the trial court, its decision will control on appeal, regardless of where the preponderance of the evidence lies.

6. APPEAL AND ERROR ⊜757(1)—REVIEW—PRESUMPTIONS OF CORRECTNESS.

Where the portions of the record printed in appellant's brief do not show that the findings below require a different judgment, the judgment will not be reversed, since it will be assumed to have been correct.

7. REPLEVIN ⊜52—CLAIM BY THIRD PERSON —DEFENSE.

That intervener in claim and delivery obtained possession of goods replevied by subterfuge would not prevent judgment for intervener on finding that he was in fact the owner.

Department 2.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action in claim and delivery by E. May Lutz against the Merchants' National Bank of San Diego, wherein C. W. McKee intervened. From a judgment against plaintiff and in favor of the intervener, plaintiff appeals. Affirmed.

A. C. Mouser, J. De La Motte, and Andrews & Wright, all of San Diego, for appellant.

E. E. Kirk, of Los Angeles, for respondent.

WILBUR, J. On this appeal from the judgment against the plaintiff and in favor of the intervener, no brief is filed and no oral argument made on behalf of the intervener. The appellant moved for a judgment upon the ground that no brief had been filed, which motion was denied. The case was regularly set for hearing in this court. No appearance was made on behalf of the intervener. The matter is now submitted for decision upon the brief of the appellant and the typewritten transcript, prepared under section 953a, Code of Civil Procedure. Appellant seeks a reversal upon the merits, without an examination of the record, upon the authority of Richter v. Fresno Canal Co., 101 Cal. 582, 36 Pac. 96, and subsequent cases following the rule therein announced; Davis v. Hart, 103 Cal. 530, 37 Pac. 486; Kelly v. Bradbury, 104 Cal. 237, 37 Pac. 872; Bullock v. Bullock, 29 Cal. App. 463, 155 Pac. 1009. These cases hold that, where the appellant claims a reversal upon the ground of the insufficiency of the evidence to support the findings, the court will, in the absence of an appearance on behalf of respond-

ent, "assume, without looking into the record, that the point raised by the appellant that the evidence is insufficient to justify the findings attacked is well taken." There are several reasons why this rule does not apply. Under the alternative method of appeal no "specification on the ground of insufficiency of the evidence to support" the findings is required. Under this system of appeal, it is the duty of the parties to "print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court." Section 953c, Code Civ. Proc. Since the decisions in the above-cited cases, the Constitution has been amended, to provide that—

"No judgment shall be set aside, or new trial granted, in any case, on the ground * * * of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Const. art. 6, § 4½.

[1] It is incumbent, therefore, upon the appellant to print in his brief such portions of the record as he deems essential to a correct understanding and determination of the appeal, and, while in the absence of any brief on the part of the respondent the appeal may be determined upon those portions of the record printed in appellant's brief, it is incumbent upon the appellant thereby to show that error resulting in a miscarriage of justice has occurred in order to entitle him to a reversal, even in the absence of any brief or appearance on behalf of the respondent. The typewritten transcript in the case contains over 640 pages, containing about 160,000 words. The quotations from the record contained in appellant's brief contain between 5,000 and 6,000 words, or about one-thirtieth of the volume of the typewritten transcript. Appellant, under the head of "Statement of Facts," has summarized the facts as claimed by her, and has, under the head of "Statement of the Case," incorporated other statements of fact. Neither the pleadings, findings, nor judgment are printed in the brief. The action is one of claim and delivery to recover from the defendant, Merchants' National Bank, possession of two certificates of stock, one for 500 shares in the Palomas Land & Development Company, and the other for 350 shares in the Palomas Valley Canal Company. The bank defaulted and C. W. McKee intervened, claiming that the stock in question belonged to him and was held by the bank in escrow, the stock having been sold by McKee for $50,000, $10,000 having been paid. The plaintiff, in answer to the complaint in intervention, claims that the stock had been placed with her as security to protect her upon a written guaranty for the payment of $10,000 and that respondent had obtained possession of the stock from her by an agreement that he would return the same after voting it at an election, and that said promise was fraudulently made without any intention of fulfillment. It is apparent from the brief of appellant and a cursory examination of the transcript that the transaction involved in this case was a part of a series of transactions by which the stock of the two corporations above mentioned, hereinafter called the "old companies," were to be conveyed to the Palomas Land Company, a newly organized company, hereafter referred to as the "new company."

The foregoing statement sufficiently discloses the involved character of the litigation. A reversal of the judgment is sought upon the following points:

"First. The court erred in placing the burden of proof upon the plaintiff, E. May Lutz, in this case, as between her and the intervening plaintiff McKee.

"Second. The court erred in sustaining the objection of the intervening plaintiff to the offer of the plaintiff, E. May Lutz, to show that the eight notes given by Carson and Crane for $40,000 had been sold and disposed of by McKee, and that he was not the owner and holder of said notes, and had no further interest therein.

"Third. The court erred in not ordering the Palomas Land Company and the owners and holders of the notes sold and transferred by McKee to be impleaded and brought into court.

"Fourth. That the great preponderance of the evidence was against the findings of fact and conclusions of law of the court.

"Fifth. That the conclusions of law are not justified by the findings of fact."

[2] With reference to the first point, it is sufficient to say that nowhere in the appellant's brief is there any portion of the record which shows that the burden of proof was placed upon the plaintiff. If we assume that the court required the appellant to first offer her evidence, there could have been no prejudicial error in the mere order of proof. The case was tried without a jury, and we have no means of ascertaining from the record what view the court took with reference to the burden of proof.

[3] As to the second point, there is nothing in the record which discloses that this ruling was prejudicial. The court found that the plaintiff had no interest in the stock, that it was not deposited with her as security, and that it was the property of the intervener. Assuming these findings to be supported by the evidence, there could be no error in the refusal to allow evidence that the intervener had disposed of these purchase price notes.

[4] With reference to the third point, there is no showing in the brief that at any time the court was asked to bring in any of these

parties, or that the matter was submitted to the court in any manner for determination. The question of the ownership of the stock and the right to its possession was litigated between the appellant and intervener. It would no doubt have been proper to have had the Palomas Land Company made a party and to have had the holders of the notes referred to made parties, for the reason that in the organization of the new company and the contracts in relation thereto it was provided that the stock in the old companies was to be transferred to the new company in exchange for 136,000 shares of stock in that company. It is claimed that these shares of stock in the new company were actually issued and placed in the possession of the plaintiff as security for the $10,000 above mentioned. One of the questions involved in the case was, therefore, whether or not the actual ownership of the shares of stock in the old company was thereby vested in the new company. We cannot say, however, that it was error for the trial court to fail to bring in these parties on its own motion.

[5] As to the fourth claim that the great preponderance of the evidence was against the finding of fact and conclusion of law of the court, it is sufficient to say that, if there was any substantial evidence to sustain the findings of the court, that decision must control in this court, whatever our view may be concerning the preponderance of the evidence.

As to the fifth point, it may be said that neither the conclusions of law nor the findings of fact are set out in the appellant's brief. Plaintiff sets out in her brief the testimony of a number of witnesses which it is claimed justified the trial court in finding that the stock in both the old and new companies was deposited with her as security for the obligation of $10,000, which she guaranteed and afterwards paid on behalf of the new company. But appellant does not claim that this is all the evidence. After stating the evidence favorable to her position, it is said:

"There was no contradiction of the same save by McKee himself, but his own testimony, his letters, and telegrams, all point to the conclusion that McKee gave the stock to appellant for the purpose of inducing her to put up the $10,000 for the company, as collateral security and to make her absolutely secure after she had refused all the other offers."

It appears by the transcript that the intervener flatly denied that the stock was placed in the hands of the plaintiff as security. He was asked the following question and gave the following answer:

"Q. Did you not say to Mrs. Lutz that you would also at that time place in her hands as security to her for this obligation which she was to assume your certificates of stock in the old companies and that she could hold it as security or a pledge amounting to that, for the payment of any obligation that you would incur? A. Absolutely no."

[6, 7] It is apparent, then, that appellant's contention is, as she states it, that the preponderance of the evidence, although contradicted, was in her favor. This is not a ground for reversal. Appellant also claims that two of the findings are sufficient to entitle her to recover in the action. One is to the effect that the stock in the old companies was placed by respondent with her on an agreement that he would transfer said stock for 136,000 shares of stock in the new company, the transfer to be made when the new company had completed the payment of an option to purchase the other two-thirds interest in the old companies, and on the further agreement that respondent would give E. May Lutz a proxy to vote said stock, and the other finding that the possession of the stock had been fraudulently obtained from appellant by respondent; that is to say, upon the agreement to return the same, without any intention so to do. To an understanding of these findings it should be stated that the stock in controversy here represented a one-third interest in the old companies, and that the 136,000 shares of stock in the new company, to be issued in exchange therefor, represented a one-third of the stock of the new company; that the other two-thirds of the stock of the old companies were not owned by the respondent, but that the new company held an option originally given to respondent and transferred by him to the company to purchase the other two-thirds of the stock of the old companies for $50,000. The record printed in appellant's brief does not make it manifest that these findings required a different judgment. There may have been other facts shown in the evidence by the respondent which would make the judgment in favor of respondent a correct one. We are bound to assume, in the absence of satisfactory showing to the contrary, that the judgment of the trial court was correct. Nor does the securing of possession of the certificates of stock by the promise to return the same without the intention so to do justify a reversal of the case, for if, as found by the court, the stock was actually owned by McKee, he was entitled to possession thereof. In that event, the fact that he secured the same by subterfuge would not entitle the plaintiff to the recovery thereof. The fact that appellant in her concluding argument contends that she was entitled to the possession of the stock in one or the other of three different capacities shows the difficulty of correctly understanding the case on the meager portion of the record set out in

appellant's brief. The appellant contends that—

"The judgment of the court, as it now stands, results in this: McKee has sold to the Palomas Land Company the option agreement for the two-thirds interest of Turner and O'Neill for $55,000, upon which $30,000 has been paid; he has had issued to him 136,000 shares of stock of the Palomas Land Company for which he gave the secretary the two certificates of stock of the old companies, representing the other one-third interest; that he obtained possession of that stock so pledged, by a species of deceit; that he has again sold that one-third interest evidenced by the two certificates, for the sum of $50,000 to Crane and Carson, receiving $10,000 in cash and eight promissory notes for the sum of $5,000 each, which notes he has sold and received payment therefor, and said notes are in the hands of third parties without any security of any sort, and now the court's holding will, if Carson and Crane refuse to pay those notes, give the two certificates of stock back to McKee to again sell and dispose of to other parties for perhaps $50,000 more."

If it is true that McKee has once hypothecated and twice sold the stock and received the full value thereof at the time of each sale, and $10,000 at the time of the hypothecation, and that the effect of the judgment is to restore to him the stock for sale a third time, there is no doubt that there has been a miscarriage of justice, and the case should be reversed. But we cannot accept the statement of the appellant in her brief unless substantiated by the record therein contained, and this the record fails to do. From an examination of that record we are unable to see that the trial court committed any error.

The judgment is affirmed.

We concur: MELVIN, J.; LORIGAN, J.

---

179 Cal. 390

## BANGHAM v. MICHAEL et al. (Sac. 2729.)

(Supreme Court of California. Dec. 11, 1918. Rehearing Denied Jan. 9, 1919.)

1. MORTGAGES ⟸594(5)—REDEMPTION—COMPLIANCE WITH STATUTES.

Holder of a junior lien upon mortgaged property, who, upon last day of redemption period, tendered full sum of money required for redemption, being a redemption by virtue of Code Civ. Proc. § 701, subd. 2, could not redeem, where he failed to comply with provisions of section 705.

2. MORTGAGES ⟸591(1)—REDEMPTION—COMPLIANCE WITH STATUTE.

The right of the holder of a junior lien to redeem property sold under a decree of foreclosure of a prior mortgage thereon is purely statutory, and, in the absence of a compliance therewith, a tender of the money required to redeem is wholly ineffectual.

3. MORTGAGES ⟸591(1)—REDEMPTION—PROCEDURE.

Act of commissioner, who made sale, in accepting from holder of junior lien money required to redeem, was ineffectual, where holder did not comply with Code Civ. Proc. § 705, as to furnishing officer making sale, with note of record, etc.

4. MORTGAGES ⟸608 — REDEMPTION — STATUTES APPLICABLE.

Until holder of junior lien upon mortgaged property complied with Code Civ. Proc. § 705, commissioner who made sale was under no obligation to accept money required to redeem, and consequently sections of Civil Code, as to extinguishment of contractual obligations or those arising by operation of law, would have no application, although commissioner accepted the money.

Department 1.

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Action by R. E. Bangham against M. Michael and others. From judgment denying status of the American National Bank of San Francisco, a corporation, as a redemptioner, it appeals. Judgment affirmed.

Edgar C. Chapman, of San Francisco, for appellant.

Wilson & Haines, O. C. Wilson, and Martin L. Haines, all of San Francisco, for respondents.

VICTOR E. SHAW, Judge pro tem. This action grew out of the following facts: As commissioner appointed by the court therefor, R. E. Bangham, plaintiff herein, sold certain real estate as directed by the decree made in a suit brought by M. Michael against one J. Noble Jones, to foreclose a mortgage thereon. At this sale, made June 16, 1915, Michael, mortgagee, became the purchaser of the property. As holder of a junior lien thereon, the American National Bank was made a defendant in the foreclosure suit, and hence was a redemptioner as defined in section 701, Code of Civil Procedure. Early in the forenoon on the last day for redemption, to wit, June 16, 1916, an agent of Michael called upon the commissioner and demanded that he execute a deed conveying the property to Michael as the purchaser thereof, with which demand the commissioner complied. Thereafter, on the same day, and before the expiration of the time within which said bank was entitled to redeem the property, it, as such redemptioner, tendered the full sum of money required for redemption, which the commissioner received and gave a receipt therefor, but, upon the ground that he had theretofore executed and delivered a deed to Michael, refused to execute a deed to the bank as such redemptioner. Michael claiming to have purchased the property,

and, the bank likewise claiming that it was entitled to a deed as redemptioner, the money was left in the hands of the commissioner, who, depositing the money in court, brought this action as provided in section 386, Code of Civil Procedure, praying that Michael and the bank be required to litigate their respective rights growing out of his acts.

The court found that by reason of the bank's failure to comply with section 705, Code of Civil Procedure, its acts were ineffectual to constitute it a redemptioner of the property sold, and adjudged that the money so paid to the commissioner be delivered to the bank by the depositary thereof.

From this judgment denying appellant's status as a redemptioner of the property, the bank has appealed upon the judgment roll.

[1] Appellant, being the holder of a junior lien upon the mortgaged property, is, by subdivision 2, section 701, Code of Civil Procedure, declared to be a redemptioner, and it was entitled to redeem the property on the day it tendered the full sum of money required therefor, upon complying with the provisions of section 705, Code of Civil Procedure, which provide:

"A redemptioner must produce to the officer or person from whom he seeks to redeem and serve with his notice to the sheriff making the sale, or his successor in office:

"1. A copy of the docket of the judgment under which he claims the right to redeem, certified by the clerk of the court, or of the county where the judgment is docketed; or, if he redeem upon a mortgage or other lien, a note of the record thereof, certified by the recorder;

"2. A copy of any assignment necessary to establish his claim, verified by the affidavit of himself, or of a subscribing witness thereto;

"3. An affidavit by himself or his agent, showing the amount then actually due on the lien."

As found by the court, the bank did not comply with any of these provisions.

[2] The right of the holder of a junior lien to redeem property sold under a decree of foreclosure of a prior mortgage thereon is purely statutory, and, in the absence of a compliance therewith, a tender of the money required to redeem is wholly ineffectual for the purpose.

[3] The power of the sheriff or that of a commissioner acting in the matter is altogether statutory, and his acts are nugatory unless the provisions of the statute are pursued. Wilcoxson v. Miller, 49 Cal. 193; Haskell v. Manlove, 14 Cal. 54; Robertson v. Van Cleave, 129 Ind. 228, 26 N. E. 899, 29 N. E. 781, 15 L. R. A. 68.

[4] Sections of the Civil Code invoked by appellant as to the extinguishment of contractual obligations, or those arising by operation of law, have no application to the question at issue, for the reason that until appellant complied with the provisions imposed by the statute the commissioner was under no obligation to act in the matter any more than he would have been in the absence of a tender of the amount of money required to effect the redemption. Kofoed v. Gordon, 122 Cal. 314, 54 Pac. 1115, upon which appellant relies, involved no question of statutory redemption by a junior lienholder as distinguished from the mortgagor in a foreclosure suit.

The judgment is affirmed.

We concur: RICHARDS, Judge pro tem.; SLOSS, J.

---

179 Cal. 409

## Ex parte GARNER. (Cr. 2211.)

(Supreme Court of California. Dec. 13, 1918.)

1. COURTS ⟸92—OPINIONS—DICTA.

That the validity and binding force of a statute has been long acquiesced in and recognized by dicta in judicial decisions furnish an almost irresistible reason for not overturning it.

2. COURTS ⟸78—CONSTITUTIONAL COURTS—INHERENT POWER—JURISDICTION AND PROCEDURE.

In the absence of statute or where the statute is inadequate, a constitutional court, by virtue of its inherent power, may itself prescribe appropriate provision for acquiring jurisdiction and adopt the procedure to be followed.

3. CONSTITUTIONAL LAW ⟸52—LEGISLATIVE POWER—PUNISHMENT FOR CONTEMPT.

The Legislature may prescribe the measure of punishment for constructive contempt of a constitutional court, provided such penalty be sufficient to enable the court to vindicate its authority and maintain the dignity and respect due it.

4. CONSTITUTIONAL LAW ⟸52 — POWER OF LEGISLATURE — PUNISHMENT — IMPAIRMENT OF COURT'S POWER.

The Legislature may not, whether by procedural rules or the inadequacy of the penalty fixed, substantially impair or destroy the implied power of a constitutional court to punish for contempt.

5. CONTEMPT ⟸71—PUNISHMENT—VALIDITY OF STATUTES.

Code Civ. Proc. § 1218, imposing a maximum punishment of $500 fine and imprisonment for five days, or both, for constructive contempt of court, is not invalid as providing such an insignificant punishment as to impair the court's power to vindicate itself and to protect its dignity.

6. CRIMINAL LAW ⟸1213—CRUEL AND UNUSUAL PUNISHMENT.

The constitutional prohibition against the infliction of cruel and unusual punishment relates to the character of the punishment only.

7. CONTEMPT ⟸72—CRUEL AND UNUSUAL PUNISHMENT.

Imprisonment as a punishment for contempt of court is neither cruel nor unusual.

In Bank.

Application by Guy S. Garner for a writ of habeas corpus, directed against John C. Cline, Sheriff of Los Angeles County. Petitioner discharged.

Newlin & Ashburn, of Los Angeles, for petitioner.

Edgar W. Camp and Joseph L. Lewinsohn, both of Los Angeles, for respondent.

VICTOR E. SHAW, Judge pro tem. Petitioner, in that he was found guilty of unlawfully interfering with the process of the court, was adjudged guilty of contempt, and as punishment therefor he was sentenced to pay a fine of $500 and be confined in the county jail for a period of 90 days. Upon payment of the fine and after 5 days' imprisonment in the county jail, a writ of habeas corpus was issued, the return to which shows that petitioner was found guilty of acts similar to those involved in Ex parte Buckley, 69 Cal. 26, 10 Pac. 69. That such acts constituted contempt must be, and is for the purposes of this case, conceded.

Section 1218, Code of Civil Procedure, provides:

"Upon the answer and evidence taken, the court or judge must determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding five hundred dollars, or he may be imprisoned not exceeding five days, or both."

The sole question presented is as to the validity and binding force of this provision of the statute; it being the claim of respondent that the Legislature has no power to enact a law, however reasonable, limiting the power of a constitutional court in imposing punishment for contempt. This contention is based upon the fact that since the court, without restrictions as to its power to impose punishment for contempt, is created by the Constitution, it, as to such an offense, and subject to the provisions of the Constitution (article 1, § 6) that forbids the imposition of excessive fines and the inflicting of cruel and unusual punishment, possesses all the powers of a court of justice as it existed at common law, among which in such matters was the exercise of unlimited power.

Except as amended in 1871, when the word "must" was substituted for the word "shall," the statute is identical with the act of the Legislature adopted in 1851 designated as section 488 of the Practice Act. Until now, due to the fact that the courts of the state have accepted it as the law pertaining to the subject, no occasion has arisen for questioning the validity of this provision, which by reason of a venerableness rarely attained by a statute of this state should have rendered it immune from the attack made.

Beginning at an early date, we find this court, in cases where the point was not directly involved, and hence subject to the criticism that what was said was dicta, giving expression to language which clearly recognized that the power of courts to impose punishment for constructive or "out-of-doors" contempt was restricted as provided by statute. In the case of Ex parte Cohen, 6 Cal. 318, decided in 1855, where the alleged contempt consisted in the refusal of petitioner to comply with an order, the court said:

"Under our statutes, the power of a court to punish for a contempt is limited to a fine of $500 and imprisonment for five days, except (as provided in section 1219, Code Civ. Proc.) when the contempt consists in the omission to perform an act which is yet in the power of a person to perform, in which case he may be imprisoned till he have performed it."

In Ex parte Rowe, 7 Cal. 176, in discussing the power of the court to impose punishment, the court said:

"But the exercise of this power is regulated by the statute."

In Galland v. Galland, 44 Cal. 475, 13 Am. Rep. 167, petitioner had been adjudged guilty of contempt in the failure to obey an order of court requiring him to pay alimony, and this court, in the course of the opinion filed therein, said:

"In this state the power of courts to punish for contempt has been regulated by statute. It is provided that when one is adjudged guilty of contempt he may be punished by a fine of not exceeding $500 and by imprisonment for not exceeding five days, except when the contempt consists in the omission to perform an act which is yet in his power to perform. * * * This is a limitation upon the power formerly exercised by courts to punish for contempt."

In the Matter of Tyler, 64 Cal. 434, 1 Pac. 884, where a fine was imposed as punishment for the adjudged contempt, the court, speaking on the question as to the power of the court to enforce payment thereof by imprisonment, said:

"It [the court] had jurisdiction to punish by fine not exceeding $500, or imprisonment not exceeding five days, or by both."

In Ex parte Abbott, 94 Cal. 333, 29 Pac. 622, Chief Justice Beatty, in passing upon a like question, used language as follows:

"The limit of punishment there [section 1218] prescribed is a fine not exceeding $500, or imprisonment not exceeding five days, or both."

To like effect is the language of the same learned judge in the concurring opinion in the case of Ex parte Todd, 119 Cal. 58, 50 Pac. 1071.

[1] While it may be conceded that these quoted expressions were dicta, nevertheless such recognition of the validity and binding force of the statute, together with long ac-

quiescence therein, furnish, as said in People v. Richards, 1 Cal. App. 566, 82 Pac. 691, "an almost irresistible reason for not overturning it."

No doubt exists as to the inherent power of a constitutional court, in the absence of statutory provision therefor, to impose punishment for a contempt. Its very existence depends upon the exercise of such power. Hence it may be conceded that a statute without constitutional authority therefor which takes from the courts all power to punish for contempt, or fixes a penalty wholly inadequate for the purpose, would not be countenanced by the courts. Nevertheless, and while in such cases conceding the existence of such power vested in the courts, we are not prepared to adopt respondent's theory that our constitutional courts possess inherent power to the full extent as did the courts of England, which in some cases we find imposed enormous fines and imprisonment for years. To do so would not only be inconsistent with the spirit and genius of our institutions, but likewise would be tantamount to a denial of legislative power to regulate the practice and procedure by which our courts are governed, a power which, without constitutional authority, is universally recognized in all states where the code system of pleading and practice prevails. The validity of such regulations has been repeatedly upheld in this state. Thus in Ex parte Harker, 49 Cal. 465, where it is said:

"The mere procedure by which jurisdiction is to be exercised may be prescribed by the Legislature, unless, indeed, such regulations should be found to substantially impair the constitutional powers of the courts, or practically defeat their exercise."

To like effect are the cases of In re Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594; Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206, and United Railroads v. Superior Court, 170 Cal. 755, 151 Pac. 129, Ann. Cas. 1916E, 199.

[2] Likewise it is held that in proceedings for contempt the court, in order to acquire jurisdiction over persons against whom the proceeding is had, must comply with the regulations adopted by the Legislature therefor. In the absence of a provision covering the particular case, or where it is inadequate, no doubt but such constitutional court, by virtue of its inherent power, may itself prescribe appropriate provision for acquiring jurisdiction and adopt the procedure to be followed. Notwithstanding this recognized right of invasion upon the inherent powers of the court as to rules of practice and procedure which counsel for respondent must concede, they deny to the legislative body the right to restrict the action of the court in imposing penalty.

[3] If, however, the legislative power may go to the extent of prescribing adequate rules of procedure by which the courts are controlled, we perceive no reason why they should not likewise be controlled as to the measure of punishment to be inflicted in "out-of-doors" contempt proceedings, provided the penalty so fixed be sufficient to enable the courts to vindicate their authority and maintain the dignity and respect due to them.

[4] The Legislature may not, whether by procedural rules or the inadequacy of the penalty fixed, substantially impair or destroy the implied power of the court to punish for contempt; yet it may provide rules of procedure and fix the maximum penalty which, if adequate for the purpose designed, must be deemed operative in controlling the action of the court.

[5] That the maximum punishment of $500 fine and imprisonment for five days, or both, as prescribed by section 1218 for the contempt involved in the instant case, which was a representation that for $50 paid to him petitioner could and would corruptly influence the judge of the court to render a wrongful decision, was not so small and insignificant as to impair the power of the court in vindicating itself and protecting its dignity, is shown by the fact that since its admission as a state the courts thereof, during periods of storm and stress such as few commonwealths have experienced, have found the penalty adequate for their protection. In addition to this fact it appears that in the severity thereof the penalty so fixed is more drastic than that contained in like statutes adopted in 14 states of the Union, the Constitutions of which, like our own, are silent upon the subject, and in 14 other states having courts created by their Constitutions, wherein no authority for the adoption of restrictive rules as to the power of the court in this respect is given, the statutes fix a maximum punishment of less severity than the penalty imposed herein by the lower court. It is worthy of note that in only three states—Georgia, Louisiana, and Virginia—does the organic law contain provisions of express grant of such power to the Legislature, and yet, in so far as we are advised, the courts, with two or three exceptions, have not expressly held such statutes inoperative.

No good purpose can be served in reviewing the great number of authorities cited in the able and exhaustive briefs filed by counsel. Suffice it to say that many of them involve powers of legislative as distinguished from constitutional courts, while others relate to the power of the Legislature to enact regulations governing procedure and trial in contempt cases. In 13 Corpus Juris. 93, it is said:

"When the duration of the imprisonment or the amount of the fine is limited by statute, the punishment may conform to such limitation, but cannot exceed it."

Many cases in support of this proposition are cited by the author, some of which are pertinent to the precise question involved and many of them having no bearing thereon. Perhaps no court has given more careful consideration to the exact question under discussion than that of Missouri, where a like statute, adopted in the absence of constitutional authority, was in State v. Shepherd, 177 Mo. 234, 76 S. W. 79, 99 Am. St. Rep. 624, declared invalid and of no binding force upon the constitutional courts. Later this decision was followed by a majority opinion in the case of Railway v. Gildersleeve, 219 Mo. 170, 118 S. W. 86, 16 Ann. Cas. 749, where Mr. Justice Lamm, whose judicial labors in that court constitute a monument to his industry and learning, filed an able and exhaustive dissenting opinion, concurred in by two of the justices, wherein he reviewed a great number of cases and upheld the validity of the statute. In the subsequent case of Ex parte Creasy, 243 Mo. 680, 148 S. W. 914, 41 L. R. A. (N. S.) 478, the validity of the statute as a limitation upon the power of the court to inflict a penalty for contempt in excess of that provided was attacked, and the court adopted the views thereon enunciated by Justice Lamm in his dissenting opinion in the Gildersleeve Case.

Judges are but human, and as said by Lord Camden in the trial of Hindson and Kersey, found in 8 Howell's State Trials, 58:

"The discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper, passion. In the best it is oftentimes caprice; in the worst it is every vice, folly, and passion to which human nature is liable."

And hence, as said by Judge Taft in City of Detroit v. Detroit City Ry. Co. (C. C.) 54 Fed. 1, where "influences of a personal nature are present, we must presume a human weakness in all judges to prevent injustice from the frailty of a few." Recognizing this human frailty, a judge, since as we hold it is not necessary in vindicating his authority nor in maintaining the dignity of the high and exalted office which he occupies, should not have unbridled power to summarily commit a citizen to prison for a term of years, however long, for a constructive contempt.

[6, 7] It is no answer to this, as suggested by respondent, to say, in the language of Chief Justice John Marshall, that "all delegated power is liable to be abused," nor that the Constitution affords protection in that it prohibits the infliction of cruel and unusual punishments, since this inhibition relates to the character of the punishment, and imprisonment is neither cruel nor unusual. State v. McCauley, 15 Cal. 429.

Nor is there any merit in the suggestion based upon Ex parte Karlson, 160 Cal. 378, 117 Pac. 447, Ann. Cas. 1912D, 1334, that contempt is a matter of price, since a poverty-stricken contemnor fined $500 and committed to prison until the fine is paid must, on account of his financial inability, suffer imprisonment, whereas a man of means subjected to a like fine and conditional penalty may escape imprisonment by paying the fine at once. Like arguments would apply in every criminal case wherein a man is subjected to a fine and committed to prison until it is paid.

Petitioner having paid the fine of $500 imposed, and served five days' imprisonment in jail, it is ordered that he be discharged from custody.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.; RICHARDS, Judge pro tem.

---

(179 Cal. 418)

## In re DARGIE'S ESTATE.

### Appeal of CHAPMAN et al.

(S. F. 8710.)

(Supreme Court of California. Dec. 17, 1918.)

1. HUSBAND AND WIFE ⟸273(1)—COMMUNITY PROPERTY—RIGHT OF POSSESSION.

During lifetime of husband he is owner and entitled to possession of all community property; surviving wife only becoming entitled to one-half of community property, under Civ. Code, § 1402, as survivor of the marital community.

2. HUSBAND AND WIFE ⟸248½—SEPARATE PROPERTY—OWNERSHIP.

All the property owned by a husband at the time of his marriage, with all the rents, issues, and profits, continue to be his separate property, under Civ. Code, § 163.

3. WILLS ⟸577—CONSTRUCTION—COMMUNITY PROPERTY.

A will devising to a wife one-half of all the property "possessed" by testator, "being the same portion to which she would be entitled in the event of all of my property being community property," showed an intent that the wife was to have not only one-half of the separate property, but one-half of the community property.

In Bank. Appeal from Superior Court, Alameda County; W. S. Wells, Judge.

In the matter of the estate of William E. Dargie, deceased. From a partial decree of distribution, M. C. Chapman and others, as executors, trustees, and residuary legatees, appeal. Reversed.

Fitzgerald, Abbott & Beardsley, and Eugene E. Trefethen, all of Oakland, for appellants.

M. C. Chapman, John F. Conners, and J. Clem Arnold, all of Oakland, for appellants executors and trustees.

Edgar D. Peixotto, of San Francisco, for appellant Dargie.

A. A. Moore and Stanley Moore, both of San Francisco, for respondent.

WILBUR, J. This is an appeal by the executors and trustees and by the residuary legatees from a partial decree of distribution, whereby three-fourths of the estate of the deceased was distributed to his surviving wife, one-half as community property, and one-half under the terms of the will. The correctness of the decree depends upon whether or not, by the provisions of the third division of the will, the deceased intended to deal with the entire community property, or only with that portion thereof (one-half) over which he had the power of testamentary disposition. Section 1402, C. C. The provision in question reads as follows (italics ours):

"I hereby certify and declare that at the time of my marriage with my wife Erminia Peralta Dargie, I owned and *possessed* in my own right, property of the then value of about one hundred thousand dollars, and which said property is still owned and *possessed* by me, and is a part and portion of my estate, but that for the purpose of this my said will, *all of the property of which I am now possessed* may be considered as community property, and I do hereby give, bequeath, devise and *confirm* unto my said wife Erminia Peralta Dargie, *one-half of all the* property, real, personal or mixed, *of which I may die* seized or *possessed*, being the same portion thereof to which she would be *entitled* in the event of all of my said property being community property."

[1] It will be observed that the decree stated that certain property was "owned and possessed" by him at the time of his marriage, and was still "owned and possessed" by him, but directs that such property, and all other property "possessed" by him be considered as community property. He then bequeaths and devises and *confirms* to his wife one-half of all property "possessed" by him at the time of his death. He evidently considered that the entire community was "possessed" by him, as it was, in fact, and deals with it as a whole. The deceased does not bequeath one-half of "my property," or of "my interest in the community property," or of the "property over which I have testamentary power," but one-half of all the property "possessed" by him. To make assurance doubly sure, he adds, "being the same portion to which she would be *entitled* in the event of all of my property being community property"—not, be it observed, the same portion she would receive in the event that deceased left no will (three-fourths, there being no father or mother or brothers or sisters, sections 1402, 1386, subd. 2, C. C.), but the portion of the community property she is "entitled to" as of right, namely, one-half (section 1402, C. C.). During the lifetime of the husband, he is the owner and entitled to the possession of all the community property. Upon his death the surviving wife becomes entitled to one-half of the community property as the survivor of the marital community, regardless of the existence of other heirs or of a will, but the other half passes by will, or, in case of intestacy, by the laws of succession, to his heirs, including the surviving wife in certain cases. Dargie v. Patterson, 169 Pac. 360. One-half, then, is the "portion" of the community property, to which the widow is entitled, by virtue of its community character. That the testator was referring to this half of the property to which she is entitled of right, is also further indicated by the use of the word "confirm" in the following clause:

"I do hereby give, bequeath, devise and *confirm* unto my said wife Erminia Peralta Dargie one-half of all the property * * * of which I may die seized or possessed."

It is true that the additional words, "I do hereby give, bequeath and devise * * * unto my said wife," etc., import more than a mere recognition of the right over which the testator had no control. But the words are appropriate to the purpose of the testator, which was to "give, devise and bequeath" to his wife one-half of all of his separate property, which, for convenience, he directed to be considered as a part of the community property. While it is true that the direction that the separate property should be treated as a part of the community property was, by implication, a devise and bequest to his wife of a one-half interest therein, it was more appropriate that this should be done, as it was, by express bequest and devise.

[2, 3] In the argument, counsel treat the will as, in effect, stating that decedent's separate property consisted of $100,000. If, however, at the time of his marriage, the deceased owned a hundred thousand dollars' worth of property, that property, with all the rents, issues and profits thereof, continued to be his separate property. Civ. Code, § 163. The marriage occurred December 15, 1881. The will was drawn 29 years thereafter (1910). The deceased died in 1911, at which time his estate was appraised at $933,900. It might be exceedingly difficult to determine what portion of the property left by him was derived from his separate property, and the rents, issues, and profits thereof, and what portion, if any, constituted community property. It is quite conceivable that, if the source of all the property left by the deceased could have been ascertained, it would have been discovered that it was largely separate property. It is, therefore,

evident from the will that the deceased intended to prevent the difficulty of ascertaining what portion of his property was community, and what portion separate property, and that he desired his wife to have one-half, and no more, of all the property left by him, whether community or separate property. The will is not susceptible of the construction that the testator was therein dealing with only his separate property and the one-half of the community property over which he had testamentary control, for he expressly provides to the contrary. The court was in error in allowing the surviving wife three-fourths of the property of the deceased. She is entitled to one-half of the separate property of the deceased, and to one-half of the community property.

Decree reversed.

We concur: SHAW, J.; RICHARDS, Judge pro tem.; LORIGAN, J.

SLOSS, J. I concur in the judgment. The question is one of interpretation, simply, and I agree with Justice Wilbur's conclusion that a reading of all the provisions of the will discloses the testator's intent that the entire estate possessed by him in his lifetime should be regarded as community property, and that the widow should receive only one-half of that entire estate. In other words, the testator in speaking of "the property, real, personal, or mixed of which I may die seized or possessed," had in mind the whole of the community property, and not merely the part of it which was subject to his power of testamentary disposition.

It should, perhaps, be added that no member of the court, as I understand, is disposed to depart in the slightest degree from the familiar and well-settled rules governing the construction of wills made by married men possessed of community property. This court has consistently ruled that such a testator is presumed to know that his power of disposition by will does not extend to the surviving wife's half interest in the community property, and that the will is ordinarily to be read as covering, by its dispositions, only the property which the testator had the right to devise or bequeath, i. e., his separate property and an undivided half of the community property. The gift to the widow of "half of my estate" would, therefore, in the absence of words indicating a contrary intent, carry to her one-half of the estate subject to testamentary disposition, and she would take, in addition, one-half of the community property as survivor. A few citations will suffice: Beard v. Knox, 5 Cal. 252, 63 Am. Dec. 125; Est. of Silvey, 42 Cal. 210; Est. of Smith, 108 Cal. 115, 40 Pac. 1037; Est. of Vogt, 154 Cal. 508, 98 Pac. 265; Est. of Prager, 166 Cal. 450, 137 Pac. 37. In the present case, however, the wording of the will is such that the presumptions referred to cannot be applied without doing violence to the testator's declared intention.

I concur: ANGELLOTTI, C. J.

---

(38 Cal. App. 642)

## CRESCENT INV. CO. v. LAKE COUNTY INV. CO. et al. (Civ. 2552.)

(District Court of Appeal, First District, Division 1, California. Nov. 12, 1918. Rehearing Denied by Supreme Court Jan. 9, 1919.)

1. MORTGAGES ⊂⊃415(1)—ACTION FOR FORECLOSURE—DEFENSE.

In action by plaintiff corporation as bona fide mortgagee, having advanced the money secured by the mortgage, the allegation, by way of a separate defense, of certain alleged acts of fraud on the part of one of plaintiff's directors and stockholders, was immaterial.

2. PLEADING ⊂⊃214(8)—DEMURRER—ADMISSION.

Admission by demurrer is for purpose of testing question of law, and is binding only in so far as a ruling upon the demurrer is concerned.

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Action by the Crescent Investment Company, a corporation, against the Lake County Investment Company, a corporation, and others. Judgment for plaintiff, and defendants appeal. Judgment affirmed.

E. A. Freeman and F. J. Gordon, both of Oakland, for appellants.

Beverly L. Hodghead, of San Francisco, for respondent.

LENNON, P. J. This is an appeal from a judgment rendered in favor of the plaintiff. The appeal is upon the judgment roll alone.

[1] The complaint asked for the foreclosure of a mortgage upon certain real property owned by the defendants. Defendants in their answer denied the execution of the note and mortgage and substantially all the material allegations of the complaint, and set up by way of separate defense certain alleged acts of fraud on the part of one of the directors and stockholders of the plaintiff company. The plaintiff demurred to this separate defense, and the demurrer was sustained. Certainly, if the plaintiff was a bona fide mortgagee, and had advanced the money secured by the mortgage, the matters alleged in the separate defense would be immaterial in this foreclosure suit, and the demurrer was properly sustained. The questions of the execution of the mortgage and the consideration therefor were tried under the

issues raised by the complaint and the denials thereof, and the trial court found in favor of the plaintiff.

[2] The appellants raise just one point upon their appeal, and we agree with the attorney for respondent that the law applicable to that question would seem to require no ruling by an appellate court. Appellants contend that, by demurring to the separate defense of the defendant, plaintiff thereby admitted all the alleged acts of fraud contained therein, and, having so admitted such acts, it stands self-convicted of conduct which should bar it from any relief in a court of equity. Of course, the admission made by a demurrer is merely an admission for the purpose of testing a question of law, and is only binding upon the demurrant in so far as a ruling upon the demurrer is concerned.

The judgment is affirmed.

We concur: BEASLY, Judge pro tem.; STURTEVANT, J., pro tem.

---

(38 Cal. App. 592)

## FRANCIS v. SHRADER et al. (Civ. 1669.)

(District Court of Appeal, Third District, California. Nov. 9, 1918. Rehearing Denied by Supreme Court Jan. 7, 1919.)

1. VENDOR AND PURCHASER ⊜189—TITLE OF VENDOR—ESTOPPEL TO DENY.

Vendee in possession under contract for sale of land cannot deny title of vendor in an action in ejectment.

2. VENDOR AND PURCHASER ⊜191—DEFAULT OF VENDEE—RIGHT OF POSSESSION.

Vendee under contract for purchase of building cannot continue to hold possession after making default in payments, regardless of whether vendor has title.

3. VENDOR AND PURCHASER ⊜339 — RECOVERY OF PAYMENTS—RIGHTS OF VENDEE.

Vendee under contract for purchase of realty is not entitled to return of purchase money paid while he continues to hold possession.

4. VENDOR AND PURCHASER ⊜334(3) — RECOVERY OF PAYMENTS—RIGHTS OF VENDEE.

Vendee, after making default in payments, cannot recover payments made, except where there has been mutual rescission.

5. VENDOR AND PURCHASER ⊜334(1) — RECOVERY OF PAYMENTS—RIGHTS OF VENDEE.

Vendor, not in default, *held* entitled to retain moneys paid to her as part of purchase price, although there was no express covenant in contract for purchase to that effect.

6. VENDOR AND PURCHASER ⊜334(4) — RESCISSION BY VENDOR—WHAT CONSTITUTES.

Vendor's notice of forfeiture of contract of purchase of realty, because of failure to make payments, *held* not to constitute an abandonment or rescission, so that vendee's assignee was entitled to recover payments made.

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Action by Mary F. Francis against John Shrader and others, as trustees in liquidation of the West Virginia Oil Company, and D. L. Peters and another, in which defendants filed a cross-complaint. Judgment for plaintiff, and defendants appeal. Affirmed.

George E. Whitaker, of Bakersfield, for appellants.

Matthew S. Platz, of Bakersfield, for respondent.

HART, J. The action is in ejectment. The complaint alleged that on the 1st day of June, 1911, plaintiff "was the owner of, except as against the paramount title of the United States of America," certain oil-bearing lands in the county of Kern, describing them; that, on July 29, 1911, plaintiff and one E. S. Good entered into a contract by the terms of which plaintiff agreed to sell and convey, and said Good agreed to buy, said lands for the sum of $70,000, payable in installments. Said contract contained the following clause:

"In the event of a failure to comply with the terms hereof, by the said party of the second part [Good], the said party of the first part [Francis] shall be released from all obligation in law or equity to convey said property, and the said party of the second part shall forfeit all right thereto."

It is next alleged that in the month of September, 1911, the West Virginia Oil Company "went into possession under plaintiff" of said lands, and that on January 9, 1912, said Good in writing assigned all his interest under said contract to said corporation; that on January 29, 1912, plaintiff entered into a contract with said West Virginia Oil Company extending the time of payments, and it was agreed that as part consideration for the extension of said payments the oil company would not remove any of the pipe or casings in any wells drilled on said land, nor any of the derricks erected thereon, and that the company would pay for all labor and materials furnished on said lands and pay off all legal claims or liens filed thereon. Time was made of the essence of the contract. Plaintiff received as payment on account of the sale of said lands, from Good and from the oil company, $15,000 as principal and $600 as interest, and it is alleged that a payment of $5,000, due on April 29, 1912, was not paid. On October 1, 1912, plaintiff served on the oil company a notice of forfeiture of contract for failure to make payments, in which it was stated:

"You are hereby notified that your right and title under said agreement have been forfeited and surrendered."

Demand for the possession of the premises was alleged. It was also alleged that the West Virginia Oil Company, on November 30, 1912, forfeited its charter and right to do business by failure to pay its corporation license tax, and that the defendants Shrader, Lathrop, Green, Fredenall, Soale, and Meredith at that time were the members of the board of directors of said corporation and are now its trustees in liquidation.

The answer of the defendants admits as true all the allegations of the complaint with respect to the agreements referred to therein, the default of defendants in the payments on the purchase price, and the giving of notice of forfeiture by plaintiff, but denies plaintiff's ownership of said lands; denies the allegation in the complaint that on the 1st day of June, 1911, "plaintiff was in the quiet, peaceable, and exclusive possession of all or any of the described premises until the possession thereof was taken by defendants on or about the month of September, 1911, or at any other time"; admits the demand made on defendants by plaintiff for the return to her of the possession of said lands, but alleges that, at the time of the demand so made, the plaintiff failed, neglected, and refused to pay or to offer to pay or return either to the West Virginia Oil Company or the trustees in liquidation of said company the moneys received by plaintiff for and on account of the purchase price of said lands, and has ever since failed, refused, and neglected to repay or return the moneys so received by her; denies that said defendants, ever since the 29th day of April, 1912, have withheld, unlawfully, the possession of said lands from plaintiff, or have unlawfully excluded, or unlawfully now exclude, plaintiff from the possession of said lands, or any part thereof; denies that defendants have not any right, or at any time never had any right, to the possession of said lands, but, "on the contrary, these defendants allege" that at all times since the month of September, 1911, they have had the right to such possession, and still have the right to such possession, and will continue to have such right "until the plaintiff shall pay to them, as trustees of said West Virginia Oil Company, the sum of $15,600 so paid to and received by plaintiff from the said West Virginia Oil Company for and on account of the purchase price of said lands."

The defendants also filed a cross-complaint by which they seek to recover the said sum of $15,600 paid by the said company to the plaintiff on account of the purchase price of said lands. Said cross-complaint sets up the several agreements referred to in plaintiff's complaint, the notice of forfeiture and demand of plaintiff for the restitution of the premises, alleges that the plaintiff failed and refused, and now still fails and refuses, to refund to the defendants the moneys paid by the oil company on the purchase price of the lands, and that the defendants as trustees, etc., are entitled to hold the possession of said lands until said moneys are paid over by the plaintiff to the defendants.

The plaintiff demurred to the answer and to the cross-complaint, and moved to strike from the answer the allegations denying plaintiff's ownership of and right to the possession of the land, that on June 1, 1911, or at any other time, the plaintiff was in the quiet, etc., possession of the lands, and until defendants took possession thereof in September, 1911, that defendants, ever since April 25, 1912, have unlawfully withheld possession of said lands from plaintiff, and have unlawfully excluded, and now unlawfully exclude, plaintiff from the possession thereof, that defendants have no right to the possession of said lands, and that defendants are entitled to the possession thereof until the plaintiff repays to them as trustees, etc., all moneys received by her from the said oil company as part of the purchase price of said lands.

The court overruled the demurrer to the answer, sustained the demurrer to the cross-complaint, without leave to amend, and granted the motion to strike from the answer the averments above specified as those to which said motion was addressed, and rendered judgment in favor of the plaintiff. From said judgment the defendants prosecute this appeal.

[1] The motion to strike from the answer the denial that the plaintiff was the owner of the lands, and that she was, by reason of such ownership, on the 1st day of June, 1911, in the quiet, peaceable, and exclusive possession of said lands, was properly granted upon the ground that the vendee in possession under a contract for the sale of land cannot deny the title of the vendor in an action in ejectment. 39 Cyc. p. 1614; Tyler on Ejectment, p. 558; Garvey v. Lashells, 151 Cal. 533, 91 Pac. 498; Gervaise v. Brookins, 156 Cal. 107, 108, 103 Pac. 332.

The other portions stricken out involved mere legal conclusions, and also the allegations with respect to the failure and refusal of the plaintiff to pay back the moneys she had received from the oil company on the purchase price of the lands, and the right of the defendants to retain such possession until such moneys were returned to the vendee, or its trustees in liquidation, the defendants herein. The order striking from the answer the latter allegations and the order sustaining the demurrer to the cross-complaint involve and present the principal point made by the appellants, viz.: That appellants, as is their contention, have the right, under the contract for the sale of the

lands, "to recover the payments made on it [said contract]; that the contract does not warrant the plaintiff retaining the payments when she forfeited the defendants' rights under the contract, and that before the plaintiff can maintain the action she must return the payments made."

It is to be noted that nowhere in the answer or in the cross-complaint is there any allegation showing or tending to show that the plaintiff was guilty of any default under the contract, nor is there any statement or allegation in either of those pleadings of the defendants denying or pretending to deny that the oil company was not in default in its payments according to the terms of the contract. To the contrary, the defendants in their pleadings expressly and directly admit that the oil company was in default in its said payments, and had been so for a long period of time and offer no excuse for such default. The defendants stand upon the bald proposition that, the contract of sale not being completed or consummated, though through no fault of the plaintiff, and the latter having received a large sum of money on the purchase price, said money ought to be returned to them before they are required to give up possession of the property, notwithstanding that the oil company, vendee in possession, refused to go on with the fulfillment of the terms of the agreement. They undertake to support this position by the statement that all that the contract provided for in the way of a forfeiture was that, in case of default by the oil company in the payments on the purchase price, it was to forfeit all right in the property and that the casings and derricks, used in the production of oil from the lands, were to revert to the plaintiff; "that the contract is entirely silent as to the payments—there was nowhere in it any stipulation that they [the moneys paid] should be forfeited to the plaintiff." It is asserted that the "notice of forfeiture given by the plaintiff bears out this contention."

While all that the defendants say as to the language of the forfeiture clause of the contract, and that of the notice declaring the contract at an end and the oil company's forfeiture of its right to proceed with the consummation of the contract, is true, we are in no doubt as to the soundness of the respondent's position that the defendants have not shown that they are entitled to the return of the moneys paid to the plaintiff under the contract as a condition precedent to the return to the plaintiff of the possession of the lands or at all.

[2-4] Counsel for the plaintiff, in their brief, well and succinctly state the law in this state respecting the rights of the parties to contracts such as the one involved herein as follows:

"It is now the settled law of this state that a vendee under a contract for the purchase of real property cannot continue to hold the possession thereof after making default in the payments as therein provided, regardless of whether the vendor has title or not, and that the vendee cannot refrain from making payments as by the contract provided, and also continue to hold possession of the land; nor can the vendee under any circumstances be entitled to the return of the money by him theretofore paid thereunder while he continues to hold possession of the land; nor can the vendee after making default in his payments without legal excuse ever recover the return of any of the money he may have paid thereon when the vendor was not in default of anything on his part to be kept and performed, except when there has been mutual rescission" (citing Glock v. Howard, 123 Cal. 10 et seq., 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; Haile v. Smith, 128 Cal. 419, 60 Pac. 1032; Brushi v. Quail Mining, etc., Co., 147 Cal. 120, 123, 81 Pac. 404; Garvey v. Lashells, 151 Cal. 526, 531, 91 Pac. 498; Oursler v. Thacher, 152 Cal. 739, 745, 93 Pac. 1007; Gervaise v. Brookins, 156 Cal. 103, 108, 103 Pac. 329; List v. Moore, 20 Cal. App. 616, 129 Pac. 962; Skookum Oil Co. v. Thomas, 162 Cal. 539, 123 Pac. 363; Champion Min. Co. v. Champion Mines, 164 Cal. 205, 213, 128 Pac. 315).

There is not shown in this case, nor is it in any way pretended, that there was a repudiation or abandonment of the contract by plaintiff or a consent to a rescission thereof by her. The notice of forfeiture and demand of possession clearly shows that she stood squarely upon the terms of the contract.

[5] The contention that the plaintiff is not entitled to retain the moneys paid to her as part of the purchase price, for the reason that there is no express covenant in the contract that she may do so upon the forfeiture for breach of the contract of the vendee's right to consummate the purchase, and notice thereof and demand for restitution of the premises by the vendor, is answered by the cases above named, and notably by the case of Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17, where the principles governing such contracts as the one here are elaborately considered and ably expounded. The following is what the court in that case, among other things, said:

"When an equitable showing is not made to excuse the breach, the vendor has the right in equity, as he always has at law, to retain the moneys paid by the vendee. Therefore we have said that it matters not in such contracts that the parties have declared that the vendor may retain the moneys paid as stipulated damages. The name which the parties thus give does not alter the fact nor change the vendor's rights. If it be said that the clause for stipulated damages is void, still the vendor is entitled to retain the money. Thus, in Hansbrough v. Peck, 5 Wall. 497 [18 L. Ed. 520], the Supreme Court

of the United States, having under consideration this identical question, says: 'No rule in respect to the contract is better settled than this: That the party who has advanced money or done an act in part performance of the agreement, and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done.'

"In precise illustration of the proposition may be quoted the language of the learned Chancellor Walworth, in Egerton v. Peckham, 11 Paige 352: 'The contract, it is true, contains a general provision that if default be made in either of the payments Strobeck shall forfeit all the previous payments and give up possession of the premises. *This, however, is but the legal effect of the contract without such a provision.* (Italics ours.) For, if no such provision had been contained in the agreement, the defendant might have brought an action of ejectment to recover the possession of the premises, which ejectment suit this court would not have restrained, except upon the terms of paying the balance of the purchase money and the costs of suit. Nor could the payments already made pursuant to the terms of the contract have been recovered back if the vendee had refused to complete his purchase *even if this clause of forfeiture had not been inserted in the contract.*'" (Italics ours.)

In a concurring opinion by Mr. Justice Harrison in the Glock Case and concurred in by Garoutte and Van Fleet, JJ., it is said:

"The provision that in case of default by the plaintiff to comply with his agreement he should forfeit his right to whatever moneys he might theretofore have paid, and that the defendant should be released from all obligation to convey the property, was but a declaration in express terms of what would have been the legal rights of the parties without such provision. The plaintiff had agreed to pay the money to the defendant as a condition precedent to his right to demand a conveyance of the land, and as the consideration for the defendant's agreement to make the conveyance, and he could not by his mere default become entitled to repossess himself of the money which he had paid under this express agreement."

In List v. Moore, 20 Cal. App. 623, 129 Pac. 964, it is said, referring to the cases cited by the attorneys therein:

"It is declared also that the right of the vendor to retain the part of the purchase price paid after the default of the vendee is independent of any express clause in the contract for forfeiture of rights or for retention of the purchase money as liquidated damages, that such clauses are merely declarations in express terms of the legal rights of the parties under such a contract, without them, and that the validity of such express clauses is immaterial. It is furthermore held that in such case it is only where the vendor, after default of the vendee, agrees to a mutual abandonment and rescission that the vendee is entitled to receive the purchase money paid."

[6] We have said that the notice of the forfeiture and demand for the return to plaintiff of the possession of the lands did not constitute an abandonment and rescission of the contract. In Oursler v. Thacher, 152 Cal. 745, 93 Pac. 1007, the notice of forfeiture is very much like the one in this case, and it was in that case held that the notice or the act of giving it did not involve or constitute a rescission. The court said:

"Plaintiffs had the right without abandoning or rescinding the contract to insist that by the terms thereof defendants, by reason of their default, had no further right thereunder. * * * Their notice of forfeiture and demand for possession of the mining property were strictly in line with this claim and were in no sense a repudiation or abandonment of the contract or a consent to a rescission thereof. * * * There being no rescission or abandonment of the contract by the plaintiffs, and the plaintiffs at all times having insisted on the contract and stood on its terms, and being in no respect in default, the vendees in default were not entitled to recover either the moneys paid by them to plaintiffs or the moneys expended in developing the property."

See, also, Glock v. Howard & Wilson Colony Co., supra, and cases therein cited, on what does and does not constitute in such a case as this a rescission of the contract.

There is no occasion for the entertainment of the remotest doubt that the case here comes within the doctrines of the Glock and other cases above cited, and that the judgment appealed from should, therefore, be affirmed.

It is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

---

36 Cal. App. 568

EMPLOYERS' LIABILITY ASSUR. CORPORATION, LIMITED, OF LONDON, ENG., et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 2491; L. A. 5422.)

(District Court of Appeal, Second District, California. March 22, 1918. On Rehearing by Supreme Court in Bank, May 21, 1918.)

MASTER AND SERVANT ⊂=375(1) — WORKMEN'S COMPENSATION—"COURSE OF EMPLOYMENT."

A street flushing motor truck operator, who fell from truck in effort to pick up wrench from footboard while manipulating water discharge lever, was injured in "course of employment," though at time of injury one not an employé was running the truck by his permission.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

Proceedings under the Workmen's Compensation Act (St. 1913, p. 279) by Earl A. Booth

for compensation, opposed by Tryon & Brain, copartners, employers, and the Employers' Liability Assurance Corporation, Limited, of London, England, insurer. Award by the Industrial Accident Commission of the State of California, and the employer and insurer make application for writ of review. Affirmed.

George H. Moore, of Los Angeles, for petitioners.

Christopher M. Bradley, of San Francisco, and Warren H. Pillsbury, of Oakland, for respondents.

WORKS, Judge pro tem. The petitioners Tryon & Brain, copartners, were engaged in the operation of certain street flushing motor vehicles in the city of Los Angeles, and Earl A. Booth was the driver of one of them. He was forbidden by his employers to permit any person to ride on the vehicle with him while he was in the discharge of his duty. Nevertheless, upon the occasion which is of interest in this proceeding, he had in company with him one Schilling, while he was engaged in his work. The truck operated by Booth had a seat across the front capable of accommodating two persons. Immediately in front of the right side of the seat was the steering wheel by means of which the truck was guided, the vehicle being what is known as a right-drive machine. It was on the right side of the seat, therefore, that Booth was accustomed to sit when the truck was in service in his charge. On the occasion now in question, however, Schilling, who was an experienced motor driver, occupied the right side of the seat and operated the car. Booth was at his left and, while the truck was moving forward under the guidance and operation of Schilling, was engaged in the manipulation of a lever which controlled the discharge of water upon the street. While so engaged, Booth observed a wrench lying on the footboard of the truck. He feared it was about to fall into the street and reached over to pick it up. In his attempt to do so he pitched to the ground and suffered severe injuries from the fall. At the time, the truck was moving over a smoothly paved street, and there was no jar nor shock to which Booth's fall could be attributed.

Because of the injuries suffered by him, Booth made application to the respondent Accident Commission for compensation, and it was awarded him. In this proceeding the petitioners seek to have the award annulled.

Petitioners' first point is that Booth's injury did not occur in the course of his employment, for the reason that when he surrendered the running of the truck to Schilling he stepped aside from his employment and took upon himself an added risk not within the course of the employment. Counsel cite several decided cases to the general point that compensation may not be awarded an employé where he departs from the performance of his regular work and takes up the discharge of another task for his employer, which latter is different from the ordinary work which the employé was engaged to perform. One of these cases, taking it as a sample of them all, is Robert Sherer & Co. v. Ind. Acc. Com'n, 185 Cal. 615, 166 Pac. 318. In that case the employé was a night watchman on a locomotive, but he was injured when he was away from the locomotive altogether and while performing work entirely distinct from his duty in connection with it. He had left the engine and had temporarily taken the post of a night watchman on a steam shovel owned by the same person who owned the locomotive, the steam shovel being some distance from the locomotive. While the employé was on the steam shovel he lost his life, and the Supreme Court held that he was not entitled to compensation, because he was outside the course of his employment at the time. That case and the others like it do not aid us now. The employé of Tryon & Brain did not abdicate either the place or the character of his employment. He gave up a part of his work to another, it is true, as he permitted Schilling to run the truck, but it was strictly within the line of his duty to operate and care for the levers which controlled the flow of water from the tank of the truck to the street. The same may be said of his attempt to prevent the wrench from falling from the footboard. He was not outside the course of his employment merely because he allowed a stranger to perform a part of his task while he was engaged in the performance of the remainder of it. It is a part of petitioners' contention on this point that Booth took upon himself a risk outside of his employment in permitting Schilling to run the truck; but that does not appear to be the case. In fact, the contrary appears. The accident, so far as any connection of Schilling with it as a causative factor is concerned, happened in no manner different from the following imaginary case: We will suppose the truck to be standing still for some proper reason, let us say, while the truck tank is being filled from a fire plug at the curb. As the truck stands, let us also suppose Booth to be occupying the left side of the seat, either because the fire plug is on that side and he will soon be called upon to turn off the water, or for any other reason. He discovers the wrench on the footboard and, in reaching for it, falls from the car, either because he becomes overbalanced, or his foot slips, or his hand misses its hold upon some handle or projection he has attempted to seize as he leans forward. In such a case he would undoubtedly be entitled to compensation, and the record here discloses no different state of facts, so far as legal effect is concerned.

The petitioners contend that Booth was intoxicated, and that his injury resulted from

his being in that condition. They insist that a finding of the respondent commission that he was not intoxicated is not sustained by the evidence. They do not contend that there was not evidence before the commission on both sides of this question, but they insist that the testimony to the effect that Booth was not intoxicated was "intrinsically unbelievable." We do not so regard it. The commission was within its province, under all the evidence, in determining that Booth was not intoxicated at the time of the accident.

The petitioners insist that there should be an annulment of the award to the extent that it allows the amount of a certain bill for hospital charges and for the services of physicians. They say that no evidence was taken upon the question, and that the only showing of record in support of the allowance of the bill is a statement of charges at a hospital, filed seven days after the case was submitted to the commission for decision. This bill was filed pursuant to a stipulation entered into at the hearing, within the terms of which it appears properly to come, both as to its subject-matter and as to the time of its filing.

The award is affirmed.

We concur: CONREY, P. J.; JAMES, J.

Opinion of Supreme Court in Bank, denying rehearing.

PER CURIAM. The petition to have the above-entitled cause heard and determined by this court after judgment in the District Court of Appeal for the Second Appellate District is denied.

MELVIN, J. (dissenting). I dissent from this court's refusal to transfer the case to the Supreme Court.

The man to whom the Industrial Accident Commission awarded compensation was the driver of a street-flushing motor vehicle. His duty was to operate and guide the machine and, incidentally, to manipulate the lever by which water was discharged upon the street. The only place from which he could perform these services was the right side of the seat. He was forbidden to allow any one to ride with him, but in violation of orders had permitted another man to take the steering gear while he moved to the left-hand side of the seat. While seated there he endeavored to pick up a wrench from the footboard on that side of the truck, and in so doing lost his balance, fell and was injured.

It is clear that if the driver had been in the place where his obligation to his employers required him to be, he would not have met with this accident. The fact that he was using the lever for the release of the water—a part of the work intrusted to him—is a false quantity in the problem. His was not a divided duty. He was not required to steer the car part of the time from the right-hand side of the seat and to work the lever a part of the time from the other side. His place of duty was at the steering wheel. This place he had abandoned in disobedience to orders, and if he had done the work for which he was hired and paid, he would not have met with this accident. If the man had left his machine; had gone to Casey's saloon for a drink; and while there had been hit by a hardwood bung starter wielded by a strong-armed bartender, no one would pretend that his employer was bound to compensate him. Yet his position on the left-hand side of that seat was logically as flagrant a departure from his post of duty as would have been his presence at Casey's bar. The case of Sherer & Co. v. Industrial Accident Commission, 185 Cal. 615, 166 Pac. 318, is absolutely in point, and is utterly opposed to the conclusion reached by the Industrial Accident Commission, the District Court of Appeal and the majority of the Justices of this court.

I concur: LORIGAN, J.

---

38 Cal. App. 548

SIMONS v. BUNNELL, Police Judge.
(Civ. 2702.)

(District Court of Appeal, Second District, California. Nov. 7, 1918.)

1. APPEAL AND ERROR ⊜612(3)—ALTERNATIVE METHOD OF APPEAL—TRANSCRIPT.

Transcript, if considered as one prepared under alternative method of appeal, described in Code Civ. Proc. §§ 953a–953c, is not a duly certified transcript (except as to judgment roll, accompanied with clerk's certificate thereto), where it was not transcribed by court reporter, and truth and correctness thereof was not certified by trial judge.

2. APPEAL AND ERROR ⊜641—ALTERNATIVE METHOD OF APPEAL—TRANSCRIPT.

Where merits of grounds of reversal relied upon cannot be ascertained without referring to contents of police court record, and where transcript showing such record as evidence received in superior court has not been settled by the judge thereof, no grounds for reversal appear and judgment will be affirmed.

Appeal from Superior Court, Kern County: Milton T. Farmer, Judge.

Proceedings by Max Simons against F. W. Bunnell, Police Judge of the City of Bakersfield. From a judgment denying plaintiff's application for a peremptory writ of mandate, he appeals. Affirmed.

E. A. Klein, of Bakersfield, for appellant.

Walter Osborn and Leon French, both of Bakersfield, for respondent.

⊜For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

CONREY, P. J. This is an appeal from a judgment denying plaintiff's application for a peremptory writ of mandate. There is no printed transcript. The appellant has not printed with his brief any part of the contents of the transcript. The transcript is described on its title page as "Clerk's Transcript Prepared under Sec. 953a, C. C. P." Pages 1 to 28 contain the judgment roll, together with the clerk's certificate thereto. Page 29 purports to be a copy of the notice of appeal, and pages 30 to 118 purport to contain a statement of testimony received in the trial of a criminal action before the police court of the city of Bakersfield, in which court respondent Bunnell, as police judge, presided, together with certain instructions to a jury and a copy of docket entries and of the complaint in said action in the police court. Page 119 is a certificate by the clerk of the superior court covering both the judgment roll and said subsequent documents, all of which the clerk certifies were prepared in accordance with the provisions of section 953a of the Code of Civil Procedure.

[1] Considering the transcript as one which the appellant attempted to have prepared under the alternative method of appeal described in sections 953a, 953b, and 953c of the Code of Civil Procedure, it is not (except as to the judgment roll) a duly certified transcript, since it was not transcribed by the court reporter, and the truth and correctness thereof does not appear to have been certified by the judge of the superior court.

[2] The brief for appellant shows that he is relying upon claimed grounds for reversal the merits of which could not be ascertained without referring to the contents of said purported record made in the police court. As pointed out above, the transcript showing that record as evidence received in the superior court has not been settled by the judge who tried the case in which this appeal is taken, and for that reason alone, if for no other, no grounds for reversal appear.

The judgment is affirmed.

We concur: JAMES, J.; MYERS, Judge pro tem.

---

38 Cal. App. 612

## PEOPLE v. KAWANO. (Cr. 621.)

(District Court of Appeal, Second District, California. Nov. 11, 1918.)

1. False Pretenses ⟸39—Intent to Defraud Bank—Evidence.

Evidence that defendant presented to first bank check on another, knowing he had not sufficient funds for its payment, and that payment was refused until he secured an indorser, when at his request he was paid the sum named in the check, warranted the inference that defendant intended to defraud the first bank, and it was immaterial that it subsequently recovered from the indorse

2. Criminal Law ⟸400(8) — Evidence of Bank Account.

The testimony of the bank's credit remittance man that the defendant had only the one account, which was introduced in evidence, and had no credit with the bank at the time he drew the check, was within the exception to the hearsay rule that results of voluminous facts or of the examination of many books and papers, which could not be conveniently made in court, may be proved by the person who made the examination, as provided in Code Civ. Proc. § 1855, subd. 5.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

M. Kawano was convicted under Pen. Code, § 476a, and from the judgment and an order denying a new trial he appeals. Judgment and order affirmed.

M. R. Van Wormer, of San Luis, for appellant.

U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn, Deputy Atty. Gen., for the People.

MYERS, Judge pro tem. This is an appeal from a judgment of conviction under section 476a of the Penal Code, and from an order denying a motion for a new trial.

Defendant was charged by information with having made, drawn, uttered, and delivered to the Commercial Bank of San Luis Obispo a certain check for the sum of $15 on the First National Bank of Los Angeles, with intent to defraud said Commercial Bank, knowing that he did not have sufficient funds or credit with said First National Bank to meet the same. The evidence showed that on March 5, 1918, the defendant presented to the Commercial Bank a blank check of the First National Bank and "wanted to get $15." The teller thereupon filled in the check for that amount to the order of his bank, and the defendant signed it. The teller refused to cash the check without the signature of an indorser thereon, and defendant took it away and secured the indorsement of one Kurokawa thereon, after which, on the same day, he brought it back to the Commercial Bank, delivered it, and received the cash on it. The check was returned unpaid and was never paid by the First National Bank, but the amount thereof was later paid to the Commercial Bank by the indorser, Kurokawa.

[1] Two points are made upon the appeal:

(1) "That there was no evidence that defendant intended to defraud the Commercial Bank of San Luis Obispo."

Appellant urges, in this connection, that it is apparent from the evidence that, if defendant intended to defraud any one, it must have been the indorser, Kurokawa, who was financially responsible and who did in fact eventually pay the check. It is urged by the respondent that the offense was complete when the defendant first signed and presented the check to the Commercial Bank, without Kurokawa's indorsement thereon, under the terms of the statute, which provides that the making or drawing or uttering or delivering, under the conditions specified, shall constitute the offense. Whether this be correct or not, it seems sufficient to say that when the defendant, upon the second occasion, presented the indorsed check to the Commercial Bank for the purpose of getting the money thereon and did thereby obtain the money, these facts, shown by the uncontradicted evidence, warranted the inference by the jury of the further fact that he intended then and thereby to defraud said bank of the money so obtained, if the other elements of the offense were then existing. The circumstance that the Commercial Bank might be able to, and did thereafter in fact, succeed in transferring the burden of its loss to the shoulders of the indorser, in no way militates against the reasonableness of this inference.

[2] This brings us to the second point urged by appellant, namely:

"That there was no evidence that defendant had no funds or credit with the First National Bank of Los Angeles at the time he made the check, or that he knew he had no funds or credit there."

The credit remittance man of the First National Bank, who was charged with the handling of all business with outside California banks, testified that he had made a personal inspection of the books of the bank, in company with the auditor thereof, with reference to the particular account of M. Kawano, the name of defendant, and the name signed to the check, and that there was no account on the books of the bank in that name other than the one introduced in evidence, and that defendant had no credit with said bank at the time he drew the check or at any time subsequent to October 30, 1912. The account introduced in evidence was in the name of M. Kawano and was opened on October 22, 1912, and closed on October 30, 1912. Appellant urges that the books of the bank were the best evidence to prove these facts, and that the testimony of the witness was therefore hearsay and incompetent. The burden upon the prosecution in this respect was to prove a negative, namely, that the books of the bank did "not" show a certain thing. If appellant's contention were correct, it would have been incumbent upon the prosecution in this case to bring into court all the books of customers' accounts with the First National Bank of Los Angeles covering a considerable period of time. This brings this case within the well-established exception to the hearsay rule, which is stated as follows:

"When it is necessary to prove the results of voluminous facts, or of the examination of many books and papers, and the examination cannot be conveniently made in court, the results may be proved by the person who made the examination." San Pedro Lumber Co. v. Reynolds, 121 Cal. 74, 86, 53 Pac. 410, 413.

This rule is codified in section 1855, Code of Civil Procedure, subdivision 5, as follows:

"There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases: * * * (5) When the original consists of numerous accounts or other documents, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole."

The judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; JAMES, J.

---

38 Cal. App. 563

## BOARD OF TRUSTEES OF LELAND STANFORD JUNIOR UNIVERSITY v. RODLEY. (Civ. 1889.)

(District Court of Appeal, Third District, California. Nov. 7, 1918. On Rehearing, Dec. 7, 1918.)

1. WATERS AND WATER COURSES ⟸119(2) — SURFACE WATER—RIGHTS OF UPPER PROPRIETOR.

The upper proprietor has no right to divert by artificial means the surface water standing upon his own land to the land of the lower proprietor to the prejudice of the latter.

2. WATERS AND WATER COURSES ⟸119(2)— SURFACE WATER—NATURAL DRAINAGE.

The easement of the upper proprietor to have the water flow on the land of the lower proprietor is limited to the disposition of the water through natural channels, and he cannot accelerate it by artificial ditches, or increase the drainage to the injury of the lower owner.

3. WATERS AND WATER COURSES ⟸119(2)— DRAINAGE OF SURFACE WATER—RIGHTS OF UPPER PROPRIETOR—DIVERTING FROM NATURAL COURSE.

That the surface water from only a portion of upper proprietor's land flowed in its natural course to the land of his neighbor did not justi-

fy him in so draining, by means of ditches, the residue of his land.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by the Board of Trustees of Leland Stanford Junior University against J. Ellis Rodley. Judgment for defendant, and plaintiff appeals. Judgment reversed.

Wilson & Wilson, of San Francisco, and McCoy & Gans, of Red Bluff, for appellant.
Guy R. Kennedy, of Chico, for respondent.

BURNETT, J. Plaintiff and defendant owned adjoining tracts of land, the land of the latter being higher than that of the former. It is alleged in the complaint that defendant dug a ditch upon the defendant's said tract of land over and along nearly the entire length of said land and up to the point where it adjoins plaintiff's land, for the purpose of draining defendant's said tract of land, and caused all rain and surface waters thereon to run to and upon said plaintiff's land, and said ditch since its construction has so drained defendant's tract of land, and "has carried all of said surplus rainwater contrary to their natural course, to the end of said ditch at the said point of the boundary line of the said two tracts of land." It is further alleged that these surface waters have "flowed to and upon and over and across the plaintiff's said tract of land and have caused large bodies of water to form upon the plaintiff's said tract of land, and have thereby made a large portion of plaintiff's said tract of land unfit for cultivation or use, and have thereby caused great and irreparable damage and injury to plaintiff and to plaintiff's said tract of land." There is also an allegation that it is the purpose of defendant to continue the maintenance of said ditch and to so perpetuate the overflow of plaintiff's land. The prayer was, therefore, for damages and an injunction to prevent any further injury to plaintiff's property. The findings and judgment, however, were in favor of defendant, and from said judgment the appeal has been taken.

There is, really, no substantial conflict in the evidence upon any material point. There are various minor differences, but the witnesses are in somewhat unusual accord on all important matters. A careful reading of the record discloses these facts as stated substantially by appellant: (1) Defendant's land is nearly level and has but little natural runoff or drainage. (2) The surface is somewhat lower toward the center of the tract than on the east and west sides thereof. (3) Through the tract from east to west are three elevations or ridges, and these have formed three separate and distinct depressions or "potholes" of considerable extent for holding water. (4) During the winter the rains cause these "potholes" to become filled with water which varies in depth from a few inches to a foot or more. (5) It was only during excessive and unusual floods that these potholes overflowed and the water ran off of defendant's land by natural course. (6) Before the construction of the ditch hereinafter mentioned, these depressions held the water on defendant's land as late as the month of May, and many of defendant's fruit trees were killed by the standing water, and he was also prevented from cultivating the soil and raising crops thereon. (7) For a short distance of a few hundred feet from the southeast corner of defendant's land there was a swale, or water course which would conduct water finding its way therein onto the plaintiff's land. (8) For the purpose of conducting the surface and surplus waters from his said land onto and through the said swale onto plaintiff's said land and thereby draining his own land, especially the portions covered by said potholes, defendant in the fall of 1914 caused to be constructed a ditch throughout almost the entire length of his said land and so as to connect with said swale, and, also, caused said swale to be cleaned out and deepened. (9) The result of the construction of said ditch and of the change made in the swale was that said land of defendant, especially said depressions or potholes, were drained and the waters caused to flow to and upon said land of plaintiff. (10) This result greatly increased the amount of water flowing from said defendant's said land to and upon plaintiff's and caused material damage to plaintiff and to its said land. (11) It was and is the intention of defendant, by means of said ditch, to continue to so conduct said surplus water onto the land of plaintiff, and he will do so unless restrained and enjoined by the court.

[1-3] What are the legal principles applicable to the situation created by the foregoing facts? As to the question there can be no doubt in this state, as the law of and pertaining to surface waters is clearly settled. The upper proprietor has no right to divert by artificial means the surface waters standing upon his own land to the land of the lower proprietor to the prejudice of the latter. He must allow it to pursue its natural course by its accustomed channel. He has an easement to have the water flow on the land of the lower proprietor, but it is limited to the disposition of the water through the chosen channels of nature. The owner of the upper land cannot accelerate by means of artificial ditches or increase the drainage of his own land to the injury of the lower owner. It would, of course, follow that, if the surface water from only a portion of his land flowed in its natural course to the land of his neighbor, this would not justify him in so draining by means of ditches the residue of his land. The principle does not apply to a gradual increase in drainage that may be caused by the cultivation of the soil accord-

ing to the usual method. We are, however, not dealing with that condition, but we are clearly confronted with the fact that by artificial means the defendant has caused a considerable portion of his land to be drained and the water precipitated onto the land of plaintiff, whereas, according to the course of nature said water would not reach said land.

Among the many decisions in this state bearing upon the situation it is sufficient to refer to some of the later ones. In Rudel v. Los Angeles County, 118 Cal. 281, 50 Pac. 400, some of the earlier cases are reviewed, and it was held that the upper proprietor could not gather and concentrate surface water from a large area in a single channel and precipitate it in volume upon the servient tenement, but only that he was entitled to have it flow in its wonted manner without obstruction.

In Wood v. Moulton, 146 Cal. 317, 80 Pac. 92, it was said:

"Appellants' principal contention is that, under the statutes of this state (Stats. 1850, p. 219) and under section 4468 of the Political Code, as the common law of England is made the rule of decision in this state where not repugnant to or inconsistent with our Constitution or laws, the defendants' acts in ridding themselves of this stormwater were entirely consistent with their rights, and if plaintiff suffered damage therefrom it was damnum absque injuria. Such, indeed, was the rule at common law, but, by a long course of decisions in this state consistently adhered to, the rule of the civil law has been adopted and has become our rule of property." (Citing a large number of cases.) "It follows, therefore, that the owner of higher lands has no right, for his own relief, either to divert surface or stormwaters from his lands onto the lands of another, over which they would not naturally have flowed, nor has he the right by accumulating the surface waters upon his own lands, in ditches, or other like artificial channels, to precipitate them upon his neighbor's land in larger quantities or in different form from that which they would have had or taken in the course of nature."

In Galbreath v. Hopkins, 159 Cal. 297, 113 Pac. 174, it is said:

"It is, of course, clear under the law that, unless the defendants have acquired a right by prescription to discharge the water from the pond by artificial means upon the land of plaintiff, they have no right to do so at all. While the owner of upper land has the right to have the waters from his land flow in their natural course down upon the lands below, he has no right, by the construction of ditches or other artificial means, to turn waters which have naturally accumulated in ponds or depressions on his land upon the land of his neighbor lower down; * * * and, where water is thereby caused to flow upon the land of another which would not naturally flow thereon, this is an invasion and injury to his right of property and a nuisance per se, the continuance or maintenance of which he has the right to have enjoined."

Heier v. Krull, 160 Cal. 441, 117 Pac. 530, is to the same effect. Therein it is declared:

"The gist of the threatened injury alleged in the complaint is the making of the new ditch and the alteration of the slough in such a manner that the water falling on the land north of the alleged ridge, and which did not before reach plaintiff's lands, will be carried to and upon said lands through said proposed ditch across the ridge. Every landowner must bear the burden of receiving upon his land the surface water naturally falling upon land above it and naturally flowing to it therefrom, and he has the corresponding right to have the surface water naturally falling upon his land or naturally coming upon it, flow freely therefrom upon the lower land adjoining, as it would flow under natural conditions. From these rights and burdens the principle follows that he has a lawful right to complain of others, who, by interference with natural conditions, cause such surface water to be discharged in greater quantity or in a different manner upon his land, than would occur under natural conditions. This is the settled law of this state."

The record before us brings this case within the doctrine of these decisions. It may be admitted that the surface waters from a large portion of the defendant's land is accustomed to flow in accordance with the topography and slope of the country onto the land of plaintiff, but the case is entirely different in reference to the waters that are accumulated in said potholes. Indeed, the testimony of the defendant himself shows very clearly that the purpose of the construction of the ditch was to drain these depressions so as to save his orchard. If said waters had been accustomed to flow off in a natural way, there would have been obviously no necessity for the construction of the ditch. Defendant seems to have proceeded upon the theory that the rule of the common law as to surface waters prevails in this state, and the court below apparently took that view of the case. Counsel for respondent also argues from the same standpoint, and he cites from other jurisdictions well-considered decisions upholding his contention; but they do not state the rule applicable in California.

It is to be regretted that the accumulated surface waters on defendant's land have been to him the occasion of such injury, but in morals as well as in law he is not justified in shifting this burden to his neighbor. Of course, he must use his own property so as not to willfully injure another, or, as the Latins have it, "Sic utere tuo ut alienum non lædas."

If it had been shown that by percolation, seepage, or other natural method, said waters were accustomed to flow over plaintiff's land, and that the burden of the servitude had not been appreciably increased by the construction of the ditch, we would, of course, have a different case. We find no such condition, however.

We have not considered other matters, as

we deem the foregoing decisive so far as this appeal is concerned.

The judgment is reversed.

We concur: CHIPMAN, P. J.; HART, J.

On Rehearing.

PER CURIAM. We have carefully examined the interesting petition of respondent for a rehearing, but we do not think the evidence is sufficient to take the case out of the rule as to surface waters which was enunciated in our opinion filed herein. It is possible that such evidence may be supplied on another trial. There are a few general observations by some of the witnesses that might be construed as having some tendency to support respondent's position, but we think the evidence is too uncertain and indefinite to justify the finding that all the surface waters from defendant's land "flow by their natural course into natural channels" upon the plaintiff's said tract of land.

Of course if plaintiff has no further interest in the litigation, as suggested by respondent, this fact can be shown on the retrial; but there is nothing in the record to justify us in taking cognizance of that fact.

The petition for rehearing is denied.

---

38 Cal. App. 601

## GLENN et al. v. CALIFORNIA TRONA CO. et al. (Civ. 2381.)

(District Court of Appeal, First District, Division 1, California. Nov. 9, 1918.)

1. JUDGMENT ⟸460(2) — VALIDITY—PLEADING.

A complaint characterizing a judgment as a "purported" judgment, alleged to be "claimed" by certain parties, is insufficient to impeach its validity.

2. CORPORATIONS ⟸175 — ASSESSMENT OF STOCK—PURPOSES.

Under Civ. Code, § 331, the directors of a corporation had power to assess the stock for payment of expenses, conducting the business, or paying debts, and a complaint to annul an assessment, not alleging that it was not levied for any of such purposes, but showing a large judgment debt, is subject to demurrer.

3. CORPORATIONS ⟸189(12)—ASSESSMENTS—VALIDITY—ACTION TO ANNUL—BURDEN OF PROOF.

The burden is upon the party attacking an assessment of corporate stock to show its invalidity.

4. CORPORATIONS ⟸189(11)—ASSESSMENT OF STOCK — ACTION TO ANNUL — PLEADING—COMPLAINT.

In an action to annul an assessment of corporation stock, a complaint, alleging that the purpose of the assessment was to "freeze out" the plaintiffs, is insufficient to show that the assessment is invalid.

5. CORPORATIONS ⟸189(2) — ASSESSMENT OF STOCK—ACTION TO ANNUL ASSESSMENT.

In an action to set aside the sale and recover stock sold for delinquent assessments, invalid for irregularity or defect in the sale, the plaintiff must pay or tender to the corporation or party holding the stock the sum for which the same was sold in view of Civ. Code, § 347.

6. CORPORATIONS ⟸189(11)—ACTION TO ANNUL ASSESSMENT—PLEADING.

In an action to annul assessments and recover stock sold under delinquent assessment, plaintiff failed to state a cause of action by merely alleging a previous tender of the assessments, without offering in his complaint to do equity by paying the assessments.

7. APPEAL AND ERROR ⟸948 — DISCRETION OF COURT — PRESUMPTION — AMENDMENT OF PLEADING.

Where plaintiff has been permitted to amend a complaint three times and still fails to state a cause of action, it cannot be presumed the superior court abused its discretion in refusing leave to further amend.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Effie C. Glenn and others against the California Trona Company and others. From a judgment sustaining the demurrers to the third amended complaint, plaintiffs appeal. Affirmed.

R. H. Countryman, of San Francisco, for appellants.

Charles W. Slack and Chauncey S. Goodrich, both of San Francisco, for respondents Foreign Mines Development Co. and others.

Perry Evans, of San Francisco, for respondents California Trona Co. and others.

BEASLY, Judge pro tem. This is an action brought to annul an assessment on the corporate stock of the California Trona Company and to vacate the sale of delinquent stock belonging to the plaintiffs. The action was begun in May, 1912. A third amended complaint was filed on May 3, 1915. Demurrers by the defendants to this third amended complaint were sustained on April 21, 1916, and judgment was entered on April 25, 1916. The appeal is taken from that judgment.

[1] One of the attacks upon the assessment made in the third amended complaint was based upon the allegation that the board of directors which levied the assessment were not the legal board of directors of the company. Between the time of the filing of the third amended complaint and the decision on demurrer, the Supreme Court, in the case of Dolbear v. Wilkinson, 172 Cal. 366, 156 Pac. 488, Ann. Cas. 1917E, 1001, decided that this board of directors was the legally elected and constituted board of directors of

the corporation. That point is therefore not insisted upon by the appellants; but they do insist that the assessment is void for other reasons arising out of the following facts: It is alleged that the assessment was levied for the purpose of "freezing out" the plaintiffs by having their stock sold thereunder. It is further alleged that certain of the individual defendants, namely, E. J. Boyes, Guy Wilkinson, Lucien Simon, Goodrich, and Hanus, are the directors of the California Trona Company, and that the other individual defendants are stockholders of that company. It is further alleged that these stockholders and directors are mere dummies for the Foreign Mines Development Company, another corporation, organized in Great Britain. There is a further allegation that, by a judgment of the superior court of the city and county of San Francisco entered previous to the sale of plaintiffs' stock, the defendants were enjoined from using a certain judgment of said court existing in their favor to settle any assessment upon any of the stock of the California Trona Company. This latter judgment is characterized as a "purported" judgment, which it is alleged is "claimed" by Simon and his wife. There is no allegation in this third amended complaint sufficient to impeach the validity of that judgment. Indeed, from the allegations of the complaint it must be held to appear upon the face thereof that this judgment is a valid judgment, for it is presumed to be valid in the absence of allegations showing its invalidity, and this is especially true upon a collateral attack such as that made upon it in this action. It is further alleged that Simon and his wife and the other defendants did use this judgment in violation of the injunction for the settlement of the assessments upon certain stock of the defendants; and it is also alleged that the sale of the stock was not made at public auction but behind closed and locked doors, in a room to which no person was admitted except upon permission of the individual defendants in this action. It is also averred that Phillips, one of the plaintiffs, who held 20 shares of the stock of the California Trona Company, evidenced by a single certificate, tendered immediately before the sale to a person who claimed at that time to be the secretary of the corporation, but who is not alleged to have been actually such secretary, sufficient money to cover the assessment on six of his shares and the costs incurred by the corporation up to that time in preparing for the sale.

[2-6] These allegations are not sufficient to show an invalid assessment. The directors of the corporation had power under section 331 of the Civil Code to assess the stock of the corporation for the purpose of paying expenses, conducting business, or paying debts of the corporation. It is not alleged in this complaint that this assessment was not levied for the purpose of paying the expenses of the corporation or of conducting its business, and it is not only not alleged that the company was free from debt, or that this assessment was not levied for the purpose of paying its debts, but it appears upon the face of the complaint itself, construing it according to the familiar rule for the construction of pleadings upon demurrer, that there was a valid judgment for $40,000 existing in favor of Simon and his wife against the corporation at the time this assessment was levied. The burden is upon the party attacking an assessment to show its invalidity, and no facts appear in this complaint sufficient to show that this is other than a valid assessment; not even the allegation that the purpose of the assessment was to "freeze out" the plaintiffs is sufficient to invalidate it. Von Horst v. American Hop & Barley Co. (C. C.) 177 Fed. 976. In that case United States District Judge Van Fleet, in passing upon this question raised in the same way by a demurrer to a complaint, said:

"It is not alleged in any specific way that the assessment was not levied for a proper purpose, but simply that it was not levied 'in good faith, but for the purpose of freezing out this complainant.' Since fraud will not be presumed, but must be made to appear, this averment is not sufficient to negative the presumption that the assessment was levied for a proper purpose."

This is but the application of the general rule that where the act done is not illegal the motive which prompts it is immaterial. Clopton v. Chandler, 27 Cal. App. 595, 150 Pac. 1012. The circumstances surrounding the levying and enforcement of this assessment may have been suspicious, even reprehensible and perhaps fraudulent; but, if so, counsel for plaintiff should have been able to set them forth specifically and clearly, and, as he has not been able to do so after four attempts, the trial court, compelled to either find a sufficient cause of action stated in the complaint or to sustain the demurrer, was right in taking the latter course, so far as the attack upon the assessment for fraud is concerned.

Assuming, but not deciding, that the sale was invalid, still plaintiffs have not stated a cause of action in their complaint to set aside the sale, for under section 347 of the Civil Code no action must be sustained to recover stock sold for delinquent assessments upon the ground of irregularity or defect in the sale, unless the party seeking to maintain such action first pays or tenders to the corporation, or the party holding the stock sold, the sum for which the same was sold. It is not alleged in the complaint that any of the plaintiffs except Phillips tendered the sum for which any of the stock was sold under this assessment at any time. Phillips is averred to have tendered the assessment on six shares, as above stated, to a person who claimed to be, but is not averred to have been,

the secretary of the corporation, and it is averred that the directors of the corporation refused to receive the money, but proceeded in spite of this tender to sell the six shares of stock. As to all the plaintiffs except Phillips, under the foregoing section 347 of the Civil Code, the complaint is insufficient because of the failure to aver any tender whatever. We think Phillips also has failed to state a cause of action in not going further than his allegations, and offering in his complaint to do equity by paying the assessment, for it was held in Buena Vista, etc., Co. v. Tuohy, 107 Cal. 243, 40 Pac. 386, that a plaintiff seeking equity must do equity, and that a complaint in equity which does not offer to do equity is demurrable. The foregoing section of the Code is no more than declaratory of this maxim of equity jurisprudence, and the general rule of equity pleading above referred to must be applied to it.

There are other objections to this complaint of equal importance, but the objections noticed were fatal to it as a pleading, and the order sustaining the demurrer was therefore correct.

[7] The plaintiffs object to that part of the order which refused them permission to further amend; but it cannot be presumed, where a party has filed a complaint and has been permitted to amend it three times, and still fails to state a cause of action, that the superior court abused its discretion in refusing leave to further amend.

The judgment is affirmed.

We concur: LENNON, P. J.; STURTEVANT, Judge pro tem.

---

(38 Cal. App. 586)

WELLS v. ALLEN et al. (Civ. 2550.)

(District Court of Appeal, First District, Division 1, California. Nov. 8, 1918. Rehearing Denied by Supreme Court Jan. 7, 1919.)

1. APPEAL AND ERROR ⟸1012(1)—SCOPE OF REVIEW.

An appellate court may not disturb a finding made by the trial court, unless it appears that there is no evidence to support it, or that the evidence so clearly preponderates against the finding as to amount in legal effect to a want of substantial evidence.

2. MARRIAGE ⟸50(5) — COMMON-LAW MARRIAGE—EVIDENCE—SUFFICIENCY.

Evidence *held* to establish validity of common-law marriage between plaintiff and deceased, so as to entitle plaintiff to have his title to community property quieted.

3. MARRIAGE ⟸50(5)—EVIDENCE—COMMON-LAW MARRIAGE.

The fact that a man who, at common law, married a prostitute consented to her continuing as such after the alleged marriage is not conclusive against the fact of marriage, but merely raises an inference that the marriage did not take place.

4. HUSBAND AND WIFE ⟸262(1)—COMMUNITY PROPERTY—PRESUMPTIONS.

The presumption that property acquired by either husband or wife during coverture is community property is unchanged by the amendments to Civ. Code, § 163.

5. HUSBAND AND WIFE ⟸264—COMMUNITY PROPERTY—PRESUMPTIONS.

The presumption that property acquired, by either husband or wife, during coverture, is community property, can be overcome only by clear and convincing evidence.

6. HUSBAND AND WIFE ⟸254—COMMUNITY PROPERTY.

Fact that title to property was taken in wife's maiden name and the property was later mortgaged by her under that name was of no effect if it was purchased with community funds, since it became community property regardless of the name in which it stood.

7. HUSBAND AND WIFE ⟸264—COMMUNITY PROPERTY—PRESUMPTIONS.

Disputable presumption, under Civ. Code, § 164, as amended by St. 1897, p. 63, that wife was entitled to one-half undivided interest in land deeded to herself and husband as her separate property, is overcome by court's finding that the consideration consisted of community funds.

8. HUSBAND AND WIFE ⟸254—COMMUNITY PROPERTY—RIGHTS OF WIFE.

Where property was purchased with community funds and title taken in the wife's name, her conveyance thereof to a title company, with subsequent reconveyance to herself and husband jointly, did not enlarge her interest.

9. HUSBAND AND WIFE ⟸262(1)—COMMUNITY PROPERTY—PRESUMPTIONS.

Conclusive presumption, under Civ. Code, § 164, as amended by St. 1897, p. 63, that a deed to the wife vests title in her as her separate property is available only to an innocent purchaser, and does not bar the husband's action to quiet title against the wife's kin on the ground that the land was community property.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Frank Wells against Emma Allen, administratrix of the estate of Refugia Wells, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Lovett K. Fraser and Ornbaun & Fraser, all of San Francisco, for appellants.

Louis H. Brownstone, of San Francisco, for respondent.

LENNON, P. J. This is an appeal on behalf of certain defendants from a judgment rendered for the plaintiff in the above-entitled action, quieting his title to certain real

property in the city and county of San Francisco. The defendants, Theodore Verdusco, Michael Verdusco, Muria Castro and Pablo Castro, her husband, Dolores Bryan and James Bryan, her husband, have appealed pursuant to section 941B, Code of Civil Procedure. The facts, in brief, are as follows:

The plaintiff, Frank Wells, filed suit to quiet title to certain real property situated in the city and county of San Francisco and particularly described in the complaint filed herein. Emma Allen, as administratrix of the estate of Refugia Wells, deceased, was made a party defendant, as were also the above-named appealing defendants. The complaint set out that all the defendants claimed some right, title, or interest in and to the said property, but that said claims were without right, and asked that the plaintiff's title be quieted against them.

The defendant Emma Allen, as administratrix, etc., answered and alleged that the property in controversy was the property of Refugia Wells, deceased, and that she was entitled to the same as administratrix of the estate of said decedent.

The other defendants answered and claimed the whole of said property as the heirs at law of Refugia Wells, deceased.

The trial court found, in effect: That Refugia Wells, sometimes known as Refugia Verdusco, died intestate; that at the time of her death she was the wife of the plaintiff, Frank Wells; that the property in dispute was community property; that none of the defendants are entitled to any interest in said property; and concluded, as a matter of law, that Frank Wells was the owner in fee simple and entitled to the possession of said property.

[1, 2] The appellants contend that the evidence does not support the findings in certain important particulars. The first objection made by appellants is that the evidence does not support the finding that the plaintiff and the deceased were husband and wife. The court found all the facts necessary to support a common-law marriage, which was a valid marriage in this state at the time these parties assumed that relation, and an appellate court may not disturb a finding made by the trial court, unless it appears that there is no evidence to support it, or that the evidence is so clearly preponderating against the finding as to amount in legal effect to a want of substantial evidence. Williams v. Kidd, 170 Cal. 631, 151 Pac. 1. While there is some conflicting evidence in the record, we think that the testimony amply supports the findings in this regard. The evidence is uncontradicted that these people lived together openly and notoriously and continuously as husband and wife for nearly 30 years; there is evidence that the woman was known to every child on the street where she and plaintiff lived, and to all the neighbors and tradespeople, as Mrs. Wells; that the plaintiff paid her bills and spoke of her as his wife and introduced her as such, and that the deceased called the plaintiff her husband. The defendants emphasize the fact that the evidence shows that the deceased, before her marriage to Wells and for several years thereafter, was a prostitute, and that the plaintiff admits that after their marriage she continued this course of life and earned money thereby. Counsel for appellants seem to think that this evidence should negative all other evidence in the record in support of the marriage, and raise in effect an absolute presumption against any such finding. They cite the case of Grigsby v. Reib (Tex. Civ. App.) 139 S. W. 1027, and quote language therefrom to the effect that such conduct on the part of a woman is absolutely inconsistent with the idea of marriage. We have carefully read that case, and find that the court, upon reviewing the finding of the trial court that there was no marriage, discussed the weight of the evidence, and justified the finding by referring to evidence of prostitution after the alleged marriage, and known to the alleged husband. The court there said that the social and financial position of the alleged husband, as shown by the record, was such as to make it improbable that he would have married a woman and allowed her to openly continue such a course of conduct, and that in the light of this and other evidence, the findings of the trial court were justified. The facts of that case, we think, were somewhat different from the facts in the case under consideration.

[3] In the present case, the record contains no testimony as to the social and financial standing of the plaintiff. From what appears in the record, he was of the same social standing as his wife and her associates. While it is true that there is a presumption that every man will observe the ordinary standards of conduct shared by self-respecting people, and that such an acquiescence on plaintiff's part in his wife's conduct was certainly violative of these, yet we assume that the trial court took this matter into consideration and duly weighed this evidence as against the other evidence offered in arriving at its findings. The fact of the husband's acquiescence in the wife's subsequent misconduct could only be evidence against the probability of the marriage; it would merely establish an inference that a marriage had not taken place in the absence of direct evidence to the contrary.

In the case of Sharon v. Sharon, 75 Cal. 23, 16 Pac. 358, the court said:

"Where the holding out to the world of the relation is evidence of a prior contract, such evidence does not necessarily depend for its effect upon amenity of manners, or upon the degree to

which parties extend to each other the affectionate respect which should attend the intercourse of husband and wife in well-ordered households. The statute does not make the validity of a marriage by consent depend upon the full performance of their mutual duty; the failure to perform certain important obligations is made ground for divorce."

We think that under the decisions the facts found in regard to this marriage fully complied with the requirements of section 55, Civil Code, prior to the amendment of 1895 (St. 1895, p. 121) and that the findings of such facts were justified by the evidence.

[4, 5] Appellants also contend that the finding that the property in dispute was purchased with the community funds of plaintiff and deceased is unsupported by the evidence. Here again we are met with a situation where the evidence is conflicting, and the only question before this court is: Was there any evidence to warrant the finding and to prevent an appellate court from interfering therewith? The plaintiff testified that immediately after the alleged marriage he gave his wife $550 in cash; that during the entire period of the marriage (29 years) he worked regularly, except for one month, when he was looking for work; that he handed over all of his wages to his wife; that his wages averaged from $120 to $150 per month. The marriage took place early in the year 1886, and the property in question was purchased in October, 1887. The cost of the lot was $2,500. The building upon the property was not put up until a year later, and at least a part of the money used for that purpose was obtained by mortgaging the property. The plaintiff erected the building himself.

It is true there is some testimony by the relatives of deceased that she seemed to have plenty of money before and after her alleged marriage; but the testimony is also to the effect that she spent this money freely, and that she was generous with her entire family, giving them thousands of dollars. There is no testimony as to the amount of money she had on hand at any time; all the testimony in regard to her money is vague and uncertain. Most of the testimony of the brothers and sisters of deceased, and of her friend, Mrs. Soledada Garcia, as to the earnings of Refugia Wells, had reference to a time after the alleged marriage, and such earnings would, of course, be community property. Mrs. Garcia also testified that deceased showed her some money tied up in a quilt about three years before her alleged marriage. There is no evidence as to the amount of this money, and there is evidence that after that time she sent money to her relatives in Mexico and brought them all up here, and that she sent her mother $500 for spending money. Added to this evidence was the legal presumption (unchanged by the amendments to section 163, Civ. Code, as of the date of the acquisition of this property) that property acquired by either husband or wife during coverture is community property, which presumption must be overcome by clear and convincing evidence. Dimmick v. Dimmick, 95 Cal. 323, 30 Pac. 547; Meyer v. Kinzer, 12 Cal. 247, 73 Am. Dec. 538; Ramsdell v. Fuller et al., 28 Cal. 38, 87 Am. Dec. 103.

[6] The fact that the property was taken in the maiden name of deceased, and later mortgaged by her under that name, would be immaterial, in view of the above findings. For if the parties were married and if the property was purchased with community funds, it would be community property regardless of the name in which it stood. Osborn v. Mills et al., 20 Cal. App. 346, 128 Pac. 1009.

[7, 8] The last contention made by appellants is that, even under the findings, the plaintiff is barred, by section 164 of the Civil Code as amended in 1897 (St. 1897, p. 63), from claiming this property as community property because in 1912 the deceased deeded the property to the San Francisco Land & Title Company for the purpose of procuring a McEnerney title to the property, and that said company held the title until such purpose was accomplished, and then deeded the property to Frank Wells and Refugia Wells in accordance with the request of the latter.

Under the provisions of section 164 of the Civil Code, where property is conveyed to a married woman and her husband, two presumptions arise from the terms of the conveyance: First, a disputable presumption that title to an undivided one-half interest, as tenant in common, in the property described in the deed vested in the wife "as her separate property"; second, a conclusive presumption of such fact in favor of a purchaser in good faith and for a valuable consideration. Kuns v. Dias, 32 Cal. App. 651, 163 Pac. 1052; Pabst v. Shearer, 172 Cal. 239, 156 Pac. 466.

Conceding that a disputable presumption that the deceased was entitled to an undivided one-half interest in the property by reason of the terms of the deed to herself and her husband by the title company would arise in favor of the appellants, such a presumption can be overcome by positive evidence to the contrary, and we think the fact, as found by this court, that the property was purchased with community funds, dispels the presumption. The court having found that the property was in fact community property, it was impressed with that character as it passed from one grantee to another, and the plaintiff might show the facts against any but innocent purchasers for value. Certainly, since the trial court has found that Refugia Wells had only a com-

munity interest in the property, she could not enlarge that interest by transferring the property to another without consideration and having that other retransfer to herself and her husband jointly.

[9] As to the point raised by the appellant that under section 164, Civil Code, as amended in 1897, the plaintiff is barred from maintaining an action to establish the community nature of this property from and after 1 year from the taking effect of said amendment, it has been decided by the case of Osborn v. Mills, supra, that such amendment was added for the sole purpose of protecting innocent purchasers for value, and is applicable only in such a case.

The judgment is affirmed.

We concur: STURTEVANT, Judge pro tem.; BEASLY, Judge pro tem.

---

38 Cal. App. 605

HUFFAKER v. GRAY. (Civ. 2558.)

(District Court of Appeal, First District, Division 1. California. Nov. 11, 1918.)

1. PLEADING ⟸214(1) — DEMURRER—ADMISSIONS.

In rulings on demurrer to complaint, allegations of complaint will be taken as true.

2. JUDGMENT ⟸443(3)—VACATION—FRAUD—PERJURED TESTIMONY.

That plaintiff obtained judgment by theft of documents from defendant and by the denial of existence of such documents is no ground for vacation on ground of fraud; the theft and suppression being an incident merely of plaintiff's perjured testimony denying their existence, and it having been incumbent upon defendant to meet perjured testimony at trial.

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by E. Huffaker against John Gray. From judgment for defendant upon demurrer to complaint, plaintiff appeals. Affirmed.

Rodolph Hatfield and E. Huffaker, both of Oakland, for appellant.

John L. McVey, of Oakland, for respondent.

LENNON, P. J. This is an appeal from a final judgment rendered upon a demurrer by the superior court of the county of Alameda.

[1] A bill in equity was filed to vacate and set aside a judgment in the case of John Gray v. E. Huffaker, rendered by the same court on January 30, 1915. The allegations of the bill are that the judgment sought to be vacated was procured by fraud on the part of the plaintiff in that action for the reason that said plaintiff stole from defendant certain papers enumerated and described in said bill, which papers were necessary for a proper defense to said action; that, on account of being deprived of such written evidence, defendant was unable by his own testimony to sustain his defense; that defendant did not discover the fact that the said papers had been stolen by plaintiff until 30 days before bringing the present action. A demurrer to the bill was sustained. The question upon this appeal is as to the correctness of the ruling on demurrer. The issue being raised by demurrer, we assume, for a decision of the question involved, that all the allegations of the complaint are true.

It seems that the facts in this case bring it squarely within the reasoning of the case of Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159. The discussion in that case fairly answers all the arguments of appellant here. The court there points out that it has been settled beyond all controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony, giving as a reason for the rule that there must be an end of litigation; and that, when parties have once submitted a matter, or have had an opportunity of submitting it, for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy. The court then proceeds to an explanation of the meaning of the term "extrinsic or collateral fraud," and enumerates such instances as: Keeping the unsuccessful party away from the court by false promise of a compromise, or purposely keeping him in ignorance of the suit; or where an attorney fraudulently pretends to represent a party and connives at his defeat, or, being regularly employed, corruptly sells out his client's interest. The court then proceeds with the analysis and says:

"In all such instances, the unsuccessful party is really prevented, by the fraudulent contrivance of his adversary, from having a trial; but, when he has a trial, he must be prepared to meet and expose perjury then and there. He knows that a false claim or defense can be supported in no other way; that the very object of the trial is, if possible, to ascertain the truth from the conflict of the evidence; and that, necessarily, the truth or falsity of the testimony must be determined in deciding the issue. The trial is his opportunity for making the truth appear. If, unfortunately, he fails, being overborne by perjured testimony, and if he likewise fails to show the injustice that has been done him on motion for a new trial, and the judgment is affirmed on appeal, he is without remedy. * * *

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

"But counsel for appellant seek to distinguish this case from those in which it has been held that a judgment will not be set aside by reason of its being based upon forged documents or perjured testimony. They say that the fraud committed by Cohn was the bribing of Johnson; that this was collateral and extrinsic; that it was not and could not have been the subject of investigation at the trial of the original action. We do not think this distinction can be maintained. The fraud that Cohn committed was the production of perjured evidence in support of his defense. The means by which he induced the witness to swear falsely was but an incident."

[2] We think in the present case that the fraud by which plaintiff obtained his judgment was by means of his own perjured testimony, because it is alleged that the plaintiff, knowing of the existence of the stolen documents, suppressed them and denied their existence. The theft and suppression of the documents were merely incidents and means of strengthening his perjured testimony. Of course, it may be said, if the theft had been proven at the trial, the testimony of the plaintiff would have been discredited; but it is equally true that in the case of Pico v. Cohn, above cited, if the bribery had been proven, the testimony of the witness would have been of no effect.

Appellant has not cited, and we are unable to find, any case in this state overruling or modifying the doctrine as expressed in the case herein discussed.

The judgment is affirmed.

We concur: BEASLY, Judge pro tem.; STURTEVANT, Judge pro tem.

---

38 Cal. App. 615

## HOOKER v. EAST RIVERSIDE IRR. DIST. et al. (Civ. 2602.)

(District Court of Appeal, Second District, California. Nov. 12, 1918. Rehearing Denied by Supreme Court Jan. 9, 1919.)

1. Waters and Water Courses ⟸230(2)—Irrigation Districts—Bonds—"Issued."

In the Wright Act (St. 1887, p. 29), relating to the issue of irrigation district bonds, and in the text of a judgment thereunder, the word "issued" *held* used in the sense of "authorized," rather than in the sense of "executed."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Issue.]

2. Judgment ⟸517—Collateral Attack—Matters Not Presented.

A judgment rendered by a court having jurisdiction of the persons and subject-matter cannot be collaterally attacked by merely showing that some of the evidence which might have been produced by plaintiff in support of the issues as framed was not so produced.

3. Judgment ⟸820(3) — Conclusiveness—Assignee of Bonds.

Plaintiff, owner of bonds, is bound and estopped by a federal judgment declaring them invalid, to which his predecessor in interest was a party; there being no claim that plaintiff was without notice of the steps or proceedings in the federal court (Code Civ. Proc. § 1908, subd. 2).

4. Limitation of Actions ⟸96(2)—Mutual Mistake—Pleading—Complaint.

An action for reformation of bonds on the ground of mutual mistake comes under the three-year statute of limitations, and is not deemed to have accrued until the discovery of facts constituting the mistake (Code Civ. Proc. § 338, subd. 4).

5. Limitation of Actions ⟸96(2) — Reformation of Bonds for Mutual Mistake.

Where the owner of bonds discovered the facts constituting an alleged mistake for which action was brought more than three years prior to beginning of action, recovery was barred, the running of the statute not being interrupted by transfer of the bonds to his assignee (his former assignor).

6. Limitation of Actions ⟸28(1) — Implied Contracts.

An action to compel a municipal corporation to return or pay for property received rests either upon an obligation created by law, or upon an implied contract, and in either case falls within the provisions of Code Civ. Proc. § 339, subd. 1, and whether the right of action accrued upon the delivery, in payment of bonds void upon their face, or upon a subsequent judgment of their invalidity in 1905, such action begun in 1909 is barred.

7. Pleading ⟸8(11), 24—Assignment of Obligation—Right of Action.

An allegation that, when the holder transferred bonds warranting their value, he did not transfer his right to recover against the municipal district issuing them, alleges a conclusion of law, negatived by the rule that the right of action passes to an assignee as an incident of ownership.

8. Limitation of Actions ⟸1—Right of Action.

Except in case of certain statutory exceptions, a statute of limitations runs against the right of action, and not against the holder of the right.

9. Limitation of Actions ⟸105(2)—Statutes of Limitation—Suspension.

A state statute of limitation applying to an action for mutual mistake of parties as to validity of bonds was not suspended during litigation in the federal courts in which the bonds were declared void.

10. Limitation of Actions ⟸48(4)—Contracts—Payment in Bonds.

If the bonds of an irrigation district were accepted by contractor merely as evidence of obligation for the purpose of extending the time of payment thereof, the time of payment would be extended only until a default was made in the payment of the bonds.

Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by Marian O. Hooker, as executrix of the will of John D. Hooker, deceased, substituted in his stead, against the East Riverside Irrigation District, a corporation, and others. From a judgment entered upon an order sustaining defendants' demurrer to plaintiff's amended and supplemental complaint without leave to amend, the plaintiff appeals. Judgment affirmed.

Lent & Humphrey, of San Francisco, for appellant.

Henry C. Goodcell and Goodcell & Goodcell, all of San Bernardino, for respondents.

MYERS, Judge pro tem. The plaintiff appeals from a judgment of the superior court entered upon an order sustaining defendants' demurrer to her amended and supplemental complaint (hereinafter referred to as "the complaint") without leave to amend. The demurrer is both general and special, the latter presenting numerous grounds of which we deem it necessary to consider here only those which plead the statute of limitations. All of the special statutes of limitation which may be appropriate thereto are pleaded by the demurrer to any and every cause of action alleged in the complaint.

[1] From the allegations of the complaint the following facts appear: The defendant and respondent East Riverside irrigation district is a municipal corporation duly organized and existing under the provisions of the "Wright Act" (St. 1887, p. 29), and in 1890 had duly taken all of the steps necessary under the act for the creation of a bonded indebtedness in the sum of $250,000. Thereupon its board of directors instituted in the superior court of San Bernardino county, wherein it was situate, an action in rem pursuant to an amendment to said act, wherein, in December, 1891, a decree was entered confirming the proceedings theretofore taken in the organization of the district and authorization of said bond issue, and adjudging that the district "at the date of said decree was a duly and legally organized irrigation district, possessing full power and authority to issue and sell from time to time the bonds of said district in the sum of $250,000, and that the bonds of said district theretofore issued in said sum were legal and valid." (It is manifest that the word "issued" as used in said decree, as well as in said act, is used in the sense of "authorized," rather than in the sense of "executed." Wright v. East Riverside Irrigation Dist., 138 Fed. 313, 323, 70 C. C. A. 603. The bonds here in question were not executed until more than a year thereafter.)

Thereafter, in January, 1892, the district entered into a contract with appellant's testator, J. D. Hooker, whereby Hooker agreed to furnish and deliver a completed and constructed pipe line, 4,000 feet in length, more or less, to be connected and laid in trenches and to form a part of the irrigation works and system, at the agreed price of $2.50 per lineal foot, payable one-half in cash and one-half in such bonds at their par value. Hooker duly performed this contract, and there became due thereon the sum of $20,642.94, instead of the $10,000 originally contemplated. Whereupon, at the request of the district, Hooker agreed to accept $5,000 in cash in lieu of one-half cash, and also agreed to accept, "as a medium of payment" of the balance, bonds at par value. These bonds were then executed and delivered to Hooker and the $5,000 paid to him on January 27, 1892, pursuant to a resolution of the board of directors. The bonds as then issued bore the signature of W. R. McCully, who was then secretary of said district, whereas the interest coupons thereto attached bore the engraved signature of J. A. Van Arsdale as secretary, Van Arsdale having been secretary at the time the bonds were authorized and at the time the bonds and attached coupons were engraved, at which time his engraved signature was appended to the coupons pursuant to a resolution of the board.

In the latter part of 1892 Hooker sold and delivered the bonds for a valuable consideration to C. G. Hooker, warranting them good and valid and agreeing to take them back if they should prove otherwise. Thereafter, prior to June 29, 1901, C. G. Hooker sold and transferred them for a valuable consideration to C. O. Hooker and Robert G. Hooker, and C. O. Hooker and Robert G. Hooker then sold and delivered them for a valuable consideration to R. Percy Wright; all of these sales being under the same warranty.

The interest coupons were duly paid at maturity, up to and including January 1, 1897, since which time no further payments have been made thereon, or upon the principal, which was payable in installments. Wright presented for payment the interest coupons then due, and payment was refused. Thereafter, and on June 29, 1901, Wright (a citizen of the British empire) commenced an action at law in the United States Circuit Court in and for the Southern District of California, against said East Riverside irrigation district to recover judgment for the amount then due and unpaid upon said coupons. Said defendant appeared and filed its answer, alleging that said bonds and the coupons attached thereto were null and void, specifying, among other defects, the following: That on June 27, 1892, Van Arsdale, whose name appears upon the coupons, was not the secretary of said district, and that McCully, whose name appeared upon the bonds themselves, was not the secretary at the date ap-

pearing upon the bonds, to wit, December 30, 1890. Thereafter, on May 16, 1904, judgment was entered in said action, adjudging each and all of said bonds invalid and void for the reason above specified. Thereafter the plaintiff, Wright, was allowed a writ of error from the United States Circuit Court of Appeals, which resulted, May 29, 1905, in a decision by the latter court affirming the judgment. Thereafter a petition for a writ of certiorari to review said decision was presented to the United States Supreme Court and denied on January 29, 1906.

Pursuant to the covenants of warranty, the bonds were retransferred by mesne assignments from Wright back to J. D. Hooker, who again became the owner thereof on or about June 15, 1909. He then again demanded payment of the interest and principal installments then due, which was refused; whereupon he demanded payment of the sum of $15,642.94, the amount remaining unpaid under the original contract, or the return of said pipe line, which demand was also refused. Thereupon he demanded that the directors of the district cause the property therein to be assessed for taxes to provide funds for the payment of the amounts due, which was refused; whereupon he commenced this action June 29, 1909.

The complaint presents several different aspects which are illustrated by the prayer, which is as follows: First. That the bonds be adjudged valid and the plaintiff have judgment for the amount due thereon. Second. In the event they be held not valid, that they be reformed so as to become enforceable obligations and that plaintiff have judgment for the amount due thereon as so reformed. Third. In the event they be held invalid and not susceptible of reformation so as to render them valid, that they be held valid and enforceable promissory notes or obligations of defendant district, and that plaintiff have judgment for the amounts due thereon. Fourth. In the event that the three former prayers be denied, that the obligation of the original pipe line contract be held to have been suspended by the issuance of the bonds as conditional payment thereof, and that plaintiff have judgment for the amount due under said original contract, with interest. Fifth. That any judgment awarded be decreed to be a lien upon the real property within the district.

Much is said in the briefs concerning the "ethics" and "natural justice" of plaintiff's claim. It is obvious, we think, that the question presented to this court for determination is whether or not, under the facts alleged in the complaint, plaintiff is entitled in this action to the relief sought, or to any relief, with reference, not to the principles of ethics or natural justice, but rather to the established rules of law and equity jurisprudence.

Considering the complaint in the aspect first presented, that of an action upon the bonds as valid obligations, it does not state a cause of action, in that it appears therefrom that the plaintiff is conclusively estopped by the judgment of the federal court holding them void. Plaintiff attempts to escape from this situation by alleging in her complaint that in the action in the federal court the question of an estoppel arising by reason of the payment of the first interest coupons was not raised or considered; nor was the decree validating said bonds set up; nor was the question of the adoption of the lithographed signature of Van Arsdale, as the signature of the then secretary, set up.

[2, 3] It is manifest, we think, that a judgment duly rendered by a court having jurisdiction, both of the persons and the subject-matter, cannot be collaterally attacked merely by a showing that some of the evidence which might have been produced by the plaintiff in support of the issues as framed was not so produced. Conceding for the moment, but not deciding, that the question of the conclusive effect of the judgment of the superior court holding the bonds valid in the action in rem is not concluded by the judgment of the federal court because that judgment was not pleaded therein, it is apparent that such judgment could not determine the validity of the manner and mode of the attempted execution of the bonds, which was not attempted until a year and a half subsequent thereto.

Appellant also contends that she is not concluded by the judgment of the federal court because J. D. Hooker was not a party thereto. There is no merit in this contention. Hooker brought this action as the successor in interest of Wright, who, as the then owner of these bonds, was plaintiff in the federal action. The claim is nowhere made that Hooker was without notice of any of the steps or proceedings in the federal court. Code Civ. Proc. § 1908, subd. 2.

Considering the complaint in its second aspect, counsel for respondents argue with much force that plaintiff is not entitled in any event to a reformation of the bonds because the original contract pursuant to which they were issued was invalid. Their contention is that this was a contract for the construction of a pipe line, rather than a contract for a sale and purchase of property, and that therefore the district had no authority under the law to issue bonds in payment therefor, as held in Hughson v. Crane, 115 Cal. 404, 47 Pac. 120, and later cases. Their contention finds much support in the facts alleged in the complaint, but it is not necessary to decide that question here.

[4, 5] The action in this aspect is for a reformation of the bonds on the ground of mutual mistake of the parties, it being alleged that both parties to the contract believed and understood at the time of their delivery

that they were valid. This cause of action comes under the three-year statute of limitations and is not deemed to have accrued until the discovery of the facts constituting the mistake. Code Civ. Proc. § 338, subd. 4. There is no direct allegation in the complaint of the discovery of the facts alleged to constitute the mistake at any time within three years of the commencement of the action, and the demurrer might well be rested on that ground alone. The federal court held, as alleged here, that the invalidity of the bonds was apparent on their face. The district refused payment of interest upon the ground of such invalidity at some time prior to June 29, 1901. The federal Circuit Court adjudged the bonds invalid May 16, 1904, which judgment was affirmed by the Circuit Court of Appeals May 29, 1905. This latter decision was final, there being no federal question involved in that case. Taking the view most favorable to the appellant, it must be held that then, at the latest, the then owner of the bonds "discovered" the facts constituting the alleged mistake. His action for relief on the ground of mistake having accrued, at least as early as May 29, 1905, the running of the statute could not be interrupted by the transfer of the bonds to his assignee (his former assignor). This action was not commenced until June 29, 1909, more than four years thereafter.

[6] In the third aspect of the complaint, plaintiff appeals to the rule of law that, where a municipal corporation has obtained property which it had the power and right to acquire and has given in exchange therefor bonds or other securities which are void, the duty then arises to return the property or pay the reasonable value thereof (which is alleged in this case to be the same as the face value of the bonds). This rule is recognized in the case of Higgins v. San Diego Water Co., 118 Cal. 525, 555, 45 Pac. 824, 50 Pac. 670.

[7-9] Whether such duty be regarded as resting upon an implied contract or upon an obligation created by law, in either case it falls within the provisions of section 339, Code of Civil Procedure, subdivision 1; and whether it be held that this right of action accrued at the time the bonds were delivered, which were void upon their face, or that it did not accrue until final judgment of the Circuit Court of Appeals, the result is the same in either case and the action is barred. Appellant seeks in various ways to escape this result. It is alleged that when Hooker sold the bonds he did not transfer his right or claim to recover value in case the bonds were not paid, and that this right of action always remained in him. This is an allegation of a conclusion of law and is negatived by the rule of law that in such case such right of action passes to an assignee of the bonds as an incident to their ownership. Parkersburg v. Brown, 106 U. S. 487, 503, 1 Sup. Ct. 442, 27 L. Ed. 238; Goldman v. Murray, 164 Cal. 419, 422, 129 Pac. 462. And even if this were not the case, it could scarcely be held that the holder of a right of action could suspend the running of the statute by splitting his right of action and transferring a portion thereof to another. Except in the case of certain statutory exceptions, a statute of limitations runs against the right of action, not against the holder thereof. It is also argued that the running of the statute was suspended during the litigation in the federal courts. There is no merit in this contention, and the cases cited in support of it are not in point here.

The complaint in its fourth aspect proceeds upon the theory that the bonds were not taken in payment, but were accepted only as a "medium of payment," and therefore operated only to suspend the time of payment until the maturity of the bonds. It might well be said that this contention is negatived by the allegations of the complaint, from which the following facts appear: The contract itself provided for payment in bonds; the resolution of the board of directors, which was the only authority for the issuance of the bonds, provided for their issuance in payment of the obligation. Plaintiff brings this action as the owner and holder of the bonds, alleging them to be valid obligations, after having made an absolute sale of them and afterwards received them back under the warranty. Furthermore, the district, under the Wright Act, had no power or authority to issue the bonds except in payment for property purchased.

[10] But if it be assumed that the bonds were not accepted by Hooker as a payment, but merely as evidence of the obligation for the purpose of extending the time of payment thereof, the result would be to extend such time of payment only until a default be made in the payment of the bonds. Griffith v. Grogan, 12 Cal. 317, 322; Crawford v. Roberts, 50 Cal. 235; Crary v. Bowers, 20 Cal. 85, 89; Gnarini v. Bank, 162 Cal. 181, 184, 121 Pac. 726. Just when default was first made does not definitely appear, but in any event it was prior to June 29, 1901, so that the action, in this respect, is clearly barred.

No claim is here made that plaintiff could, consistently with the facts, have stated any better cause of action if the lower court had granted leave to amend. Other contentions which have been argued in appellant's brief and are not here discussed have been considered and are deemed to be without merit.

For the reasons above set forth, the judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

38 Cal. App. 623

## HORTON v. MOORE. (Civ. 2613.)

(District Court of Appeal, Second District, California. Nov. 12, 1918. Rehearing Denied by Supreme Court Jan. 9, 1919.)

1. QUIETING TITLE ⟸44(4)—COLOR OF TITLE—EVIDENCE.

In an action to quiet title, evidence *held* to show that defendant had acquired paper title sufficient to establish color of title to portions of the tract in question.

2. QUIETING TITLE ⟸13 — CONSTRUCTIVE POSSESSION OF PART OF PREMISES.

Where actual possession is taken of only a part of the land described in a conveyance, the grantee is constructively deemed to be in possession of the whole, and it is immaterial that the grantor had neither title nor possession.

3. QUIETING TITLE ⟸13 — POSSESSION BY DEFENDANT—POSSESSION BY LESSEE.

In an action to quiet title, where defendant's tenant occupied the premises for several years, knew their boundaries, and excluded other persons therefrom, such possession was not disturbed by the lease renewal at a mere nominal rate; the only change in use being the pasturage of a lesser number of cattle.

4. QUIETING TITLE ⟸12(7)—ACTUAL POSSESSION.

Where defendant had actual possession of land with color of title to a part thereof, when plaintiff and his attorney intruded thereon, built a fence around it, and immediately brought action to quiet title without other right thereto, plaintiff's occupancy was not that intended by Civ. Code, § 1006.

5. QUIETING TITLE ⟸44(5)—POSSESSION—EVIDENCE.

In an action to quiet title, evidence *held* to show that defendant was in actual possession of the land, within the meaning of the law, when plaintiff interrupted such possession by constructing a fence and beginning the action.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by John A. Horton against William M. Moore. From a judgment for plaintiff and an order denying new trial, defendant appeals. Judgment and order reversed.

Wright & Winnek, of San Diego, for appellant.

Herbert C. Kelly, of San Diego, for respondent.

JAMES, J. This appeal is taken from a judgment entered in favor of plaintiff, quieting title as against defendant in a certain tract of land in the county of San Diego. There is also an appeal from an order denying defendant's motion for a new trial.

[1] It appears from the record that the land which is made the subject of this controversy, consisting of about 75 acres, is hilly in contour and suitable generally for grazing purposes. The sole ground upon which plaintiff based his claim was that of possession acquired immediately before the commencement of this action and evidenced by the building of a wire fence about the tract. We gather from the transcript that counsel for the plaintiff was the chief mover in the enterprise to acquire a title to this property, for said counsel in his testimony admitted that he had never seen the plaintiff; that he had a contingent interest in the outcome of the suit, and had no claim of title other than that depending for its validity upon bare possession. He testified as follows:

"The possession was taken with the expectation of commencing suit as in the case of Davis v. Crump [162 Cal. 513, 123 Pac. 294] under section 1006 of the Civil Code, and, when occupancy was taken, claim of title was made contemporaneously with the taking of the possession. From that time and ever since plaintiff has claimed that land as against everybody who cannot show title by the means stated in that section 1006."

This action was commenced on the 5th day of June, 1914. Several days prior to that time, the nominal plaintiff, acting through Kelly, the attorney, put a force of men at work building a fence around the land. On the 3d day of June (two days before the action was commenced), defendant Moore caused the fence, which did not completely surround the land at that time, to be torn down. Immediately thereafter respondent's attorney had his men rebuild the fence, and on the 5th of June, at about noontime, it was nearly completed. The attorney, who was on the ground, left for his office, instructing his foreman that as soon as the ground had been completely surrounded by the fence to notify him by telephone. The foreman, acting under these instructions, telephoned the attorney at about 3 o'clock in the afternoon of June 5th that the fence had been completed, and the complaint in this action was immediately placed on file in the county clerk's office. Within the next day or two Moore again took down the fence. This comprised the whole showing of right in the plaintiff, as the evidence discloses it. The trial court determined that the plaintiff had possession of the property and that the defendant had neither title nor possession. Appellant contends that there was evidence that the defendant had possession of the whole tract claimed, and possession under color of title at least as to a portion thereof; and, secondly, that under the evidence the court was not justified in making the finding of possession in favor of the plaintiff for the reason that plaintiff's occupancy was not such as is intended to be described in section 1006, Civil Code; that under the terms of

that section a mere "scrambling" possession is not sufficient to give rise to a presumption of title. The section mentioned has been amended since the controversy herein involved arose. It provided, prior to 1915, as follows:

"Occupancy for any period confers a title sufficient against all except the state and those who have title by prescription, accession, transfer, will, or succession."

It must, of course, first be conceded that, if defendant had possession of the tract of land at the time plaintiff or his attorney intruded thereon, no cause of action such as this would arise in plaintiff's favor. We may then examine the evidence to determine whether at the time the action was commenced the defendant was in possession of the land in dispute. There was no controversy as to the facts regarding the alleged possession by the defendant. Defendant testified that two or three years prior to 1913 he had leased the whole tract to one Allen, who had used it for grazing purposes and had paid rental therefor; that in 1913 Allen had not so many cattle to pasture, and therefore not great need for the land, and that he (the defendant) had leased the property at the nominal rental of one dollar per year, the year under the nominal rental charge commencing in November, 1913, and not having expired at the time of the building of the fence by plaintiff in June, 1914. The defendant testified, in part, as follows:

"I asked him (Allen), after he gave up his butchering business, to take charge of it and be nominally in possession and pay me a nominal sum of $1.00 per year so as to hold him in possession of the property at that time. * * * The city had stopped him from butchering in his place and he didn't require it. He had just his own cattle over it—15 or 20 head of cattle."

Like testimony was given by the lessee, Allen, with the further statement that he knew the boundaries of the property; that during the early years of his leasing he herded at times as many as 200 head of cattle over that property and other property which he leased for the same purposes; that he excluded other cattle from the ground leased, also sheep, and, in brief, maintained possession of it. Referring to the last year, when the nominal rental was in effect, he said that he had not herded as many cattle there, adding:

"I haven't got over 20 head of stock there now. They are on this particular Pueblo lot 1182 pretty nearly every day."

[2] Several deeds were introduced on behalf of the defendant, being generally quitclaim in form and reciting that the grantors relinquished all interest in "Pueblo lot 1182," being the tract which included the 75 acres in dispute. Some of these deeds specified, in addition, subdivisions of the larger tract and referred to a certain partition suit which had theretofore been prosecuted in the superior court of San Diego county. Three of these deeds had been recorded at dates long prior to the building of the fence by the plaintiff. Defendant's testimony showed that, guided by a certificate of title issued by an abstract company, he had for several years been endeavoring to buy in the interests of all persons concerned in the title of the land in dispute. The deeds which we have mentioned, however, appear to have covered only portions thereof. We have noted that this land was contained within a larger tract, the larger tract being known as Pueblo lot 1182. While two of the quitclaim deeds purported to transfer to the defendant "all interest in Pueblo lot 1182," they also, as just stated, referred to the property intended to be conveyed as subdivisions thereof. One of these subdivisions contained only 2½ acres, another 10 acres. A third deed was quitclaim in form without specifying any particular portions of the whole tract; this latter deed, as defendant, testified, being intended to cover a certain 44 acres. It does not appear that defendant by the conveyances which he showed in evidence pretended to have acquired paper title to the whole tract. It does appear to us, however, that such paper showing, sufficient to give color of title, was established as to portions of the tract, in so far as that question may be important to be considered. Where actual possession is taken of only a part of land described in a conveyance, the grantee is constructively deemed to be in possession of the whole, and it is immaterial that the grantor had neither title nor possession. Webber v. Clarke, 74 Cal. 11, 15 Pac. 431.

[3, 4] But aside from any aid which a colorable title might give to defendant's case: The land was occupied by defendant's tenant for at least several years prior to November, 1913, and this tenant knew the general boundaries thereof and excluded other persons from its use, and we see no reason to hold that this possession was disturbed in November, 1913, when the defendant renewed the lease at the nominal rate, for the only difference in the use to which the land was put thereafter, and down to the commencement of the action, was that the lessee pastured thereon a much smaller number of cattle than he had theretofore. If the defendant may be said to have had actual possession of the land at the time the plaintiff and his attorney intruded thereon and built the fence, then it matters not at all that he held under color of title, for, by the admission of his counsel and the utter lack of evidence showing anything to the contrary, the plaintiff had no better title. Smith v. Hicks, 139 Cal. 217, 73 Pac. 144. In such a case the defendant was the occupant and entitled, under section 1006, Civil Code, to maintain his possession against every one except the state or persons who had

acquired a better right than he had. It has been uniformly held that in order to establish possession of real property it is not necessary that a fence be built about it and that if a fence is so built it is merely evidence tending to show possession of the person who constructs it. It is also held that the terms "occupation," "possessio pedis," "subjection to the will and control," are synonymous; that property is possessed and occupied when it is put to a use appropriate to its general character. Webber v. Clarke, supra; Lawrence v. Fulton, 19 Cal. 683; United States v. Rogers (D. C.) 23 Fed. 658; Andrus v. Smith, 133 Cal. 78, 65 Pac. 320. As stated at the trial, counsel for the plaintiff maintains that his case satisfies all the requirements presented in Davis v. Crump, 162 Cal. 513, 123 Pac. 294. In that we do not agree at all. An examination of the text of that decision shows that the court found nothing to indicate possession in any one but the defendants at the time of the making of the claim of title, the court saying:

"As we have seen, there is nothing here to compel the conclusion that the possession was taken otherwise than peaceably, or that any portion of the property inclosed was in the actual possession of any other person at the time."

[5] As appellant suggests, the possession of the plaintiff at best was well described, considering the interruption thereof, as "scrambling." However, such possession might have ripened into the right claimed upon the completion of the fence, if there was an absence of showing of possession in any other person at the time. In the view we take of the evidence, the defendant sufficiently established the fact of actual possession within the meaning of the law, against which plaintiff was not entitled to prevail.

The judgment and order are reversed.

We concur: CONREY, P. J.; MYERS, Judge pro tem.

---

(38 Cal. App. 549)

SMITH v. SIMPSON. (Civ. 1874.)

(District Court of Appeal, Third District, California. Nov. 7, 1918. Rehearing Denied by Supreme Court Jan. 6, 1919.)

COMPROMISE AND SETTLEMENT ⊂=23(3)—EVIDENCE—SUFFICIENCY.

In an action to recover a balance on a note wherein defendants claimed a settlement for half the amount of the note, a finding for plaintiff on the issue of settlement *held* not contrary to the great current of the evidence.

Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Action by T. M. Smith against Charles L. Simpson. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank Freeman, of Willow, for appellant.

Daniel A. Ryan, of San Francisco, for respondent.

HART, J. It is alleged in the complaint that, on January 1, 1907, defendant made, executed, and delivered to plaintiff a promissory note (a copy of which is set forth) for the sum of $5,605.32, payable 12 months after date, with interest at 5½ per cent.; that, on the 5th day of February, 1908, defendant paid upon said note the sum of $2,802.66; and that no other payments have been made.

The answer is that said payment of $2,802.66 was "in full payment of the promissory note; * * * and that the said plaintiff accepted said sum from the defendant in full satisfaction and discharge of the said promissory note; * * * and that thereupon the said plaintiff delivered to the defendant the said promissory note; and that the defendant is now the owner and holder of the same."

The cause was tried before the court, without a jury, and the findings were: That the note in question was executed and the payment of $2,802.66 made thereon as set forth in the complaint; "that said payment was not in full payment of the said promissory note, and plaintiff did not accept, nor agree to accept, said sum in full satisfaction or discharge of the said note; that the defendant is in the possession of, but is not the owner of, the said promissory note; that plaintiff is the owner and entitled to the possession of the said note; that at the time of the said payment and in consideration thereof and in payment of the balance due upon said promissory note, to wit, $2,802.66, plaintiff agreed to accept and defendant agreed to make and give his, defendant's, two certain promissory notes, to wit, one to John Curry for $1,000, payable to said John Curry, one to T. M. Smith, plaintiff herein, for $1,802.66, payable to said plaintiff; that defendant failed and refused to make or give said notes, or either of them, in accordance with said agreement or at all; that there is now due and unpaid from defendant to plaintiff on said promissory note as principal the sum of $2,802.66," with interest at the rate of 5½ per cent. from June 11, 1909. Judgment was in favor of plaintiff for the sum of $3,904.74, from which judgment defendant prosecutes this appeal.

The sole contention advanced by the appellant is that the findings are not supported by the evidence, and the case of Field v. Shorb, 99 Cal. 661, 34 Pac. 504, and other cases, are cited to support his position. In the Shorb Case the court said:

"We are adverse to holding that a finding by a jury or trial court on an issue of fact is not warranted by the evidence, whatever we might think as to its preponderance, where there is

presented a fair, reasonable ground for a difference of opinion, and where a conclusion either way could not be considered as the necessary result of the exercise of an unsound judgment. But where the great current of the evidence is against the verdict, and we cannot escape the conviction that it is wrong, we should not be deterred from setting it aside by the contention that one or two general statements or assertions of one or two witnesses bring the case within the rule which governs in cases where there is a material 'conflict of evidence.' And in the case at bar we cannot resist the conclusion that the evidence is insufficient to support the finding of the unsoundness of the mind of the deceased on July 3, 1890."

An examination of the evidence in the present case has not convinced us that it comes within the ruling of the Shorb Case. The "great current of the evidence" does not appear to be against the findings herein, as we shall presently show. The only question which could arise here, in considering the evidence, is whether the testimony from which the findings were evidently educed is entitled to such credit and weight as to justify its acceptance as proof of the ultimate fact, and this question was for the trial court to determine and which it has determined against the defense interposed by the defendant. While we think that it is very clear, so far as a reviewing court is able to judge, that the preponderance of the evidence is in favor of the conclusion reached by the trial court as evidenced by its findings of fact, the least that can be said of the evidence as a whole is that there exists therein a substantial conflict, and that it, therefore, presents "a fair, reasonable ground for a difference of opinion" as to its effect, and that "a conclusion either way could not be considered as the necessary result of the exercise of an unsound judgment."

From the testimony of the plaintiff it appears that the plaintiff was at one time a partner in the sheep business with Mr. Curry, the father of the wife of the defendant, but at the time of the transaction to which we are about to refer the said Curry was not living. It may further be stated that the plaintiff is related in some way to Mrs. Simpson.

In the summer of 1903, Simpson and his wife, desiring to purchase a tract of land adjoining their land, and not having the money with which to make the purchase, called on the plaintiff and requested of him a loan of the necessary amount, which was the sum of $4,500. The plaintiff replied that he could procure the money at the Bank of Chico, in the city of Chico, and the Simpsons said that all they needed at that time was the sum of $1,000. The plaintiff subsequently obtained said sum, and, as directed by the Simpsons, sent the money to a "Mr. Freeman." Plaintiff gave his individual note to the bank for the $1,000. Later in the same year, the plaintiff made the defendant an additional loan, amounting to the sum of $3,500, which sum was also forwarded by the Bank of Chico in the name of the plaintiff to the "Mr. Freeman" above referred to. Thereafter (either in the month of December, 1903, or January, 1904) plaintiff called at the home of the Simpsons, and on that occasion the defendant executed and delivered to plaintiff his promissory note for the sum of $4,500, payable one year after date, with interest at the rate of 5½ per cent. Of the last sum of money loaned to the defendant by the plaintiff, $3,300 was obtained by the latter from W. H. Curry, a brother of Mrs. Simpson, and then a business partner of the plaintiff. The note was made to the plaintiff and said Curry. When the note matured, the defendant made a payment thereon, and gave a new note for the balance. And so the transactions between the plaintiff and the defendant were carried on from year to year—as the existing note matured, a new note was given and the old note surrendered to the defendant—until the fourth note for the sum of $6,300 or $6,400 was made and given to the plaintiff by the defendant. After the execution and delivery of the fourth note, the defendant made a payment thereon of the sum of $1,080, leaving a balance of $5,605, for which a new note, the note in suit, was given. The plaintiff subsequently assigned the note to W. H. Curry, said assignment being in the following language, indorsed on the back of the note:

"I hereby assign this note for value received as security to the amount of $3,770.00 to W. H. Curry. [Signed] T. M. Smith.

It appears that, on the 18th of January, 1908, W. H. Curry sent the note, through the Bank of D. O. Mills & Co. at Sacramento, to the Bank of Willows for collection, and accompanying the note was the following instruction or direction to the Bank of Willows:

"Note, Charles L. Simpson to T. M. Smith, $5,602.32, which please deliver to Smith or Simpson on payment of ½—$2,802.66, if paid on or before Jan. 23, 1908."

The time for the payment of the $2,802.66 by Simpson to the bank was extended to the 3d day of February, 1908. Defendant paid said sum to the bank, the written acknowledgment of payment by the bank being dated February 5, 1908. Upon the said payment being made, the note in suit was delivered by the bank to the defendant.

The plaintiff testified that he never at any time had an understanding or agreement with Simpson, or ever said to the latter's wife that he would surrender the note and call the transaction at an end if the defendant would pay $2,800 on the note. He continued:

"I put that indorsement (the assignment) there about a week or two after the note was made, and I gave it into the possession of Mr. Curry. I didn't get it back afterwards. The note does

not belong to Mr. Curry. The payment indorsed on it of $2,802 was paid to Mr. Curry as part of the amount that I owed him. He got part of his money. Mr. Curry sent the note to the Bank of D. O. Mills through the Bank of Willows for collection, and this $2,802 was paid. (The witness probably intended to say that the note was delivered to the D. O. Mills Bank, and by it sent to the Bank of Willows for collection, which was the fact.) He (Curry) sent it at my request. The reason I did this was because he wanted to get his money out of this note. He was going to bring suit against Mr. Simpson if it wasn't paid. The wife of Charles Simpson is a sister of Mr. Curry. They didn't want to pay Mr. Curry, as they had some grievance against him. * * * The instructions to the bank was that the note was to be delivered to Mr. Simpson upon the payment of $2,800. The note was to be delivered to Simpson for him to make over a new note, which he did every year before that, so that whenever the notes became due he would make a new note and pay what he could on the original note. I didn't have any agreement with Simpson and his wife that in case they paid this money to Curry, this $2,800, that was to end the whole transaction. Mr. Curry simply said if they would pay this $2,800 and give him half the face of the note, why he would throw off his interest. In order to induce the Simpsons to pay the $2,800 we threw off the interest due to date, so that we started in with a new principal of $2,800. The other $2,800, the one I am now suing for, was to draw interest and was to be paid either in cash or note. That was the understanding that we had. Mr. and Mrs. Simpson said, 'We will probably pay all of this note, and won't give any more notes.' Mr. Simpson did not give any other note for the $2,800, nor has it been paid. Mr. Simpson retained the note ever since he paid the $2,800 to the Bank of Willows."

Mrs. Simpson, wife of the defendant, testified that the plaintiff agreed to accept the $2,802 in full satisfaction of the note. She further testified that her father's estate had never been probated, and expressed the supposition that a part of the money loaned to her husband by the plaintiff belonged to her father's estate. She appeared to have conceived an intense feeling of bitterness against her brother, W. H. Curry, and expressed to the plaintiff much indignation because he (Smith) had assigned the note to said Curry. She said to the plaintiff that the note never would be paid so long as W. H. Curry had any interest in it.

The daughter of Mr. and Mrs. Simpson testified that she heard Smith say to her mother that, if the defendant would pay one-half of what the note called for, he would cancel and deliver up the note to the defendant as fully satisfied.

John Curry, also a brother of Mrs. Simpson, testifying in rebuttal for the plaintiff, stated that a few days after February 21, 1909, he received a letter from Mrs. Simpson, in which she said that they had paid W. H. Curry $2,800 on the note, and that "she would give me $1,000 and also Mr. Smith $1,800, which $2,800 represented the balance of the note" in suit. (It should here be explained that Smith testified that Mrs. Simpson insisted that John Curry was entitled to $1,000 of the $2,800 which remained due on the note after the payment of one-half the note to W. H. Curry.) While the fact, if it was a fact, that the estate of Mrs. Simpson's father was never probated, and that Mrs. Simpson believed that a portion of the money loaned to the defendant by the plaintiff, who, as seen, was a partner of her father during the latter's lifetime, came from her father's estate, is not material to the issues presented by the pleadings, yet it is not improper to state that John Curry, having been asked why he was to receive $1,000 of the $2,800 remaining due on the note, and whether it was because he was led to believe that he was entitled to a part of his father's estate, answered:

"No, sir; I don't know why it was. I was not to get it because I was led to believe that I was entitled to part of my father's estate. I don't know why it was. I never had any conversation or discussion of any kind with Mr. or Mrs. Simpson in regard to my father's estate. I don't know that my father had any estate. I never learned after his death that he had an estate."

There was considerable other testimony given by the witnesses above named, but we have given herein a substantial statement of the important facts to which they testified. There is, as will be noted, no denial by the defendant that the note sued on was executed and delivered by him to the plaintiff for moneys loaned to him by the plaintiff, nor is there any denial that no other payment was made on the note than the sum of approximately $2,800, paid to the Bank of Willows and by the bank to W. H. Curry, as above shown. The plaintiff's story of how the note came to be delivered to Simpson is not an unreasonable one. The written instruction from the Bank of D. O. Mills & Co. to the Bank of Willows was that, upon the payment of the $2,800, or one-half of the note, the note should be delivered either to Simpson or Smith. This instruction was given at the request of Curry, who then held the note as collateral security, and Smith testified that the note was so sent with his consent and by his request. This circumstance goes in corroboration of Smith's testimony that, the transactions between him and the defendant having covered a number of years, during which a number of different notes were from time to time made by the defendant and delivered to the plaintiff for the purpose of taking up and canceling a note previously made, the note in suit, if delivered to the defendant, should not, by reason of that fact, be regarded as satisfied, but should be supplied by the defendant by a new note for the balance due after the payment to Curry of the $2,800. But there is no necessity for an analysis of

the evidence to show that the findings are sufficiently supported. The whole controversy hinges upon the solution of the question whether, as Mrs. Simpson and her daughter testified, the plaintiff agreed that he would deliver up the note to the defendant as fully paid upon the payment by the latter of one-half of what the note called for to Curry or to the Bank of Willows for him, and upon this question there is a decided conflict in the testimony; the plaintiff positively testifying that there was no understanding or agreement between him and the defendant or the latter's wife that the obligation of the note would be treated as extinguished upon the payment of one-half of the sum it called for, and Mrs. Simpson and her daughter flatly contradicting that testimony. As above stated, the plaintiff's testimony is not unreasonable upon its face, nor inherently improbable. The conflict thus produced was, of course, for the trial court to determine, and, having determined it against the defendant, we perceive no ground or reason for holding that the trial court's conclusion thereon was or is wrong. Thus it is plainly manifest, as declared in the outset of this opinion, that the case here is not one in which it may with justness be said that, as a matter of law, the "great current of the evidence is against the findings."

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

---

38 Cal. App. 557

McPHAIL v. NUNES et al. (Civ. 1863.)

(District Court of Appeal, Third District, California. Nov. 7, 1918.)

1. PROCESS ⟸96(4)—PUBLICATION—AFFIDAVIT—SUFFICIENCY.

An affidavit for an order of publication of summons under Code Civ. Proc. § 412, as amended by St. 1905, pp. 141, 142, omitting to state that the certificate of residence provided for by Civ. Code, § 1163, has not been filed by defendant, or, if so filed, that defendant cannot be found by the sheriff at the place named therein, is insufficient.

2. PROCESS ⟸85—SERVICE BY PUBLICATION—COMPLIANCE WITH STATUTE.

Service of summons by publication, being in derogation of the common law, must substantially comply with the statute authorizing it.

3. PROCESS ⟸96(4) — SERVICE BY PUBLICATION—SUFFICIENCY OF AFFIDAVIT—"PROVIDED."

That affidavit of publication states that defendant resides outside state or has departed therefrom and cannot be found within state does not obviate necessity of setting out facts as to the certificate provided for by Civ. Code, § 1163, as required by Code Civ. Proc. § 412, as amended by St. 1905, pp. 141, 142, authorizing service by publication "provided" it must first appear by affidavit that no certificate of residence has been filed for defendant or, if so filed, that he could not be found by sheriff at place designated therein; the word "provided" meaning on condition (citing Words and Phrases, vol. 6).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Provided.]

4. JUDGMENT ⟸490(3)—VALIDITY—COLLATERAL ATTACK.

A judgment rendered on an affidavit of publication insufficient in setting out facts relative to certificate of residence provided for by Civ. Code, § 1163, is void on its face and may be collaterally attacked.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by Hugh McPhail against A. F. Nunes and others. From a judgment for defendants and denial of new trial, plaintiff appeals. Reversed and remanded.

Lamberson, Burke & Lamberson, of Visalia, for appellant.

John G. Covert, of Hanford, for respondents.

HART, J. Plaintiff brought the action to quiet title to 160 acres of land in Kings county and to have adjudged void the judgment of the superior court of said county, in a certain action to quiet title, wherein A. F. Nunes, one of the defendants in this action, was plaintiff, and Jennie V. Copper and certain fictitiously named parties were defendants. Judgment in the present action was in favor of defendants, from which and from an order denying him a new trial plaintiff appeals.

The facts as gathered from the pleadings and the findings are: That the land in controversy was purchased by the defendant Nunes on the 26th day of July, 1907, at a tax sale regularly authorized by the state controller and duly conducted by the tax collector of Kings county, said land having been previously sold to the state for delinquent taxes, costs, and penalties; that on the 8th day of January, 1909, said Nunes, as before stated, commenced an action in the superior court of Kings county against Jennie V. Copper and several fictitiously named defendants for the purpose of quieting title to said real property, title to which at the time of the assessment and levy of taxes thereon and the sale thereof to Nunes at the tax sale was in said Jennie V. Copper; that Nunes was awarded judgment in said action quieting his title to said real property; and that subsequently he conveyed certain interests in the land to the defendants Van Valer and Farley.

The defendants in this action denied that

plaintiff had title to or any interest in the real property in suit and set up ownership in fee in themselves by prescription, under the tax sale above referred to and also under the judgment in Nunes v. Copper et al., supra. The court found adversely to the defendants on their claim of title by prescription and under the tax sale, but found that the title was in them by virtue of said judgment in Nunes v. Copper et al.

Service of summons in said action of Nunes v. Copper et al. was by publication, and the sole point presented for decision here is whether the affidavit for publication of summons in said action was sufficient to support the order of the court for the publication and the finding in said order that defendant Copper had departed from the state.

The affidavit upon which said order of publication was based was made by A. F. Nunes, and the essential portions thereof are as follows:

"That said Jennie V. Copper cannot after due and diligent search be found within the said county of Kings, or within the state of California, and this affiant in support thereof states the following facts and circumstances:

"That said affiant placed in the hands of the sheriff of the county of Kings, state of California, the summons in the above-entitled action, for the purpose of personal service on said defendants or either of them, and the said sheriff has made his return thereon that he has been unable to find said defendants or either of them within the said county of Kings.

"That this affiant for the purpose of finding said defendants and any or either of them, and to ascertain the place of residence of either or any of said defendants, has made diligent inquiry of various residents and business agents, and has been informed by each and all of such persons inquired from, that they do not know the residence or present whereabouts of either or any of said defendants, and therefore believes that neither of said defendants are residents of the state of California, and that their present places of residence are unknown to this affiant; that affiant has made diligent inquiry to find said defendants but cannot after due diligence find either or any of said defendants within this state.

"That this affiant therefore says that personal service of said summons cannot be made on said defendants or either of them and prays," etc.

Section 412 of the Code of Civil Procedure, as amended by the Legislature of 1905 (Stats. 1905, pp. 141, 142), reads as follows:

"Where the person on whom service is to be made resides out of the state; or has departed from the state; or cannot, after due diligence, be found within the state; or conceals himself to avoid the service of summons; or is a foreign corporation having no managing or business agent, cashier or secretary within the state, and the fact appears by affidavit to the satisfaction of the court, or a judge thereof; and it also appears by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action; or when it appears by such affidavit, or by the complaint on file herein, that it is an action which relates to or the subject of which is real or personal property in this state, in which such person defendant or foreign corporation defendant has or claims a lien or interest, actual or contingent, therein, or in which the relief demanded consists wholly or in part in excluding such person or foreign corporation from any interest therein, such court or judge may make an order that the service be made by the publication of the summons, provided that where service is sought to be made upon a person who cannot, after due diligence, be found within the state it must first appear to the court by the affidavit aforesaid that there has not been filed, on behalf of such person, in the county where such action is pending, the certificate of residence provided for by section one thousand one hundred and sixty-three of the Civil Code in the county in which the action is brought; or that said certificate was so filed and that the defendant cannot be found at the place named in said certificate, which latter fact must be made to appear by the certificate of the sheriff of the county wherein said defendant claims residence in and by said certificate of residence, and which certificate of said sheriff must show that service of said summons was attempted upon said defendant at the place named in said certificate of residence but that said defendant was not to be found thereat."

The amendment of said section by the Legislature of 1905 involves that part thereof beginning with the word "provided," and which, as is to be observed, requires that the affidavit upon which the order for the service of summons by publication is based shall contain a statement that the certificate of residence provided for by section 1163 of the Civil Code has not been filed, or that such certificate was duly filed, but that the defendant cannot be found at the place designated in said certificate where service may be made.

The appellant, as stated above, contends that the affidavit was fatally defective and wholly insufficient to give the court jurisdiction to make the order of publication of summons because: (1) The facts stated therein are mere ultimate facts alleged "solely upon the belief of affiant"; (2) that the affidavit omits to state the facts required to be set forth in an affidavit for the publication of summons with respect to the certificate provided for by the section of the Civil Code above named.

[1] We think it is very clear that, for the second reason above stated, the affidavit was insufficient to justify the making of the order of publication of summons, and therefore we will not be required to consider and determine whether the affidavit was otherwise legally sufficient.

[2] It is thoroughly settled that, inasmuch as the service of summons by publication is

in derogation of the common law, to make such constructive service effectual, the statute authorizing it must be substantially complied with and its mandates obeyed. Ricketson v. Richardson, 26 Cal. 153; Columbia Screw Co. v. Warner Lock Co., 138 Cal. 445, 446, 71 Pac. 498.

It cannot for a moment be doubted that, to have legally authorized the court to make the order for the publication of the summons, it was absolutely necessary that the affidavit should have contained the statement either that no certificate designating the place where the summons might be served on the defendant, Copper, in said action, had been filed, or that, if filed, the defendant could not be found by the sheriff at the place designated in the certificate where summons might be served. The failure to do so rendered the affidavit fatally defective. In other words, by reason of the failure to incorporate that statement in the affidavit, section 412 of the Code of Civil Procedure was not only not substantially complied with, but legally the same as not complied with at all.

[3] The contention that, where the affidavit of publication states that defendant resided out of the state or has departed therefrom, and that such person cannot, after due diligence, be found within the state, it is not necessary to set forth, in addition to such statements, that no certificate of residence has been filed on behalf of the defendant, or, if such certificate has been filed, the sheriff could not find him at the place designated in such certificate, cannot be upheld. Section 412 unqualifiedly makes the statement as to such certificate one of the essentials of the affidavit for the order of publication. Said section, after setting forth other conditions which must be shown to exist to authorize the making of the order of publication, proceeds, "provided that where service is sought to be made upon a person who cannot, after due diligence, be found within the state, it must first appear to the court by the affidavit aforesaid," etc., following which is the provision as to the certificate provided for by section 1163 of the Civil Code. "The word 'provided' means 'on condition.'" Words and Phrases, vol. 6; De Witt v. Kaufman County, 27 Tex. Civ. App. 332, 66 S. W. 224, 226.

In Paschall v. Passmore, 15 Pa. 295, 308, the word is thus explained:

"The word 'provided' is recognized as implying a condition without the addition of any other words; so that if one granted lands to another in fee, 'provided' that the grantee pay to the grantor a specified sum at a certain time, there is a good condition without words of re-entry."

See, also, other cases cited in Words and Phrases, supra.

It is, of course, quite true that the word "provided" in a statute is not always or invariably to be interpreted as introducing a necessary condition. The sense in which the word is used in a statute, or the effect that it was intended by the Legislature to have therein, must be determined from a consideration of the section or statute as a whole. But, as to the meaning of the word as it is used in section 412 of the Code of Civil Procedure, there is no possible ground for controversy or doubt. The language of that part of said section beginning with said word is mandatory and plainly says that the "aforesaid affidavit" (meaning, of course, the affidavit for publication) "must" contain a statement that the certificate provided for by section 1163 of the Civil Code has not been filed, or, if filed, the defendant could not be found at the place designated in such certificate where service of summons may be made on such person.

The cases cited and relied upon by the respondents as in support of the position that the affidavit of publication was in all respects legally sufficient to have justified the order for the publication of the summons were decided prior to the amendment of section 412 of the Code of Civil Procedure by the Legislature of 1905. They are therefore not in point here.

[4] An intimation is made that, since jurisdiction will be presumed in courts of superior general jurisdiction, the remedy for the correction of the judgment was by a direct attack thereon by way of appeal. But there is obviously no merit in that suggestion.

The affidavit of publication of summons and the order directing publication of the same are part of the judgment roll, where the service of summons is constructive or by publication. It is, of course, well settled that where the judgment is void upon its face it may be attacked collaterally. In other words, if an inspection of the judgment roll itself discloses that the judgment is for any reason void, the judgment may be so declared and as having no force or effect on a collateral as well as on a direct attack thereon. Of course, the rule is different where the judgment is merely voidable. These propositions are elementary, and authorities supporting the statement thereof need not be cited.

The judgment and the order appealed from are reversed, and the cause remanded.

We concur: CHIPMAN, P. J.; BURNETT, J.

38 Cal. App. 629

## UNION OIL CO. OF CALIFORNIA v. RIDEOUT. (Civ. 1816.)

(District Court of Appeal, Third District, California. Nov. 12, 1918. Rehearing Denied by Supreme Court Jan. 9, 1919.)

1. WHARVES ⟸7—DOCKING PRIVILEGES—NATURE—"LICENSE."

The right granted to boat owners by harbor commissioners having jurisdiction over the San Francisco water front to use the piers for docking vessels is a mere privilege or license.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, License.]

2. SHIPPING ⟸80—APPROACH TO BOAT—DUTY TO INSPECT AND REPAIR.

Notwithstanding harbor commissioners have the duty of repairing defects in wharves, a boat owner using a pier must exercise reasonable care to discover and correct such defects, he inviting the public to the pier for the transaction of business.

3. SHIPPING ⟸75—CONTRACTS—CONSTRUCTION.

Under a contract between a boat owner and an oil company, whereby the boat owner guaranteed "proper unloading facilities and access to the dock" to the oil company when delivering oil to his boat, he was bound to furnish unloading facilities which would insure delivery of oil on board with safety and dispatch.

4. SHIPPING ⟸80—APPROACH TO BOAT—DUTY TO INSPECT.

The driver of an oil truck delivering oil to a steamer at a dock, having safely delivered a load about an hour before, was charged with no duty of leaving his truck and investigating as to the safety of the apron leading from the dock to the boat, where it was in the same condition as before, and could assume that defendant would use reasonable care to see that the apron was safe.

5. SHIPPING ⟸86(2)—APPROACH TO BOAT—EVIDENCE—CUSTOM.

In an action for the loss of an oil truck precipitated into the harbor because of an apron leading from the dock to a steamer giving way, evidence *held* not sufficient to show a custom of the driver to notify the engineer of the steamer before driving on the apron.

6. SHIPPING ⟸86(2)—APPROACH TO BOAT—DEFECTS—RES IPSA LOQUITUR.

In an action for loss of an oil truck precipitated into the harbor by the giving way of an apron leading from the dock to a steamer, the burden was not on plaintiff to show that the defect was produced by defendant or his agents, the doctrine res ipsa loquitur applying.

7. SHIPPING ⟸86(2)—LIABILITY FOR DEFECTS—EVIDENCE.

In an action for loss of an oil truck by the giving way of an apron leading from a dock to a steamer, evidence *held* sufficient to show that defendant had some control over the situation because of the necessity of adjusting the apron in accordance with the tides.

8. SHIPPING ⟸86(2)—APPROACH TO BOAT—DEFECTS—EVIDENCE.

In an action for loss of an oil truck by giving way of an apron leading from a dock to a steamer, evidence that the driver of the truck had made 25 trips previously, when the apron was in exactly the same position, was sufficient to show that in the ordinary course of things the apron would not give way.

9. SHIPPING ⟸75—CONTRACT—CONDITION OF PREMISES.

Where a boat owner agreed with an oil company to supply proper unloading facilities, the duty still rested on him to discover and correct any defects in an apron leading from the wharf to his steamer, regardless of the influence of the tides.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Union Oil Company of California, a corporation, against E. V. Rideout. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

W. E. Drobisch, of San Francisco, for appellant.

Tum Suden & tum Suden, of San Francisco, for respondent.

HART, J. The action was brought to recover damages for injuries to personal property. Judgment was in favor of defendant, and the appeal is prosecuted by plaintiff from said judgment.

Respondent was the owner of a certain steamer, known as the Crockett, plying upon the waters of San Francisco Bay and tributary rivers. For purposes of docking, he had rented from the board of state harbor commissioners certain space on one of the piers at San Francisco. At the portion of the pier used by respondent's steamer there was an apron which was lowered from the pier to the boat for the purpose of ingress and egress. It was so arranged as to be raised or lowered according to the tide, and was kept in place by two iron pins, one on each side, which were passed through holes in two suspension bars.

On the 21st of April, 1915, the parties hereto entered into a written agreement by which plaintiff agreed to furnish to defendant oil for fuel to be used in various steamers, among them being the Crockett. There was a clause in the contract to the effect that defendant "guaranteed proper unloading facilities and access to dock."

On January 22, 1916, defendant's bookkeeper ordered oil for delivery the next day, which was Sunday. At about 10:30 o'clock Sunday morning Edward E. Ellis, a motor

truck driver in the employ of plaintiff, appeared at the pier with a load of oil for the Crockett. He testified:

"I was present at pier 19 or on the portion occupied by the steamer of Mr. Rideout on the 23d of January, 1916. I was present the first time at about 10:30 o'clock a. m., next at 11:45 a. m. I was there both times with the truck loaded. The first time I went there on that day everything was ready, and I backed out onto the apron and unloaded my load of oil. The apron was down the same as it usually was when the boat was in, so I backed out on the apron and unloaded the load of oil. We never backed both rear wheels on the apron. I only ran one wheel onto the apron; that was the rear left wheel. It was about three or four feet from the edge of the apron. The other wheel was on the solid part of the pier. The rear end of the truck was toward the boat. We unloaded from the rear. After having backed the truck up I put the pipe on and unloaded. I did not adjust the pipe myself. I had one of Mr. Rideout's men help me the first time. They always give us a hand. The position of the apron at that time, with reference to the main floor of the dock, was about level. It took me about 15 or 20 minutes to unload at that time. At the time I left on the first visit there were present men in the employ of Captain Rideout. I had a conversation with one of the men of Mr. Rideout who was there at that time. His name is Mr. Peterson (should be Pierson). He told me to come back as soon as I could and eat lunch on the boat. Mr. Peterson (Pierson) is Mr. Rideout's bookkeeper there, and I think he is the man that takes care of the ordering of the oil; he has something to do with it. I went back to the Union Oil Company station, reloaded, and came right back and backed out into the place; the pipe was already there. The apron was just about the same position. I didn't notice it had been changed a bit. I don't know anything about the manipulation of this apron. That is not up to me. I never had anything to do with that at all. Captain Rideout's boat crew handled that. They had theretofore always put it in place. It takes four or five men to move it; one man can't. I never at any time had anything to do with it. I came back the second time and backed out onto the apron as I had previously done, one wheel on the apron and the other three wheels on the dock. One of the rear wheels on the apron and down the apron went. I tried to get the truck started the other way, and she tipped me out and dumped me into a pile of barrels and the truck disappeared. As it tipped over the wheel that was on the apron pulled over onto the pier, and she righted herself, and went right down, and hit the boat a pretty fair crack, and away she went. She tore the hood and everything off as she went down."

The witness stated that after the accident he examined the apron and found that the pins were "on top of the supports that held them up." He said that he had delivered oil to defendant's steamers not fewer than 25 times with the same truck or trucks of the same type; that he always put his truck in exactly the same position.

On cross-examination the witness testified:

"When I started the oil running it was 10:30 o'clock by my watch. I do not know if the tide was going out or not. The boat was swaying a little bit, I guess; it always sways more or less. I could not say whether the apron and the lip rises with the movement of the tide. I don't know anything about tides. I know that the tide in the bay rises and falls and I naturally infer that when the tide rises the boat rises. I cannot tell you whether or not when the boat rises the apron and lip also rise. I was not gone an hour and quarter between the first and second load. When I came with the first load there was a fireman, I think, to receive the oil. The fireman did not adjust the apron; I do not know who adjusted it. The apron was already adjusted when I landed with the first load. When I got there with the first load I did not get off the truck. I did not report to anybody that I was there with the first load. * * * When I left there was a bunch of men working around there. After I had the truck back in place they helped me put the long pipe on. Then I unloaded my load of oil and took off the pipe. * * * When I got back with the second load there wasn't anybody there. I did not report at the office; I did not report to anybody. I did not get off the truck. I did not ascertain whether there was a change in the tide, or whether the change of the tide or swaying of the boat in any wise disturbed the arrangement of the apron and the bridge. I did not inquire of anybody whether everything was in order; there was nobody there. I did not make any inspection myself. I did not know whether the apron was safe and properly fastened or not. I naturally supposed it was all right. I backed into place as I always had done when the apron was down and the boat was in. There were always men there before that, but this time nobody was there."

The testimony on behalf of defendant was as follows: E. V. Rideout, the defendant, testified that in January, 1916, he had the use of pier 19.

"The space we actually occupied is open to the public. I have not the exclusive occupation of this wharf. The space is not marked off. When we were not in possession any one can come with the permission of the wharfinger on the dock, or they can come in without permission. * * * The wharfinger looks after the dock and takes care of it. He is there constantly. I have not agreed to anything as to keeping anything in order. I was under no obligation to maintain the plank, bridging, piling, or anything of that kind. The harbor commissioners keep the dock in repair. I have nothing to do with the maintenance of the apron. The harbor commissioners or their agents make the repairs if any are needed. * * * The harbor commissioners supplied the ropes, chains, pins, and tackles. * * * I have never directed the Union Oil Company's trucks as to how they should drive or where or when, nor have I ever authorized any of my employés to direct them in the operation of their trucks on the dock. * * * I was not present on the day of the accident. The engineer was in charge of the boat on that day. Mr. Pierson, the bookkeeper, was in charge of the books."

H. H. Pierson, defendant's bookkeeper, testified:

"On the 23d of January, 1916, I was in the inner office doing some work on my books. I have nothing to do with the running of the boat other than just giving instruction when the load is to go and come. * * * I remember the Union Oil tank wagon coming to deliver oil on that Sunday morning."

The witness told of the delivery of the first load of oil, and that he asked the driver to take dinner with them if he returned in time.

"I was there when he came back with the next load. That was about five minutes of 12. When he came on the dock there was a big noise. I ran out of the office. I saw a man standing looking toward the slip. There was no truck there. I just saw that the apron was broken; one of the cables, I think it was on the left-hand side, looking down, was broken. The counterweight had dropped down. The pins were hanging underneath; the two pins on the side of the apron. I laid one on the dock and said, 'That is the trouble.' I said that to Mr. Younger, one of the other employés of the Rideout Company."

F. H. Young, who said he was "general utility man" for the E. V. Rideout Company, was with Mr. Pierson at the time of the accident. He said that he "heard an awful crash outside," and he and Pierson ran out. He testified:

"I observed the condition of the apron at the time. The apron had fallen down. The two slides that had held it up had pulled through, and one of them was broken off and the other was laying down to one side. The two pins that hold those slides in place were both hanging by their chains. One of the counterweights was broken; the fastener where it fastened to the apron was broken; one hinge was broken."

On cross-examination the witness said:

"The pins that hold this rod sustain the outer end to the apron, and also these cables that are used to hoist it up. If these pins are not in there, and any considerable weight comes upon the apron, the apron drops; that is, if the weight is more than these cables will sustain. It takes two men with great effort to operate this outer end of the apron. I have seen two men, one on each side, with great effort lift it, but two men on each side can handle it very nicely. * * * The block and tackles are attached to the outer end of the apron whenever you desire to raise or lower the apron. It takes four men to raise and lower the apron."

C. W. Thom, chief engineer of the steamer Crockett, testified that he was on the boat, with his full crew of three firemen and assistant engineer, on the day of the accident. They were at dinner and heard a slight jar on the boat when the truck hit it. He said:

"I and my crew have nothing to do with the apron. I do not exercise any authority or undertake to direct the trucks of the Union Oil Company when delivering oil. I gave the driver no orders to come back. He said he would be back, but he set no time."

On cross-examination he said:

"When the boat lands at this place the mate or the captain handle the men that handle the cargo. Then the men on the boats unload the cargo over this apron. When the apron is too high they lower it; when it is too low they raise it, and they leave it as it may be necessary for the proper handling of the cargo. The boat's crew regulate it in accordance with the tide. About sixty men constitute the crew. I suppose there were over a dozen on board at the time this accident occurred. Whenever the wagon comes from the Union Oil Company it is the custom first for them to announce their presence and then I send somebody to handle the pipe. I have nothing to do with cables or tackles or anything of that kind whatever, nor have any of my men."

In rebuttal the witness Ellis testified:

"I drove on the wharf in the ordinary manner. I backed up on the apron the same as usual. It was not a place to use any speed. I had to stop and back up. It was simply a short place to back up and you can't back with any excessive speed. When the boat is in and the apron down I do not give notice to the people on the boat of my presence. * * * If the apron was not in position when we went there the boat crew put it in position."

On cross-examination the witness testified:

"The truck and load of oil weighed 22,000 pounds. Q. You have been to school, haven't you? A. I have. Q. How far did you progress in school? A. I went far enough to read and write. Q. You are a grammar school graduate? You know all about the tides? A. I know that the tides come in."

We have thus presented sufficient of the evidence produced by both sides to subserve the purposes of the decision herein.

The findings of the court, in substance, were that defendant was not guilty of negligence in any degree, and that plaintiff's servant Ellis was guilty of negligence in recklessly and carelessly driving upon said apron in the absence of defendant and his employés and without examining said apron or inquiring as to its condition of safety.

The harbor commissioners have full and exclusive general control and jurisdiction over the wharves and piers of the San Francisco water front, and it is undoubtedly their general duty to keep the same in proper condition for the use for which they are intended and to repair them when out of order and not in proper condition for their use with safety by those docking their boats and vessels thereat.

[1] As to the contractual relation existing between the harbor commissioners and those to whom they let the privilege of docking their boats at the piers, while it is to be conceded that, in a strict sense, as counsel for the defendant contend, the relation of land-

lord and tenant does not exist between them (see Morton Bros. v. Pacific Coast Steamship Co., 122 Cal. 353, 55 Pac. 1), still it cannot be doubted that, so long as the owners of boats have their vessels in dock at said piers, though not having that exclusive right and privilege, they are nevertheless as much occupants of said piers as they would or could be if they were in the strictest sense tenants of said commissioners. We suppose it is safe to say that the right granted to boat owners by the commissioners to use the piers for the docking of their vessels is a mere privilege or license, all owners of vessels plying the waters ending in the San Francisco bay having, where duly granted them, the same privilege or license. But it does not follow from that situation that it is not the duty of the owner of a boat or vessel, while using said piers for their transportation purposes, to see that, while their vessels are so docked, the necessary facilities or equipments for the loading or discharging of freight or the taking in or discharging of passengers are in safe and proper condition for those purposes. In 29 Cyc. p. 476, it is said that "the occupant of premises, although a mere licensee, is liable for injuries inflicted by reason of his neglect or failure to keep the premises in a safe condition"; and in Thompson v. Tilton Elec. L. & P. Co., 77 N. H. 93, 88 Atl. 216, which was an action for the death of a child, who was killed by the electric current of one of the company's poles while leaning against the pole, which stood in a public highway, the court said:

"In the view most favorable to the defendant, the relation existing between it and the deceased was that which arises between two licensees upon land of a third party. Each must use ordinary care not to injure the other or his property."

[2] Even if there were inherent defects in the apron or any other of the equipments of the pier essential to the loading or unloading properly and with safety of freight on and from the vessels docking thereat, and it was the duty of the harbor commissioners to correct such defects, it was still incumbent on the defendant, while using the pier, to exercise reasonable or such care as might have been necessary to the discovery of such defects and the correction thereof either by himself or the commissioners. This requirement of the defendant follows from the proposition that, when using the dock for the purposes of the transportation business in which he is engaged, the defendant, like the man who conducts a merchandise business of any character, invites the public to the dock and to use the pier for the purpose of transacting business with him, and, again like the merchant, he is required to maintain in safe and proper condition the means of ingress and egress whereby his customers go in upon and out of his boat, and the means whereby freight is transferred from the boat to the wharf or from the wharf to the boat.

[3] As a matter of fact, as to the plaintiff in this case, the defendant, in his written contract, guaranteed to the former, when delivering oil to his boats, "proper unloading facilities and access to the dock." By this covenant the defendant agreed to provide the plaintiff with safe means whereby he could deliver the oil upon the boats, and thus he expressly bound himself, as the law itself had already bound him, to provide the plaintiff with such unloading facilities as would insure the delivery of the oil on board the boats with safety and dispatch.

[4] As the evidence above quoted herein shows, Ellis, who was in charge of the truck on the day of the accident, had on some 25 or more previous occasions delivered oil to the defendant's boats at said pier, in the same manner in which he attempted to do so when the apron gave way and the truck thus precipitated into the bay. On that very day, just a short time before—not much over an hour prior to the accident—he delivered a quantity of oil to the defendant's steamer Crockett at said pier, and in doing so drove or backed the truck, as he attempted to do when the accident occurred, onto the apron. It was necessary for him thus to move the truck upon the apron to make the delivery. On his return with the second load of oil, the driver observed that the apron was apparently in the same condition that it was in when he had previously used it. He had the right to assume that it was in the same condition, or that, being in position for its customary or usual use, there were no defects in it which would render it unsafe to use it as he had always used it. He had a right to assume that the defendant, when in use of the pier, would exercise reasonable care to see that the apron and its essential equipments were maintained in a condition to be used with safety. Particularly was he justified in so assuming, in view of the fact that he knew that the defendant's engineer and others connected with the boat knew that he would return and expected him to return to the boat that day, shortly after the first load was delivered, with another load of oil to be delivered to the boat. He was not, therefore, charged with the duty of leaving his truck and himself making an investigation to assure himself of the safety of the apron.

In Earl v. San Francisco Bridge Co., 31 Cal. App. 339, 160 Pac. 570, an action for damages for personal injuries to an employé who was injured from a powerful electric current while manipulating a part of the electrical apparatus, which had gotten out of repair without the knowledge of the plaintiff, and which defect was the cause of the injuries received by him, this court said, at

page 346 of 31 Cal. App., at page 572 of 160 Pac.:

"It was not negligence on the part of respondent to assume that conditions were as before, and that the switch would disconnect the current. Having the right to assume that the appliance was in the same condition, he was excusable for his failure to make an examination or inspection whereby he might have ascertained what had been done; nor was the difference in the appearance of the equipment so palpable and obtrusive as to compel the conclusion that, while hastening to perform his duty, if he had exercised ordinary care he would have discovered the change."

As above stated, the evidence shows that there was absolutely no difference in the appearance of the apron at the time of the accident from its appearance when he delivered the first load of oil that day or at any other previous delivery of oil by the same driver.

[5] But it is asserted by the respondent that there existed a custom, of which the driver of the truck had knowledge, that whenever said driver took a load of oil to the boat, to be emptied from the truck into a tank maintained for that purpose on the boat, he was to notify the engineer or some other person connected with the vessel of his presence with the oil before attempting to drive the truck on the apron. But we have found no such testimony in the record as it is presented here. What the engineer did testify to was this: "Whenever the wagon from the Union Oil Company comes it is the custom first for them to announce their presence and then I send somebody to handle the pipe. I directed where the oil should go. That is the ordinary method of doing it. When the pipe is put in I am notified of it in order to direct where the flow should go." Again, the engineer testified: "Before the oil is taken aboard they always notify us, because we have got to know, otherwise we would flood the tank." This is far from saying that it was the custom for the driver to notify the engineer of his presence at the pier for the purpose of giving the engineer or some other person connected with the boat an opportunity to inspect the apron to see whether it was safe to drive the truck upon it.

It is not known, or at least it was not shown, how the apron became defective or in a condition not to be used with safety, nor is it necessary to this decision that that fact should be known, since there is no claim that the driver of the truck caused the unsafe condition thereof. An investigation after the accident, however, disclosed that the two pins which held in place the slides which supported the apron were out of their proper places and were "hanging down by their chains." In other words, it was evident that by some means or in some way, wholly unexplained by the record, the pins were removed from their proper places, and therefore afforded no support for the slides. It may be that the action of the tide had so swayed the apron as to cause the pins to become loose and so become useless for the purposes for which they were designed. However that may be, it is contended by the respondent that the burden was upon the plaintiff affirmatively to show either that the pins were removed by the defendant or his servants or that the defect in the apron was produced by some other act of theirs.

[6] We do not agree to that proposition, but, on the contrary, we think that the doctrine of res ipsa loquitur applies. That rule is stated as follows by Shearman & Redfield on Negligence, § 60:

"Where a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care."

See Judson v. Giant Powder Co., 107 Cal. 549, 556, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146.

In Bergen v. Tulare County Power Co., 173 Cal. 720, 721, 161 Pac. 269, 273, which was an action for damages for death caused by the negligent installation of an electrical apparatus, the court said:

"It is the rule in this state that where electricity is furnished to a system installed and operated exclusively by the owner of the premises, the doctrine res ipsa loquitur has no application. * * * But where the defendant in such a case *had some control over the situation* (italics ours), either by reason of its construction or its operation of plaintiff's plant, a showing of accident without plaintiff's fault shifts the burden of proof."

[7] We have already shown that the pier and its equipments necessary for the loading and discharging of freight, during the times the vessels of the defendant occupied the pier, were under the latter's exclusive control and management. The chief engineer of the defendant's boat, which was at the pier when the accident happened, testified:

"When the boat lands at this place (the pier), the mate or the captain handle the men that handle the cargo. Then the men on the boats unload the cargo over this apron. When the apron is too high, they lower it; when it is too low, they raise it, and they leave it as may be necessary for the proper handling of the cargo. The boat's crew regulate it in accordance with the tide, and they use it wherever there is a necessity."

That evidence is sufficient, if there were no other in the record, to show that the defendant had "some control over the situation" by reason of the necessity of regulating

the apron in accordance with the action of the tide and of keeping it in proper condition for using it for the boat's purposes with safety.

[8] As before shown, it also further appears from the evidence that Ellis, the plaintiff's truck driver, during the preceding two years during which the plaintiff had been supplying the defendant with oil, had delivered the oil to the latter's boats, and had no less than 25 different times put his truck, preparatory to emptying the oil into the tanks of the boats, in exactly the same position on the apron as he put it when the accident happened, and that never before the occasion on which this accident happened had any trouble or damage occurred by reason of that act. This experience was sufficient to show that in the ordinary course of things such accidents did not happen. Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 344, 73 Pac. 164.

If it be said that the only reasonable theory of how the apron became defective was, as above suggested, that it was the result of the action of the tide, an agency not subject to human control—the act of God—still, under the rule above stated, "the explanation should come from the party charged with the special duty of protection." Cooley on Torts, § 799; Judson v. Giant Powder Co., supra.

[9] Moreover, if the condition of the apron is influenced by the tides, it is still the duty of the defendant to see that any defect therein so occasioned is discovered and corrected. We may assume that a professional navigator is thoroughly familiar with the action of the tides and the effect thereof on navigation and all the essentials of shipping.

We can perceive no escape from the conclusion that the evidence, as to which there is no dispute so far as are concerned the vital considerations upon which the case must be decided, does not support the findings necessary to the support of the judgment.

The judgment is accordingly reversed and the cause remanded.

We concur: CHIPMAN, P. J.; BURNETT, J.

179 Cal. 432

EMPLOYERS' LIABILITY ASSUR. CORPORATION, LIMITED, OF LONDON, ENGLAND, v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. ÆTNA LIFE INS. CO. v. SAME. OCEAN ACCIDENT & GUARANTEE CORPORATION, Limited, v. SAME. (L. A. 5732, 5739, 5740.)

(Supreme Court of California. Dec. 24, 1918. Rehearing Denied Jan. 23, 1919.)

1. MASTER AND SERVANT ⟸346—WORKMEN'S COMPENSATION—BURDEN—POLICY OF LAW.

It is the policy of the law to place the burden arising from personal injuries upon the business or industry in which an injured employé is engaged, by placing the responsibility for indemnity upon the employer.

2. MASTER AND SERVANT ⟸347—WORKMEN'S COMPENSATION — STATUTES — CONSTRUCTION—"EMPLOYER"—EMPLOYÉ."

In defining the terms "employer" and "employé" in any statute passed in pursuance of Const. art. 20, § 21, authorizing the Workmen's Compensation Law, no definition therein contained can enlarge the scope of the constitutional authority.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé; Employer.]

3. MASTER AND SERVANT ⟸361—WORKMEN'S COMPENSATION—RELATION OF PARTIES.

In determining whether or not the relationship of employer and employé existed under the Workmen's Compensation Law, the general law as well as the terms of the statute itself must be considered.

4. MASTER AND SERVANT ⟸361—WORKMEN'S COMPENSATION—PERSONS WITHIN STATUTE —"EMPLOYER"—"EMPLOYÉ."

The definitions of "employer" and "employé," in Workmen's Compensation Law, §§ 13, 14, are broad enough to include both the general and special employer.

5. MASTER AND SERVANT ⟸361—WORKMEN'S COMPENSATION—JOINT EMPLOYERS.

Where a partnership furnished men and a foreman to a cement company, who were to be paid by the partnership with funds furnished by the cement company, the partnership retaining the power to hire and discharge, the men were under the joint control of the partnership and the company, who were jointly associated in carrying out the work.

6. INSURANCE ⟸144(1) — WORKMEN'S COMPENSATION—ACCIDENT INSURANCE—AMENDMENT OF POLICY.

Where a policy protecting an employer under the Workmen's Compensation Law fails because of mutual mistake to express the intent of the parties, it may by mutual consent be corrected, even after the happening of an accident covered thereby, in the absence of estoppel, and if not done so as to defeat an employé's right to compensation.

7. MASTER AND SERVANT ⟸404—WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF EMPLOYMENT—EVIDENCE.

Under the express provisions of Workmen's Compensation Law, § 77a, as amended by St. 1915, p. 1102, § 28, the hearsay declarations of decedent are admissible to find that his death arose out of the employment, within the Act.

In Bank.

Proceedings under the Workmen's Compensation Law by Ellen R. Coulter, claimant, to recover for the death of J. A. Coulter, employé, opposed by the Employers' Liability Assurance Corporation, Limited, of London, England, the Ætna Life Insurance Company, a corporation, and the Ocean Accident & Guarantee Corporation, Limited. An award was made in claimant's favor by the Industrial Accident Commission, and the insurance carriers petition separately for writs of review. Award against Ætna Life Insurance Company and the Employers' Liability Assurance Corporation, Limited, of London, England, affirmed, and award against the Ocean Accident & Guarantee Corporation, Limited, annulled.

Willis I. Morrison and C. La V. Larzelere, both of Los Angeles, for petitioner Ocean Accident & Guarantee Corporation, Limited.

Haas & Dunnigan, of Los Angeles, for petitioner Employers' Liability Assur. Corporation, Limited, of London, England.

Henshaw, Black & Goldberg, of San Francisco, for petitioner Ætna Life Ins. Co.

Christopher M. Bradley, of San Francisco, for respondents.

WILBUR, J. These proceedings were instituted by the petitioners to review an award against them by the Industrial Accident Commission in favor of Ellen R. Coulter for the death of her husband, J. A. Coulter, alleged to have been caused by an accident of employment on November 16, 1917, at the plant of the Riverside Portland Cement Company, near Riverside, Cal. The Ocean Accident & Guarantee Corporation and the Employers' Liability Assurance Corporation were insurance carriers for the Wellman-Lewis Company, a copartnership, while the Ætna Life Insurance Company was the insurance carrier for the Riverside Portland Cement Company. These insurance carriers each claim exemption from liability upon the ground that the partnership or corporation insured by them, respectively, was not the employer of the deceased at the time of his death. They also claim that the award was improper for the reason that the evidence was insufficient to establish the fact that the death of the decedent resulted from injuries arising out of or received in the course of his employment. The Ocean Accident & Guarantee Corporation also claims that the award

against it is improper for the reason that both parties admitted that, by mutual mistake, the contract covered the accident in question, while the real contract was intended to cover work then being carried on at Hemet only, and that before the hearing the policy had been amended by mutual consent.

The Riverside Portland Cement Company, which will hereafter be referred to as the "Cement Company," was engaged in manufacturing cement. It became necessary to install new machinery and to rearrange the plant. The plans and specifications for such work were made by the engineers of the Cement Company. The Wellman-Lewis Company, hereafter called the "partnership," was engaged in the business of installing and handling large machinery, and had a number of employés experienced in that line of work. The Cement Company desired to secure the services of the partnership. An arrangement was made by which the partnership furnished to the Cement Company its employés, under a foreman also employed by the partnership. The commission, upon sufficient evidence, found the facts to be as follows:

"(7) That at the time of said injury the employé was performing service upon the premises of defendant Riverside Portland Cement Company and for its benefit; that prior to his employment an arrangement had been entered into between defendant Riverside Portland Cement Company and defendant Wellman-Lewis Company whereby the latter was to secure and furnish employés, including a foreman, to perform service on the premises of and for the benefit of the Riverside Portland Cement Company, for and in consideration of the payment to said Wellman-Lewis Company of 10 per cent. of the pay roll of the employés and foreman thus furnished; that the Riverside Portland Cement Company was to furnish all materials and was to, and did in fact, give and exercise direction and control over such employés, including said foreman; that no plans and specifications were entered into for doing such work, nor was the nature and extent of the work to be done closely defined to the said Wellman-Lewis Company nor any specific sum of money agreed upon other than as stated above; that account of the time of all such employés was kept by the Riverside Portland Cement Company, such men being required to use the time clock of the said company, and a check for the wages of such employés, plus 10 per cent., and less incidental deductions, was sent to Wellman-Lewis Company, who, in turn, paid such employés their wages; that no time was agreed upon for the completion of said work, and that the Riverside Portland Cement Company reserved the right to require the furnishing of such additional employés as it should deem necessary and to cause the discharge of any employés whom it might regard as undesirable; that said agreement between Wellman-Lewis Company and the Riverside Portland Cement Company was substantially an agreement to furnish labor, skilled and experienced only; that the deceased was engaged by the representatives of Wellman-Lewis Company specifically for the work in question, and had not been a regular employé of Wellman-Lewis Company prior to his being put to work at the plant of the Riverside Portland Cement Company; that the contract of hire by which the employé was engaged was entered into between himself and defendant Wellman-Lewis Company; that the employé looked to and received his pay from Wellman-Lewis Company; that Wellman-Lewis Company had the immediate power of hiring and discharging him, and that the employé was obliged to obey any instructions given him by the foreman furnished by Wellman-Lewis Company; that Wellman-Lewis Company was in fact participating in the performance of the labor upon which the employé was engaged and by virtue of the contract existing between it and defendant Riverside Portland Cement Company; that at the time of said injury the deceased employé was employed jointly by defendants Wellman-Lewis Company and Riverside Portland Cement Company, who were jointly associated in the carrying on of said work."

The rules of law by which it is determined whether the position of the partnership was that of an independent contractor, and, if not, whether the Cement Company was a special employer of the deceased, are well settled. In the analysis of the cases bearing upon this subject, and in the discussion of cases analogous in their facts, it should be borne in mind that the reviewing courts are, in most instances, bound by the decision of the triers of fact.

[1] If the partnership in the instant case was an independent contractor, the award against the Cement Company was void. If, however, the relation of the partnership to the deceased was that of general employer, and that of the Cement Company was that of special employer, the responsibility is more difficult to determine, for the reason that the rules of law concerning the general and the special employer, fixing the status of the special employer, are largely the product of the effort to fix the responsibility of such special employer to third persons, under the doctrine respondeat superior, and that under this doctrine the question of extent of the control exercised by the person sought to be held responsible is largely decisive of the question, as obviously it should be. But the question of liability of the employer to the employé under the Workmen's Compensation Law is quite a different matter. Under that law we are fixing a liability which it is the policy of the law to place upon the business, or industry, in which the employé is engaged, by placing the responsibility for indemnity upon the employer. Rheinwald v. Builders' Brick & Supply Co., 168 App. Div. 425, 153 N. Y. S. 598; Rongo v. Waddington, 87 N. J. Law, 395, 94 Atl. 408; Kirkpatrick v. Ind. Acc. Ins. Comm., 31 Cal. App. 668, 161 Pac. 274. In the instant case the Employers' Liability Assurance Corporation claims "that the physical control and management of the employé is the determining factor as to who

was the employer." The Ocean Accident & Guarantee Corporation contends that "the determining factor is, for whom were the individuals performing services, not what particular position they occupied." The Ætna Life Insurance Company claims that the Wellman-Lewis Company was an independent contractor, and therefore responsible for the death of the decedent, but also contends that, if the Cement Company be considered as an employer of the decedent, it was a special employer only, and that the decedent was in the general employment of the partnership, and that under the law of this state a special employer would not be liable for compensation. If the question were altogether new, it might be said that the person who enters into the contract of employment, express or implied with the employé, is at all times to be considered the employer, as it is contended the rule should be. Neither our own decisions, nor those of other states, have pursued this simple course.

[2, 3] The constitutional provisions authorizing the Workmen's Compensation Law of necessity uses the terms "employer" and "employé" (article 20, § 21), and it must follow that in defining the terms "employer" and "employé" in any statute passed in pursuance thereof no definition therein contained can enlarge the scope of the constitutional authority. So, in determining the question as to whether or not the relationship of employer and employé exists, we must look to the general law, as well as to the terms of the statute itself. See Carstens v. Pillsbury, 172 Cal. 573, 579, 158 Pac. 218; Sturdivant v. Pillsbury, 172 Cal. 581, 158 Pac. 222. This view is in accord with the statement to that effect in Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 813, 814, 159 Pac. 721, 724, where it is said:

"It is suggested that, inasmuch as the statute enjoins upon the court liberal construction, we should ignore common-law and other definitions, and should, in determining who are and who are not employés, regard only decisions under compensation acts. * * * This court has always endeavored to construe the Workmen's Compensation Act liberally and with a view to carrying out its benevolent purposes, but we cannot see why we should discard the wisdom and learning of the past in our efforts to decide what the Legislature intended by the language used."

As the law recognizes that an employé may at the same time be under a general and a special employer, it would seem to follow that the jurisdiction of the commission might well be predicated on either the general or special employment or both. The New York Court of Appeals took this view in deciding a recent case under the Workmen's Compensation Law of that state (Consol. Laws, c. 67). De Noyer v. Cavanaugh, 221 N. Y. 273, 116 N. E. 992. There De Noyer was employed as the driver of a truck by Cavanaugh, who was in the trucking business. The Crown Oil Company, who was engaged in the business of selling oil and gasoline, made an arrangement with Cavanaugh by which he was to furnish it a horse and driver to be used in connection with a tank wagon owned by the company for distributing oil and gasoline, and De Noyer was employed by Cavanaugh for this purpose. While he was engaged in delivering a can of gasoline from the truck of the Crown Oil Company, the gasoline exploded, causing his death. The award was made against the general employer, Cavanaugh. In reconciling that decision with Nolan v. Cranford Co., 219 N. Y. 581, 114 N. E. 1074, the court said:

"Even where no property of the general employer is intrusted to the employé to be used in the special employment, the general employer pays the compensation, may direct the employé when to go to work, and may discharge him for refusal to do the work of the special employer. The Industrial Commission, therefore, has full power to make an award against the general employer. It does not follow that by the application of this rule the special employer is not to be held in any case. The fact that a workman has a general and a special employer is not inconsistent with the relation of employer and employé between both of them and himself. If the men are under the exclusive control of the special employer in the performance of work which is a part of his business, they are, for the time being, his employés. Comerford's Case, 224 Mass. 571, 573 [113 N. E. 460]. Thus at one and the same time they are generally the employés of the general employer and specially the employés of the special employer. As they may under the common law of master and servant look to the former for their wages and to the latter for damages for negligent injuries, so under the Workmen's Compensation Law they may, so far as its provisions are applicable, look to the one or to the other, or to both, for compensation for injuries due to occupational hazards (Workmen's Compensation Law [Consol. Laws, c. 67] § 3, subds. 3, 4), and the Industrial [Accident] Commission may make such an award as the facts in the particular case may justify."

The above reference to the New York Workmen's Compensation Law (section 3, subds. 3, 4) is to the definition of "employer" and "employé" therein contained, which does not substantially differ from the definition given in our own Workmen's Compensation Law (Stats. 1913, c. 176, §§ 13 and 14), so far as concerns the matter under consideration here.

[4] The definitions of "employer" and "employé" in our Workmen's Compensation Law (sections 13, 14) are broad enough to include both the general and the special employer, and as such contracts of employment, express and implied, were recognized before the constitutional amendment, we do not see why either or both might not give jurisdiction to the Industrial Accident Commission. While we have heretofore held that an independent contractor is not entitled to com-

pensation under the Workmen's Compensation Law, we find nothing in our decisions which would prevent our following the rule announced by the Court of Appeals of New York in the case of De Noyer v. Cavanaugh, supra, and, recognizing the fact that in some cases where, at the time of the accident, both the general and special employer exerted some measure of control over the injured person through their respective foreman or employés, both should be held liable. Our attention has been called by the Ætna Life Insurance Company to a case (S. F. No. 8106, Ayer et al. v. Industrial Accident Commission [no opinion]) where it was held liable by the commission as the insurance carrier of the general employer in a case where the full control of the employé was at the time of the accident in the special employer, and where the petition of that company for a review by this court was denied. So far as this case can be regarded as a precedent, it establishes the responsibility of the general employer, even though there was full control by the special employer. Although the commission refused to hold the insurance carrier of the special employer, the refusal to issue a writ of review would not affirm such action. The refusal of this court to review the case tends to establish the point that, where there is a general employment, this court will not hold that the commission has exceeded its jurisdiction in giving judgment against such employer, even if there is a temporary and full control in a special employer. It is not, however, necessary for us to so hold in this case. The Supreme Court of Massachusetts, however, in a recent case, has reversed an award against the general employer. Scribner's Case, 231 Mass. 132, 120 N. E. 350 (May 28, 1918). In that case the plaintiff was in the general employment of an ice company, but was injured while handling coal for a coal company, both companies being insured. Compensation was awarded against the ice company. The court reversed the decree. The test is there stated as follows:

"'In determining whether, in a particular act, he is the servant of his original master or of the person to whom he has been furnished, the general test is whether the act is done in business of which the person is in control as a proprietor, so that he can at any time stop it or continue it, and determine the way in which it shall be done, not merely in reference to the result to be reached, but in reference to the method of reaching the result.' Shepard v. Jacobs, 204 Mass. 110, 112, 90 N. E. 392, 393 (26 L. R. A. [N. S.] 442, 134 Am. St. Rep. 648). 'The test is whether, in the particular service which he is engaged to perform, he continues liable to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired.' Coughlan v. Cambridge, 166 Mass. 268, 277, 44 N. E. 218, 219. Applying these tests, it is clear that Scribner at the time of the injury was an employé of the coal company; he was in that company's yard, engaged in its business, and doing its work; and he was under its direction and subject to its orders. Whatever may have been the relation of Scribner to the ice company in the care and management of the horses, at the time of his injury he was engaged in work over which *that company had no control.* [Italics ours.] The business was that of the coal company and under its direction. The transaction between the two companies amounted only to a loan of the ice company's servant to the coal company, the servant became the employé of the latter for the time being, and on the evidence he must be found to have assented to this, although remaining in the general employment of the ice company. Coughlan v. Cambridge, supra; Hasty v. Sears, 157 Mass. 123, 31 N. E. 759, 34 Am. St. Rep. 267; Samuelian v. American Tool & Machine Co., 168 Mass. 12, 46 N. E. 98, and cases cited.

"Pigeon's Case, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737, relied on by the employé, is distinguishable. In that case the driver was on his way to water the horse which was owned by Shaw, the general employer, who retained the general direction of the employé except so far as his control was surrendered to the city of Springfield. This relation of control included the care of the horses to the extent, at least, of seeing that they were watered. When injured, the employé was under the control of the original master and occupied in his work, and not engaged in the business of the city of Springfield nor under its direction. * * * This well-established principle of the common law which holds that an employé who is lent to a special employer as distinguished from his general employer, and who assents to the change of employment, becomes the servant of the employer to whom he is lent, applies as well to cases arising under the Workmen's Compensation Act as to those at common law."

This decision is based in part upon a consideration of the provisions of the Massachusetts Workmen's Compensation Law, differing from our own statute, as therein stated. If we follow our own action in Ayer v. Industrial Accident Comm., supra, and the decision of the District Court of Appeal, Second District, in Kirkpatrick v. Industrial Accident Comm., 31 Cal. App. 668, 161 Pac. 274, holding the general employer liable, and the Massachusetts court in the Scribner Case, holding the special employer, we reach the same conclusion as the New York court did in De Noyer v. Cavanaugh, supra, holding both or either liable.

[5] In the instant case, however, we are not required to go so far. The decision of the commission was based upon the joint control by the partnership and the cement company, and upon their finding as to such joint control their award should be affirmed. There is nothing in the decision in Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 Pac 721, cited by petitioners, inconsistent with this view. There the claimant, who had been given an award by the accident commission, was held to be an independent contractor, furnishing his own teams and drivers other than himself. This conclusion

was reached by an application of well-established principles of law to the facts therein stated.

With reference to the claim of the Ocean Accident & Guarantee Corporation that its policy included the accident in question by reason of mutual mistake, the commission found the facts as follows:

"That said Wellman-Lewis Company was at the time of said injury insured against liability in the Employers' Liability Insurance Company, and that at that time was also insured against liability in the defendant Ocean Accident & Guarantee Corporation, and that the policy issued by said insurance carrier was unlimited and covered said employer's liability to all of its employés within the state of California; that the oral intention and understanding between defendants Wellman-Lewis Company and the Ocean Accident & Guarantee Corporation at the time the policy of the latter insurance carrier was issued was that said policy should cover only employés employed at a magnesite mine at Hemet, Cal., but that said policy was in fact limited to correspond with said oral intentions after the sustaining of this injury by J. H. Coulter, and that none of the other parties to this proceeding was a party to said understanding prior to said injury, and the said employé, the applicant, and defendant Riverside Portland Cement Company, and Ætna Life Insurance Company, have at no time been parties to such agreement."

The facts found by the commission indicate mutual mistake; it being the intention of the Wellman-Lewis Company that the work at the cement company's plant should be covered by the insurance policy issued by the Employers' Liability Insurance Company, and that the work at Hemet should be covered by the Ocean Accident & Guarantee Corporation. After the happening of the accident, to wit, on January 5, 1918, a rider was attached to the policy of the latter company containing the following provision:

"It is understood and agreed that the operations covered * * * are hereby limited to cover at Hemet, Riverside county, state of California, only, and statement (4) of said policy is hereby amended to read as follows: 'Hemet, Riverside county, state of California.'"

[6] It is true that the parties to this contract of insurance could not amend the policy, after an accident, to defeat rights of compensation that had accrued before the amendment, and if the addition to the contract was in fact an amendment of the policy of insurance by mutual consent, the rights of Mrs. Coulter could not be affected thereby. If, however, the policy issued differed from that actually contracted for, and by mutual mistake of the parties expressed an agreement not intended by them, there is no reason why they could not correct the provisions of the policy to state their actual intent, unless for some reason they would be estopped from doing so. There is no showing here that any of the parties whose rights are involved ever knew of the existence of this policy previous to the accident, or acted upon it in any way. There is no evidence that deceased had any knowledge of the policy in question. His rights as an employé resulted from his status as such employé (North Alaska Salmon Co. v. Pillsbury, 174 Cal. 1, 162 Pac. 93, L. R. A. 1917E, 642), and not because of any interest he had in the policy or knowledge of its existence. We are not called upon to pass upon the question as to whether or not the Industrial Accident Commission could permit the reformation of a policy of insurance where the question of the mistake was disputed. Here the parties actually consented to the amendment of the contract to conform to their intentions, and it was so amended.

[7] The point is made that there is no sufficient evidence to justify the finding that the death of the decedent arose out of his employment, for the reason that such evidence consisted in part of his hearsay declarations. The amendment to the law passed in 1915 (section, 77a, Stats. 1915, pp. 1079, 1102) expressly permits such testimony, and the evidence, therefore, is sufficient. Western Indemnity Co. v. Industrial Accident Comm., 174 Cal. 315, 163 Pac. 60.

The awards against the Ætna Life Insurance Company and the Employers' Liability Assurance Corporation, Limited, of London, England, are affirmed, and the award against the Ocean Accident & Guarantee Corporation is annulled.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; LORIGAN, J.; RICHARDS, Judge pro tem.

---

179 Cal. 423

## In re WISE'S ESTATE. (S. F. 8556.)

(Supreme Court of California. Dec. 23, 1918.)

1. GUARDIAN AND WARD ⊂=10 — RIGHT OF PARENT.

Where affection of friends or kinsfolk opposes the natural rights of a parent, the paramount right of the parent under Code Civ. Proc. § 1751, will be regarded, unless it has been forfeited.

2. GUARDIAN AND WARD ⊂=13(4) — PETITION FOR GUARDIANSHIP — ABANDONMENT OF MINOR—EVIDENCE.

Evidence *held* not to sustain finding that mother petitioning for letters of guardianship of her son's person and estate had abandoned him.

3. GUARDIAN AND WARD ⊂=13(4)—COMPETENCY OF GUARDIAN—EVIDENCE.

Evidence *held* not to show that mother petitioning for guardianship of her son was incompetent to discharge duties of guardianship.

4. GUARDIAN AND WARD ⟸10 — RIGHT OF PARENT.

That child was in suitable home and that his inheritance would be managed by trustee would not authorize court, under Code Civ. Proc. § 1747, to deny mother's petition for guardianship, in view of her paramount right under section 1751.

5. GUARDIAN AND WARD ⟸10—RIGHTS OF PARENT.

The court may not, by merely refusing letters of guardianship to any one, deprive the mother of a right to the society of her child and the direction of his life during his minority.

6. GUARDIAN AND WARD ⟸13(4)—GUARDIANSHIP—NECESSITY—EVIDENCE.

Under facts proven, *held*, that minor needed a guardian, and that his mother was entitled to appointment.

In Bank.

Appeal from Superior Court, Santa Cruz County; Benjamin K. Knight, Judge.

In the matter of the guardianship of the person and estate of Kenneth Dare Wise, a minor. The petitions of Winifred C. Wise, the minor's mother, and of Pearl Makinney, his grandaunt, were denied, and the former appeals. Order refusing letters of guardianship to mother reversed.

J. Samuels and Oscar Samuels, both of San Francisco, and W. P. Netherton, of Santa Cruz, for appellant.

William T. Jeter and Charles B. Younger, both of Santa Cruz, for respondent.

MELVIN, J. This is an appeal by the mother of Kenneth Dare Wise from so much of an order of the superior court of Santa Cruz county as denies her petition for guardianship of the person and estate of said minor.

On September 27, 1916, Pearl Makinney, a grandaunt of the said minor, petitioned for letters of guardianship of his person and estate. In said petition it was alleged that the boy, then about nine years of age, had been left by his grandfather, Dr. Kenneth Dare Wise, a legacy of the value of about $10,000, in trust, the income of which, and the principal if necessary, should be used for the child's educational and other requirements. On the 16th of November, 1916, the mother of the minor filed her petition asking for letters of guardianship. Both petitions were heard together, and the court denied both on the ground that there was no necessity for the appointment of a guardian, and ordered that the boy remain with his great-grandmother. An additional ground for the denial of the mother's petition, as found by the court, was that by abandoning the infant she had forfeited her right to the custody and control of her child and his fortune.

Appellant contends that she is a competent person, entitled by absolute right to appointment as the child's guardian, and that the evidence does not support the finding that she had abandoned her boy.

The child had been in the custody and care of his great-grandmother and his grandaunt, in their home in Santa Cruz, ever since he was a baby about one year old. For the first three years of the period during which he lived there, the father and mother had resided most of the time in San Francisco. The habits and condition of health of the father (who was suffering from tuberculosis) were such that the home of the boy's parents was not so suitable for him as that of Mrs. Makinney, his great-grandmother. The father and mother were divorced after three years of separation from their child, and afterwards the mother worked for a living in San Francisco. She was on friendly terms with the relatives in Santa Cruz and visited her child as often as twice a year and corresponded with Mrs. Makinney from time to time regarding him. It appears that the child was intrusted by Mrs. Wise to Mrs. Makinney at the latter's suggestion and because both wished to avoid the danger of infection from tuberculosis. There was no understanding regarding the length of time the boy was to remain in the Makinney household, and no promise by the mother to surrender her rights. During the exposition of 1915, the lad went to San Francisco and remained with his mother for a week or ten days. There had been other visits also. It was shown that there was no understanding that the mother was to contribute regularly to the support of her son. At one time, upon request, she paid $30 of a doctor's bill of $50, and $7.50 for his care in a hospital. There was other testimony which need not be reviewed in detail regarding the mother's contribution to the child's welfare. Such, for example, was the statement of Mrs. Makinney that the mother had sent the lad certain suits of clothing. A study of the record convinces us that the great-grandmother expected and demanded very little from the child's mother. As she said, the keeping of the boy at her home was a matter of affection and love on her part, rather than any other cause.

[1] This is one of those cases which we are sometimes called upon to decide, in which the affection of cherishing friends or kinsfolk is at war with the natural right of a parent. In such cases, we are impelled by the force of our statutes as interpreted by the decisions of this court to regard the paramount right of the parent, unless such right has been forfeited by abandonment of the minor or by other conduct making the parent unfit to discharge the duties of guardianship. As our present chief justice (then an associate justice) said, in Re Mathews' Estate, 169 Cal. 26, 27, 145 Pac. 503:

"It is well settled that, under the provisions of section 1751 of the Code of Civil Procedure, the father or mother of a minor child under the age of 14 years, if found by the court competent to discharge the duties of guardianship, is entitled to be appointed guardian in preference to any other person, and that the court must appoint a parent seeking to be appointed, unless it finds such parent incompetent, notwithstanding the judge is of the opinion that the child's health and welfare may be promoted by giving it to another. In re Forrester, 162 Cal. 493 [123 Pac. 283]; In re Salter, 142 Cal. 412. 415 [76 Pac. 51]."

[2, 3] We are of the opinion that the evidence in this case utterly fails to sustain the court's finding of abandonment, and that it does not prove appellant to be incompetent to discharge the duties of guardianship. In many respects this case resembles the Mathews matter. Upon the second appeal in that proceeding, Mr. Justice Henshaw, delivering the opinion of department 2, and discussing the emphatic terms of section 1751, Code of Civil Procedure, and their dominance over those of section 246, subd. 1, of the Civil Code, used the following language, which in its essentials is most pertinent to the solution of the problem now before us:

"It is argued with great force that the trend of modern decisions is to regard as of primary importance the welfare of the minor himself. This is most true. The decisions to this effect are made either under the permission of the law, which contains no such restriction as that found in our section 1751, or else are given under the command of the law which, in effect, declares that over and above all else the controlling consideration shall be the welfare of the child. If we were thus at liberty to act, it might well be that the custody of this child, under the findings of the court, would be given to the Rouses. This is the injunction declared in our own law by subdivision 1 of section 246 of the Civil Code. But, as we have pointed out, unless the parent has for some reason (and no such reason is here found) forfeited his preferential right to the guardianship of his offspring, all considerations of the welfare of the child must, under our law, be regarded as subordinate to that right." In re Mathews' Estate, 174 Cal. 679, 683, 164 Pac. 8, 9.

[4] We must next consider the finding of the superior court that there was no necessity for the appointment of a guardian for the person or the estate of the minor. This finding was made under the supposed sanction of section 1747 of the Code of Civil Procedure, and was based upon the two circumstances that the child was in a suitable and comfortable home, and that, under the terms of the will of Dr. Wise, the minor's inheritance would be managed, not by a guardian, but by a trustee acting under authority of the probate court of Los Angeles county, wherein the will had been admitted to probate. The section in question is, so far as pertinent to this proceeding as follows:

"The superior court of each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either of them, of minors who have no guardian legally appointed by will or deed, and who are inhabitants or residents of the county, or who reside without the state and have estate within the county."

It is argued with much force, in opposition to appellant's claim of right to letters of guardianship, that this section vests in the court a wide discretion in determining what may be necessary or convenient for the child and its interests. This may be freely conceded, but that concession does not free us from the force of section 1751, Code of Civil Procedure, which provides that—

"The father or the mother of a minor child under the age of fourteen years, if found by the court competent to discharge the duties of guardianship, is entitled to be appointed a guardian of such minor child, in preference to any other person."

[5, 6] That the minor child, who was the object of the affection of the hostile petitioners herein, needs the care and guidance of some adult person, may not be denied. The court, by refusing to appoint either petitioner, virtually bestowed the infant upon the great-grandmother, who was not asking for letters, thus depriving the mother of a preferential right secured to her by statute. This may not be done under such circumstances as are revealed by the record before us. To allow such an order to stand would be to substitute the discretion of the court for the compulsion of the statute which gives preference to a qualified parent. It may be, and doubtless is true, that the fund left by Dr. Wise for the care and education of the child may be administered by the trustee without the aid of a guardian. And there can be no doubt that in the home of the great-grandmother the boy would be surrounded in the future, as he has been in the past, by refining influence and by all things which would contribute to his moral and physical welfare. But the court may not, by merely refusing letters to any one, deprive the mother of a right to the society of her child and the direction of his life during his minority, which is recognized as a natural privilege and is secured to her by solemn enactment. Upon the facts proved, the child needed a guardian, and the mother was entitled to the appointment. It is suggested by counsel opposed to appellant that such an interpretation of section 1751 as this court has given would have the effect virtually to eliminate the words "necessary or convenient" from section 1747. If that were its effect, there would be nothing novel in the dominance of section 1751, for we have seen that it was held in the second of the appeals in Re Mathews' Estate that the preferential parental right bestowed and declared by section 1751, unless forfeited by abandonment or some other disqualifica-

tion, overcomes and controls the discretion which the court might otherwise enjoy under the terms of section 246 of the Civil Code, But we do not agree with counsel in their opinion that the quoted words in section 1747, Code of Civil Procedure, are eliminated by our interpretation of the later section of the same Code. It is to be remembered that applicants for guardianship of minors are not always parents or persons related to such children, and numerous illustrations will suggest themselves, without our aid, in which, under reasonably supposable facts, the terms of the earlier section would apply with all force, and those of the later would have no relevancy whatever. But in the present proceeding we are bound to give the effect to section 1751 sanctioned by the authorities above cited, and others to which reference might be made, and we are compelled to hold that the finding of lack of necessity for the appointment of a guardian is not supported and justified by the evidence.

The action of the learned judge of the superior court, as shown by his very able written opinion, was based largely upon the authority of In re Gates, 95 Cal. 461, 30 Pac. 596, in which Chief Justice Beatty refused to make an order in a proceeding on habeas corpus, enforcing the mere legal right of a mother who had years before surrendered the exclusive control of her child to a relative who had obtained letters of guardianship which, however, were void for want of jurisdiction in the court awarding them. But that opinion, as all similar ones must do of necessity, left open to the petitioner the right to apply for letters and to test in the proper forum her fitness for the care and control of her minor child. In commenting upon the Gates proceeding and the matter of the Application of Bell, 28 Cal. App. 547, 153 Pac. 240, we said, in the opinion in Ex parte Britt, 167 Pac. 863, 865:

"These cases are to be carefully distinguished from those in which, after hearings held for the very purpose of determining the fitness or unfitness of a parent, courts have awarded the custody of a child."

In the later proceeding, Ex parte Mathews, 167 Pac. 873, it was held that a mother to whom letters of guardianship had been issued was entitled to recover the physical custody of her ward by habeas corpus. In commenting upon the opinions in the Gates and Bell proceedings, Mr. Justice Sloss, in the opinion in the Mathews matter, used the following language:

"If it be sound doctrine that a court or judge may, on habeas corpus, disregard an established legal right which would control the judgment in any other form of proceeding, we are nevertheless satisfied that the rule can have no just application here."

It will thus be seen that there is no just analogy between the matter at bar and the cited proceeding In re Gates.

The order refusing letters of guardianship to Winifred Wise, mother of Kenneth Dare Wise, is reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; WILBUR, J.; LORIGAN, J.; RICHARDS, Judge pro tem.; VICTOR E. SHAW, Judge pro tem.

---

179 Cal. 444

## JAQUES et al. v. TOMB. (Sac. 2720.)

(Supreme Court of California. Dec. 24, 1918.)

1. COVENANTS ⇐96(6)—COVENANTS AGAINST "INCUMBRANCE"—ASSESSMENTS.

An assessment which did not exist when land was conveyed was not an "incumbrance" within a covenant against incumbrances.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Incumbrance.]

2. COVENANTS ⇐96(1)—COVENANT AGAINST "INCUMBRANCE."

A covenant against "incumbrances" meant those incumbrances defined by Civ. Code, § 1114, and could not have had reference to an existing and obvious levee constructed across the land and owned by a levee district.

Department 1.

Appeal from Superior Court, Yuba County; E. P. McDaniel, Judge.

Action by E. E. Jaques and another against Jane Tomb. Judgment for defendant, and plaintiffs appeal. Affirmed.

C. W. Eastin, of San Francisco, for appellants.

W. H. Carlin, of Marysville, for respondent.

VICTOR E. SHAW, Judge pro tem. This is an appeal by plaintiffs from a judgment in favor of defendant, entered upon plaintiffs declining to amend their complaint after the sustaining of a general demurrer to each of the four purported causes of action set forth therein.

[1] It appears from the first cause of action that defendant was the owner of a farm situated in reclamation district No. 784, which, on October 28, 1911, she by grant deed containing a covenant of seizin and against incumbrances, conveyed to plaintiff D. E. Jaques, who, on April 28, 1912, conveyed a three-fourths interest therein to E. E. Jaques, who, also, at a date not stated, acquired the remaining one-fourth interest in said property; that, subsequent to her acquisition thereof, the district levied an assessment upon the property, which assessment, it is alleged, constituted a breach of

the covenant against incumbrances. Since the assessment did not exist at the time when defendant conveyed the land to D. E. Jaques, but was levied subsequent to said date, and, indeed, after he had conveyed the property to his grantee, we are unable to perceive how a cause of action could be founded thereon, any more than would a subsequent annual assessment, upon which to base a levy for fiscal taxes, give rise to a cause of action. Neither he nor his grantee, as such, could maintain an action to recover for this alleged breach; hence the demurrer thereto was properly sustained.

By the third cause of action it is made to appear that, at the time when the assessment was made by the reclamation district, there existed a mortgage upon the property, and that, in order to protect her security, the mortgagee was compelled to, and did, pay the assessment so levied thereon by the district, which, together with interest and penalties, amounted to approximately the sum of $3,200, by reason of which fact it is alleged that plaintiffs are damaged in the sum of $3,200 required to redeem said land from the lien thereof under the terms of said mortgage. The reasons stated as justifying the action of the court in sustaining the demurrer to the first cause of action are equally applicable to the ruling of the court in sustaining defendant's demurrer to the third cause of action, viz., that at the time of executing the deed there was no assessment in existence against the property.

[2] In the second cause of action it is alleged that, at the time defendant executed said deed of conveyance to D. E. Jaques, there had been constructed by said reclamation district a large levee, then owned by and in possession of the district, and which occupied eight acres of the land so conveyed by defendant, of the value of more than $1,600, and the levee thereon was of the value of $10,000, which fact, it is alleged, constituted a breach of the covenants in said deed to D. E. Jaques, to the damage of plaintiffs in the sum of $11,600.

The fourth cause of action, in which plaintiffs allege they have sustained damages in the sum of $5,000, is based upon the fact that said levee referred to in the second count of the complaint consists of a high embankment dividing the farm into two tracts inaccessible from each other except by a circuitous route across the land of other parties, thus rendering the farming operation of the land more expensive than it would be otherwise, and greatly depreciating the market value of the farm.

The demurrer to each of these counts was properly sustained, for the reason that upon the facts alleged both defendant's grantor and his grantee must be deemed to have understood and intended that the covenant against incumbrances meant those defined by section 1114 of the Civil Code. It could not have been considered as having reference to this existing and obvious levee, alleged to have constituted an insurmountable barrier across the farm. In the case of Ferguson v. Edgar, 171 Pac. 1061, the court had under consideration the question as to whether a public highway, and a district canal used to convey water for irrigating the farm, in common with other lands in the district, constituted a burden thereon within the meaning of a covenant against incumbrances. Referring to such covenant, the court said:

"It was not considered as having reference to obvious and physical burdens, permanent in character, such as a state highway (or irrigating canal), the use of which was open and notorious. As to such obvious burden the party proposing to buy, having full knowledge of the servitude and the necessity therefor as a means of egress and ingress to the premises, contracts subject to the physical and visible burden imposed upon the land."

In Brewster on Conveyancing, § 203, it is said:

"In cases where there is a physical burden of this sort, which is visible, there is a fair and reasonable presumption, in the absence of an express agreement, that both parties act with reference to this plain, existing burden, and that the vendor on the one hand demands, and the vendee on the other pays, only the fair value of the land as visibly incumbered."

Hence such burdens are not really incumbrances within the meaning of section 1114, Civil Code, in view of which the parties are deemed to have made and acted upon the covenant.

Since, for the reasons given, no cause of action is shown to have ever existed in favor of D. E. Jaques, there was nothing which could be made the subject of the transfer, alleged to have been made to E. E. Jaques, by the purported assignment of his claims for damages growing out of the facts stated.

The judgment is affirmed.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

(179 Cal. 463)

## HINTON v. WELCH. (Sac. 2718.)

(Supreme Court of California. Dec. 27, 1918. Rehearing Denied Jan. 23, 1919.)

1. APPEAL AND ERROR ⟸1011(1)—QUESTIONS OF FACT—REVIEW.

Where there was a substantial conflict in the evidence, a finding of the trial court thereon will not be disturbed upon appeal.

2. EVIDENCE ⟸155(8)—LETTERS.

Under Code Civ. Proc. § 1854, where plaintiff on cross-examination volunteered to state in part the subject-matter of a correspondence between her and deceased, defendant executor was entitled to present in evidence the whole correspondence to which the testimony thus volunteered related, even though it embraced the decedent's self-serving declarations.

3. EVIDENCE ⟸271(19) — LETTERS — SELF-SERVING DECLARATIONS.

In an action against estate of an alleged partner, where the executor set up repudiation of partnership, laches, and limitations, he was properly permitted to introduce in evidence a letter written by decedent to show that there was a repudiation and that plaintiff was guilty of laches and that limitations had run.

4. EVIDENCE ⟸357—LETTERS.

In an action against estate of an alleged partner, defendant could introduce letters written to deceased by plaintiff to show that plaintiff had not asserted or insisted upon the existence of such partnership and was guilty of laches.

Department 1.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Emma D. Hinton, formerly Emma D. Welch, against Blanche E. Welch, as executrix of the last will and testament of Charles Jay Welch, deceased. From a judgment for defendant and an order denying a motion for new trial, plaintiff appeals. Affirmed.

Muhleman & Crump, of Los Angeles, for appellant.

Haven & Athearn, of San Francisco, for respondent.

RICHARDS, Judge pro tem. This is an appeal prosecuted by the plaintiff from a judgment in the defendant's favor. The action was one instituted by the plaintiff against the estate of her deceased brother, Charles J. Welch, to have it decreed that the former was entitled to one-half of the property of said estate as the surviving partner of said deceased. Upon the trial of the cause the court made its findings to the effect that no agreement of partnership was ever entered into between the plaintiff and the deceased; that no such partnership ever existed; that no partnership business was ever conducted by them; that the property described in the complaint was never the property of any such partnership; and that plaintiff had no interest therein. The court further found that, if any such partnership had ever existed, a full settlement thereof had been had in April, 1910. It further found that the deceased had repudiated any such alleged partnership relation in May, 1910, and that the plaintiff then had notice of such repudiation and, based upon this finding, the court further found that the plaintiff was guilty of laches in the prosecution of her said claim and of the present action, and that her alleged cause of action was barred by the provisions of section 343 of the Code of Civil Procedure. Judgment accordingly went for the defendant, from which judgment, after a motion for a new trial had been denied, this appeal was taken.

[1] The appellant's first and main contention is that the evidence was insufficient to justify the finding of the court to the effect that a partnership had never existed between the appellant and Charles J. Welch, her deceased brother. The evidence in the case is quite voluminous, covering a period of about 30 years, during the latter half of which the partnership, according to the plaintiff's contention, was in existence. No useful purpose would be subserved by a review in detail of this evidence; but this court, after a careful examination of the record embracing the same, is satisfied that a substantial conflict is presented as to whether or not such partnership was formed or existed at any time during said period or at all. The trial court resolved this conflict in favor of the defendant's contention that no such partnership had ever existed, and its finding in that regard will not therefore be disturbed upon appeal.

[2, 3] The further finding of the court to the effect that such partnership, if it ever existed, was repudiated by Charles J. Welch in the month of May, 1910, would be immaterial, in view of its first above finding that such partnership did never in fact exist except as the same may have a bearing upon certain errors of law which the appellant insists were committed by the court during the trial of the cause and which have relation to the court's conclusion that the plaintiff was guilty of laches in the presentation of her said claim and in her prosecution of this action, and that said action is barred by the statute of limitations. These errors of law were alleged to have been committed in the admission in evidence of certain letters of the deceased to the plaintiff and also in the admission of certain letters of the plaintiff herself. As to the first of these, the record discloses the following to be the facts: The plaintiff, while upon the witness stand in her own behalf, but while undergoing cross-examination,

was asked this question, "You received, did you not, Mrs. Hinton, all of the money which you were entitled to from the estate of your father?" The plaintiff answered this question at some length, in the course of which she volunteered the statement that she had written a letter to her brother requesting a statement as to her half interest in the ranch, to which she had received a reply. The defendant produced her said letter and offered it in evidence, and thereupon offered in evidence the decedent's letter in reply. To the admission of this latter letter the plaintiff objected upon the ground that it was inadmissible as a self-serving declaration. We are inclined to the opinion that this objection was not well taken, for while we think it is true that a party may not, under the provisions of section 1854 of the Code of Civil Procedure, offer a letter of an opposing party for the mere purpose of laying the foundation for the admission of an answer to it containing self-serving declarations on the part of the writer of such reply, yet when, as in this case, the plaintiff has volunteered to state in part the subject-matter of a correspondence between the parties, the other party is entitled to have and to present in evidence the whole correspondence to which her testimony thus volunteered relates, upon the same principle, also covered by section 1854 of the Code of Civil Procedure, that when part of a conversation is given in evidence by one party the whole conversation may be given by the other party, even though it may embrace the latter's self-serving declarations. There is, however, another and a conclusive reason why the letter of the plaintiff's deceased brother, to which objection was made, was properly admitted in evidence. Among the issues joined in the case were those as to whether the said decedent had ever repudiated the partnership in question, and whether, if he had so done, the plaintiff was guilty of laches in not prosecuting her claims as to the existence of such partnership within a reasonable time after such repudiation. The letter of the plaintiff's deceased brother, to the admission of which objection was made, was the letter which, the defendant asserted, contained his repudiation of the partnership and his denial that such partnership had ever existed; it was therefore admissible in evidence of those facts for the purpose of setting in motion the time within which the plaintiff, with knowledge of such repudiation and denial, would be bound to take action for the assertion and establishment of her claims or be guilty of laches and liable to the bar of the statute of limitations for failing so to do. This letter, having been thus properly admitted, formed a sufficient basis, taken in connection with the other facts of the case, to justify the court's findings in the defendant's favor upon the subject of laches and of the bar of the statute of limitations.

[4] The other alleged error of law committed by the trial court was that of admitting in evidence a large number of letters of the plaintiff to her deceased brother, written after the date of his alleged repudiation of the partnership for the purpose of showing that the plaintiff had not, during such period and until after her brother's death, asserted or insisted upon the existence of such partnership. We think these letters were properly admissible for this purpose and as having some weight in determining the issue of the plaintiff's laches in not insisting upon her alleged rights as a partner until after the decease of her brother.

There are no other points in the case requiring consideration.

Judgment and order affirmed.

We concur: SLOSS, J.; VICTOR E. SHAW, Judge pro tem.

---

179 Cal. 447

In re SHARON'S ESTATE. (S. F. 8676.)

(Supreme Court of California. Dec. 26, 1918.)

1. ADOPTION ⟸3—STATUTORY PROVISIONS.

The right to adopt a child and the right of a person to be adopted as the child of another are wholly statutory, and one claiming that an act of adoption has been accomplished must show that every essential requirement of the statute has been strictly complied with.

2. ADOPTION ⟸4, 7—JURISDICTIONAL FACTS.

It is jurisdictional that a person adopting a child must be ten years older than the child, that all the parties whose consent is required do consent fully and freely, and that the adoption contemplated will be for the best interest of the child.

3. ADOPTION ⟸7, 13, 14—CONSENT, EXAMINATION, AND ORDER.

In 1892, to validate adoption, the following things were necessary: Consent of wife of an adopting husband, signed in presence of judge (Civ. Code, § 223, and section 226, as amended by St. 1880, p. 4); consent, duly acknowledged, of mother, or due proof of abandonment (section 224, as amended by St. 1891, p. 24): agreement of person adopting, signed in presence of judge of county in which he then resided (section 226, as amended by St. 1880, p. 4); consent of child, signed before the judge (sections 225, 226); examination of persons; a decision that interests of child would be promoted; and an order of the judge (section 227).

4. ADOPTION ⟸17 — EVIDENCE ⟸83(1) — PROOF—PRESUMPTIONS.

An adoption was not proved, under Code Civ. Proc. § 1963, subds. 15, 16, providing that it is presumed that official duty had been regularly performed, and that a judge was acting

in the lawful exercise of his jurisdiction, where the papers in the case were destroyed, and all that witnesses could testify was that from looking over indorsements on the papers they could see that there was a petition, a consent, an agreement, and an order.

5. ADOPTION ⊂=10—WHO MAY ADOPT—JURISDICTION.

No judge of the superior court of any county of California could have jurisdiction of the subject-matter of an adoption by a resident of New York.

6. EVIDENCE ⊂=386(4)—ADOPTION—EXTRINSIC PROOF.

As the only writings necessary to an adoption are the consent of the parties, the agreement of the adopting parent, and the order of the judge, the fact that the adopting parent was not a resident of California and was not ten years older than the child can be shown by extrinsic evidence to invalidate the order.

7. TRIAL ⊂=143 — DIRECTION OF VERDICT — EVIDENCE.

It is not necessary that there should be an absence of conflict in the evidence to warrant the court to direct a verdict, the court being deprived of such right only where there is a substantial conflict.

8. TRIAL ⊂=179—DIRECTED VERDICT—REFUSAL OF JURY TO DIRECT.

Where a part of the jury refused to obey an order to direct a verdict, the court had authority to appoint a juror as foreman and have him sign a verdict; contempt proceedings being unnecessary.

9. TRIAL ⊂=325(1) — DIRECTED VERDICT — POLLING OF JURY.

Where a verdict is directed, the polling of a jury is a mere useless ceremony, and the law does not require it.

10. JUDGMENT ⊂=573—DIRECTING VERDICT—CONCLUSIVENESS.

A verdict directed by the court is a decision upon the merits and is a bar to another action for the same cause.

11. APPEAL AND ERROR ⊂=1170(1) — HARMLESS ERROR — ERRORS NOT AFFECTING RESULT.

On appeal from a decree of distribution by one claiming to have been adopted by decedent, evidence *held* to satisfy the Supreme Court that there was no legal adoption and that there should be no reversal, even if errors were committed under Const. art. 6, § 4½.

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Frederick William Sharon, deceased. From a decree of distribution, Frederick Wallace Sharon appeals. Affirmed.

Dozier & Dozier, Jacobs & Oliver, and James M. Oliver, all of San Francisco, for appellant.

Garret W. McEnerney and William F. Herrin, both of San Francisco, for respondents.

SHAW, J. In a proceeding in the superior court of the city and county of San Francisco for the final distribution of the estate of Frederick William Sharon, deceased, the appellant, Frederick Wallace Sharon, appeared and filed an answer to the petition for distribution, alleging that he was an adopted son, and the only child, of said decedent; that he was not mentioned in the will of said decedent; and that by virtue of his relation as adopted son he was entitled to one-half of the estate and asking that the same be distributed to him. The widow, Louise Tevis Sharon, and the beneficiaries under the will of decedent, took issue upon the allegations of this answer. A jury was demanded by the appellant, and the case proceeded to trial. At the close of the evidence, the respondents moved the court to direct the jury to render a verdict in favor of the respondents, and against the appellant, on the issues raised by his answer. The court sustained this motion and directed the jury to return a verdict accordingly. Thereupon, nine of the jurors refused to agree to such verdict. The court then designated one of the remaining three jurors to act as foreman, and under the directions of the court he signed a verdict in accordance with the order. This verdict was then filed. The appellant's counsel then asked that the jury be polled. This demand was refused by the court. A decree of distribution was thereupon entered, refusing any share of the estate to the appellant and distributing it all in accordance with the provisions of the will of decedent. The appeal is from this decree.

The answer of the appellant alleged that in July, 1892, he was under 12 years of age, that the decedent was then 33 years of age, and was then residing in the city and county of San Francisco, and that said decedent then adopted the appellant as his son by proceedings legally had before Hon. Walter H. Levy, then one of the judges of said superior court; that at said time said decedent was the husband of Louise Tevis Sharon; that the mother of the appellant had abandoned him and was in the Republic of Mexico; that the father of the appellant was dead; that the said decedent appeared before said judge and executed an agreement to the effect that the appellant should be adopted and treated by him in all respects as his own lawful child should be treated; that Louise Tevis Sharon, the wife of said decedent, was at that time absent from the state of California; that her consent, in writing, duly acknowledged, was produced and filed by said decedent; that the said judge then separately examined said decedent and the appellant, and after such ex-

amination made an order wherein he found that the interests of the appellant would be promoted by his adoption by said decedent, and declared that the appellant should thenceforth be regarded and treated in all respects as the child of said decedent.

The appellant was a son of John W. Sharon, who was a cousin of Senator William Sharon, the father of decedent. At the time of the alleged adoption, the decedent, Frederick William Sharon, had one child, a son about seven years of age, and was a resident of the city of New York; but he and his wife were then visiting in California. From June 27, 1892, until August 30, 1892, his wife, his child, with a governess and maid, were living in rooms at the Del Monte Hotel in Monterey county, Cal. The decedent was at the hotel at intervals during that time and at other times was in San Francisco at the Palace Hotel. Senator William Sharon, shortly before his death, which occurred in 1885, conveyed all his estate to trustees, in trust for the period of ten years following his death, one-third for said decedent, who was his son, one-third for his daughter Florence, Lady Hesketh, and one-third to the children of his deceased daughter, Mrs. Newlands. This estate was very large, amounting to several millions of dollars, and during the year 1892 it was managed by Mr. Newlands, then the sole trustee.

In support of the above allegations as to the adoption papers and proceedings, testimony was given by the appellant and two other witnesses, namely, George S. McComb and William J. Heney. McComb testified that he was a deputy clerk of said superior court during the years 1891 and 1892, that he was acting as courtroom clerk for Judge Troutt at that time; that in 1892, while passing along the corridor of the city hall, he was called into the department presided over by Judge Levy, to act as clerk upon an ex parte motion, the regular courtroom clerk of said court not being then present; that he went into the courtroom and sat down; that Judge Levy came out of his chambers with three or four other people, among them a boy 10 or 12 years of age; that an attorney handed to the judge a petition for adoption; that one of the persons was then sworn, gave his name as F. W. Sharon, his testimony was taken, and the judge interrogated the boy; that the judge then said, "Take your order," or, "The petition is granted," or some similar words, directed the witness to make a minute entry of the matter, and then signed an order granting the petition; that the witness then took the papers, made an entry of the proceedings in a book called the "rough minutes," gave the papers to the judge, and saw them no more; and that some one of them requested that the matter be kept from the public. On cross-examination he corrected his testimony as to the judge having signed any order, saying that he did not recollect that occurrence, that he did not see any written order, nor any other paper except the petition for adoption, but that he did not read the petition and knew nothing of its contents, nor who signed it. He also retracted the statement that he made his entry on the rough minutes, saying that his impression was that he had made the entry on a loose sheet of paper and that he had placed the paper in the book of rough minutes, leaving it there for the regular clerk of the department when he should come in. This correction was made after he had been reminded that an entry in the book would have made the matter public. He did not explain how he came to know that the paper handed to the judge by the attorney was a petition for adoption. He did not testify that any one called it by such name, or said that it was a petition for adoption. The witness Heney testified that in the year 1892 he was a deputy county clerk and occupied the position of filing clerk; that he remembered the proceedings in adoption mentioned by McComb; that the papers were presented to him to be filed; that, "as the usual custom was," he looked them over; that there was a petition, a consent, an agreement, and an order of adoption; that as deputy clerk he indorsed each one of these papers as filed and indexed the matter in the general index of civil actions under the name, F. W. Sharon, or Frederick W. Sharon, on each side, as the respective parties. On cross-examination he said that he did not remember what judge signed the order, nor whether it was signed by more persons than one; that he could not describe the document which he said was a consent, nor say whether it was acknowledged or not; that he had no recollection of the contents of the agreement, nor by whom it was signed, nor of anything that was in it; that he did not read it at all; that he did not read the petition, nor know anything of its contents, nor who signed it; and that he did not read the order and knew nothing of its contents. He admitted that his designation of the papers by the names above given was made either from the indorsements thereon or from his knowledge that such papers were necessary to an adoption proceeding, and not from any knowledge or recollection of their contents. The appellant testified that he was born on July 10, 1879; that a few days before the alleged adoption proceedings, while he was living in San Francisco, he was taken from his place of abode by Alexander D. Sharon, a cousin of the decedent, to the Palace Hotel, and to a room occupied by the decedent; that the decedent there asked him if he wanted to be his (the decedent's) boy, and told him that he would see that the appellant was well taken care of; that he

was then kept at the Palace Hotel for something over two weeks, including the time of the alleged adoption; that during that period he was provided with several suits of new clothes and was taken to a dentist and to a nose specialist for medical treatment; that on a certain day, which it is claimed was July 23, 1892, the decedent asked him if he would like to be his boy, and thereupon he, with the decedent and said Alex. D. Sharon, went to a place which he believed to be the city hall in San Francisco; that there they saw a gentleman who he believed was a judge; that the judge asked him if he wanted to be the decedent's boy, to which he answered, "yes"; that some papers were then produced; that the papers were signed before the judge and were left there; and that they then, in connection with those papers, went to another room in the building.

This was all the evidence in proof of the papers and proceedings for the alleged adoption. There was no evidence that Louise Tevis Sharon, the wife of the decedent, was then absent from the state of California, or that she was lawfully or otherwise separated from him, or that she was not capable of giv- her consent. On the contrary, the evidence was undisputed to the effect that she was not separated from her husband, that she was then within the state, and that she was capable of giving consent. There is no evidence that the appellant himself signed a consent to the adoption.

There was evidence tending to prove that prior to the alleged adoption the decedent had formed a purpose to adopt the appellant as his son, and had told the appellant of that intention, and other evidence, apparently intended as corroborative proof, which it is claimed tends to show that the decedent had thereafter in some respect treated the appellant as a child of his own. The appellant was kept in a boarding school for about four years thereafter and supported for some six months longer in Arizona, where he was sent because he was afflicted with tuberculosis. The appellant contends that his expenses during all this period were paid by the decedent. But the evidence is almost conclusive that the expenses were paid out of the funds belonging to the Sharon trust above mentioned, and charged to all the beneficiaries. At all events, it comes far short of proving that the decedent, after the alleged adoption, regarded and treated the appellant as his own child should have been treated. He did not treat him as he treated his own child, then living. He never took the appellant into his family, nor associated with him in any way, and in fact he never thereafter spoke to the appellant or communicated with him in any manner whatever. As corroboration of the fact of a valid adoption, the evidence could not well have been weaker without being absolutely immaterial and irrelevant.

[1, 2] The right to adopt a child, and the right of a person to be adopted as the child of another, are wholly statutory. Such right is unknown to the common law. He who claims that an act of adoption has been accomplished must show that every essential requirement of the statute has been strictly complied with. Ex parte Clark, 87 Cal. 641, 25 Pac. 967; In re Stevens, 83 Cal. 331, 23 Pac. 379, 17 Am. St. Rep. 252. In Estate of Johnson, 98 Cal. 531, 538, 33 Pac. 460, 461 (21 L. R. A. 380) after careful consideration of the question as to what requirements are essential, the conclusion was stated as follows:

"The proceeding is essentially one of contract between the parties whose consent is required. It is a contract of a very solemn nature, and for this reason the law has wisely thrown around its creation certain safeguards, by requiring, not only that it shall be entered into in the presence of a judge, but also that it shall receive his sanction, which is not to be given until he has satisfied himself of these three things: (1) That the person adopting is ten years older than the child. (2) That all the parties whose consent is required do consent, fully and freely, to the making of such contract. (3) That the adoption contemplated by the contract will be for the best interest of the child adopted."

These requirements are there held to be jurisdictional. Unless they coexist, the proceeding for adoption is insufficient, the attempted contract is invalid, the judge is without power to approve it, and there is no lawful adoption. Ex parte Chambers, 80 Cal. 219, 22 Pac. 138; Ex parte Clark, supra; In re Stevens, supra; Matter of Cozza, 163 Cal. 522, 126 Pac. 161, Ann. Cas. 1914A, 214; Estate of McCombs, 174 Cal. 214, 162 Pac. 897.

[3] Under the law in force in 1892, and upon the undisputed facts of this case, the following things were necessary to make the alleged adoption valid: (1) The consent of the wife of the decedent, signed in the presence of the judge. C. C. § 223; section 226, as amended in 1880, Amendts. 1880, p. 4. (2) The consent in writing, duly acknowledged, of the mother of the child, or due proof that she had abandoned said child. C. C. § 224; Stats. 1891, p. 24. (3) The agreement of the decedent, signed in the presence of the judge of the superior court of the county in which the decedent then resided, to the effect that the child should be adopted by him and treated in all respects as his own lawful child should be treated. C. C. § 226, as amended in 1880, supra. (4) The consent of the appellant, in writing, signed by him before the judge, to the adoption, he being then 13 years of age. C. C. §§ 225, 226. (5) The examination by the judge of the persons required to appear be-

fore him as aforesaid, his decision therefrom that the interests of the child would be promoted by the proposed adoption, and the making of an order by said judge declaring that said child should thenceforth be regarded and treated in all respects as the child of Frederick William Sharon. C. C. § 227.

[4] We find in the evidence no proof whatever of such papers and proceedings for the adoption of the appellant by the decedent. If the documents have been destroyed, as it is admitted was the case here, if they ever existed, secondary proof thereof would be admissible. Without such secondary proof, the adoption cannot be said to have been proven. There was no such secondary proof. No copy of any paper was proven or offered. No witness testified to the contents of any of the supposed papers, nor gave evidence as to the substance thereof. The witnesses McComb and Heney each testified that he had not read any of the papers and did not know the contents thereof. Neither of them said that he had heard any paper read, or that any of the persons present had stated the character or contents of any paper. Heney testified that there was a petition, a consent, an agreement, and an order. As he did not read either of them nor know their contents, his knowledge of their character must have been derived wholly from the indorsements thereon or from the title on the inside, although he does not say that he read such indorsements or titles, but leaves that to be inferred from his rather evasive statement that, "As the usual custom was, I looked them over." There was no attempt to show what evidence was produced to the judge, upon which the alleged order was given. The appellant does not contend that there was any proof of the contents of any of these essential documents, except a certain proof which he claims arises by presumption. The presumptions upon which he rests his case are those stated in subdivisions 15 and 16 of section 1963 of the Code of Civil Procedure, "that official duty has been regularly performed" (subdivision 15), and "that a court or judge, acting as such, whether in this state or any other state or country, was acting in the lawful exercise of his jurisdiction" (subdivision 16).

No case has been cited by appellant, and we know of none existing, wherein these presumptions have been given such effect. Appellant cites Matter of Warfield, 22 Cal. 64, 83 Am. Dec. 49; Posten v. Rassette, 5 Cal. 469; Mandeville v. Reynolds, 68 N. Y. 533; Estate of Edwards, 58 Iowa, 431; Croom v. Winston, 18 Tex. Civ. App. 1, 43 S. W. 1072; and Leland v. Cameron, 31 N. Y. 115. None of them goes as far as it would be necessary to go in this case if we should hold that this proof established the existence, contents, and legal sufficiency of the instruments of writing, and the other facts necessary to the validity of the alleged order of adoption. In the Warfield Case, the petition for the probate of a will was missing from the files. It was referred to, however, in the other papers on file and in the records of the case, and the executor testified that he had signed and sworn to a petition for the probate of the will and that he could not tell what else it contained. Upon all the evidence the court held that the existence and contents of the petition were satisfactorily established. In Posten v. Rassette a power of attorney had been burned. Two witnesses, who were accustomed to draw such powers, each testified that he had seen and read the document and stated its substance and effect. It was said that the mere fact that they could not recite its contents word for word did not render their testimony inadmissible or ineffectual, and that the existence and contents of the power were proved by their testimony. In Leland v. Cameron an execution on which a sale of land had been made was lost. Its issuance and contents were the facts to be proven. The attorney who had entered up the judgment was dead, but on his law register, among other entries of the proceedings in the case, was this: "Fi. fa. issued December 19, 1816, to McClure." The sheriff's deed recited the delivery of the execution to the sheriff. The court held that the entry on the attorney's register was admissible as a contemporaneous memorandum of the fact of the issuance of the execution, and that, as the law fixed the contents of an execution and the data for making it up were contained in the judgment, the contents and issuance of the execution were sufficiently proven. In each of the other cases, the substance and effect of a judgment of a court of general jurisdiction, the entry of which had been lost, were proven by means of entries in the judgment book and in the judge's docket, showing briefly the character and effect of the judgment and the rendition thereof. In the Edwards Case and also in Croom v. Winston, evidence of that character was supplemented by testimony of witnesses to the contents of the pleadings.

Here we not only have no writings of any kind, but we have no testimony as to the contents, the substance, or the effect of any of the writings claimed to have existed.

In Ex parte Clark, supra, the court says that "jurisdiction in such cases, although the court be one of general jurisdiction, must appear by the record, as to both subject-matter and person," and that the judge so acting is to be regarded and treated in that respect as a court of limited and special jurisdiction. All the other decisions where the subject was involved assume that this is the rule applying to adoptions. Estate of McKeag, 141 Cal. 406, 74 Pac. 1039, 99 Am. St. Rep. 80; Estate of Camp, 131 Cal. 470, 63

Pac. 736, 82 Am. St. Rep. 371; Estate of Williams, 102 Cal. 70, 36 Pac. 407, 41 Am. St. Rep. 163; Ex parte Johnson, supra. The rule established by many decisions in this state is that, where one relies on an adjudication of a tribunal of limited or special jurisdiction, he "must show affirmatively every fact necessary to confer such jurisdiction." Rowley v. Howard, 23 Cal. 401; Newman v. Barnet, 165 Cal. 425, 132 Pac. 588; Swain v. Chase, 12 Cal. 285; Ex parte Kearny, 55 Cal. 217; Cardwell v. Sabichi, 59 Cal. 493; Kane v. Desmond, 63 Cal. 466; Jolley v. Foltz, 34 Cal. 326; Ex parte Greenall, 153 Cal. 770, 96 Pac. 804; Ferguson v. Basin Con. Mines, 152 Cal. 715, 93 Pac. 867; Eltzroth v. Ryan, 89 Cal. 140, 26 Pac. 647; Keybers v. McComber, 67 Cal. 396, 7 Pac. 838; King v. Randlett, 33 Cal. 322; Lowe v. Alexander, 15 Cal. 301. In many of these cases the record of the inferior court failed to recite some jurisdictional fact. This, of itself, does not make the judgment void, for extrinsic evidence is admissible to prove such fact, except where some statute makes the record the exclusive mode of proof. Jolley v. Foltz, supra. But if the presumptions of subdivisions 15 and 16 of section 1963 have the effect now claimed for them, no extrinsic proof would have been necessary. The fact that the inferior tribunal acted would have raised the presumption that the jurisdictional fact existed. Its action would have proved its jurisdiction; yet, in all of the cases it is held that the jurisdictional facts must be proven, either by the record, or by other evidence. In no case has it been held that the fact that a judgment or order was made and that it appeared on the record, or the presumption that official duty has been regularly performed, was sufficient proof of the jurisdiction of an inferior court or tribunal.

The conclusion necessarily follows that these provisions of section 1963 are not to be construed to dispense with the necessity of proof of the facts essential to the jurisdiction of an inferior court or tribunal, and that they apply only to the acts of such inferior court after jurisdiction of subject-matter and person has attached. When jurisdiction has been acquired to do the thing, all proceedings in the exercise thereof are presumed to have been lawfully done, unless the contrary is shown. The authorities uniformly limit the application of the presumption in this manner:

"While the law will presume in favor of the regularity of an official's act, it will not by such presumption supply the necessary jurisdictional facts." 1 Jones on Ev. § 45a.

"When the necessary facts of jurisdiction are established, the same assumption is made in favor of the judicial proceedings of judges of inferior courts," says Mr. Chamberlayne, speaking of the presumption that courts act in the lawful exercise of their jurisdiction. 2 Chamberlayne on Ev. § 1206; Best on Ev. (10th Ed.) § 361; King v. All Saints, 7 B. & C. 790, 108 Eng. Rep. 918; Kuker v. Biendorff, 63 Neb. 91, 88 N. W. 190; Wight v. Warner, 1 Doug. (Mich.) 387; Fell v. Philadelphia, 81 Pa. 75; Fowler v. Jenkins, 28 Pa. 178; Ex parte Lange (D. C.) 197 Fed. 771.

[5] The presumption being thus ineffectual as proof, nothing remains of the appellant's case. The extrinsic evidence bearing directly on the facts essential to jurisdiction, and to the effect that they did not exist, was clear and convincing. Frederick William Sharon was shown to have been a resident of New York. Consequently no judge of the superior court of any county of California could have had jurisdiction of the subject-matter of an adoption by him. Ex parte Clark, 87 Cal. 640, 25 Pac. 967; Estate of Williams, 102 Cal. 77, 36 Pac. 407, 41 Am. St. Rep. 163. The appellant admitted that he was over 12 years of age at the time, and he did not testify that he signed a consent to the adoption and produced no evidence to that effect. The wife of the decedent was capable of consenting, was not separated from her husband, was then in California, and she did not sign a consent thereto. It follows that even if the judge did make an order, as claimed, it was wholly void.

[6] In Ex parte Williams, supra, it was held that the only writings necessary to an adoption are the consent of the parties whose consent is necessary, the agreement of the adopting parent or parents, and the order of the judge, and that the existence of the other matters required may be shown by extrinsic evidence. If this be so, then of necessity the nonexistence of such other matters could be shown in proof of the invalidity of the order. Hence proof of the facts of the residence and age of the parties concerned was proper.

From the foregoing it is clear that the appellant utterly failed to prove the allegation that he was an adopted child of the decedent. The result is that he was not entitled to distribution of any part of the estate. Some minor objections remain to be disposed of.

[7] It is a settled rule of law regarding trials by jury that in a proper case the court has full power to direct the jury to render a verdict. This power exists in favor of the defendant where there is no substantial evidence tending to prove all the controverted facts necessary to establish the plaintiff's case. It is not necessary that there should be an absence of conflict in the evidence. To deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one. There are numerous decisions to this effect. We cite the following: Estate of Baldwin, 162 Cal. 473, 123 Pac. 267; Sill v. Ceschi, 167 Cal. 704, 706, 140 Pac. 949; Estate of Caspar, 172 Cal. 150, 155 Pac. 631; Jacobson v. Northwestern, etc., Co., 175

Cal. 473, 166 Pac. 3; Perera v. Panama P. I. E. Co., S. F. No. 7815, 175 Pac. 454, decided October 1, 1918. Many other cases supporting the rule are cited in the Baldwin Case. This rule would sustain the action of the court below even if it were conceded that there was some conflict in the evidence relating to the jurisdictional facts essential to a valid adoption. The conflict, if any, was beyond question not substantial, but was a mere shadow of form without substance. The objection that the court had not the power is consequently without merit.

[8] It is contended that the court erred in the manner of obtaining the verdict after its direction therefor had been given. The claim on this point is that, where a part or all of the jury refuse to obey the order, the only method by which the court can enforce it is by proceeding against the refractory jurors for contempt. It is obvious that this might easily prove ineffectual or impracticable, for in such event the refractory jurors would be able to compel a new trial and thus defeat the exercise by the court of a power which it clearly possesses. The objection is untenable, both on principle and by authority. It is based on a misconception of the theory upon which the power rests. The jury can decide facts alone. They are bound by the directions of the court as to the law and must follow those directions. A verdict is directed by the court because the evidence is such that the court can say, as a matter of law, that no other verdict is reasonably possible. The direction to render a verdict in favor of one party is the decision by the court upon a question of law. Such decisions are within the exclusive province of the court. In giving a verdict upon such an order, the jurors do not exercise discretion, but act ministerially as the instrument by which the court prepares the record which will support the only judgment that can lawfully be given. They are no more at liberty to refuse obedience than is the clerk when he is directed to do the ministerial act of entering an order or judgment of the court. The verdict so signed by one of the jurors who is appointed as foreman by the court and who signs in obedience to the order, though in form the act of the jury, is really and in law the act of the court. It is needless to elaborate further on these propositions. They are fully sustained by the authorities. Curran v. Stein, 110 Ky. 103, 60 S. W. 839; Cahill v. Chicago, etc., Co., 74 Fed. 290, 20 C. C. A. 184; Cloquet Lumber Co. v. Burns, 207 Fed. 50, 124 C. C. A. 600; Pardee v. Orvis, 103 Pa. 451; Moore v. Petty, 135 Fed. 675, 68 C. C. A. 306; Bryan v. Louisville, etc., Co., 244 Fed. 650, 157 C. C. A. 98.

[9] In such a case the polling of the jury is a mere useless ceremony and the law does not require it. Donoghue v. Indiana, etc., Ry. Co., 87 Mich. 13, 49 N. W. 512; Kinser v. Calumet, etc., Co., 165 Ill. 505; Jameson v. Officer, 15 Tex. Civ. App. 212, 39 S. W. 190; McClaren v. Indianapolis Co., 83 Ind. 319; Winn v. Neville, 79 Kan. 29, 98 Pac. 272.

[10] After the verdict was filed and before the decree of distribution was signed or filed, the appellant filed a new answer or opposition to the distribution prayed for. It was substantially the same as the previous answer. He insists that this filing of a new answer arrested the proceedings and entitled him to another trial of his case on the merits. His theory is that the decision upon the directed verdict was not a decision upon the merits, that it does not entitle the respondents to a distribution, but merely authorizes a dismissal of the appellant upon his first answer, and, in short, that it is the equivalent of a nonsuit and does not bar a subsequent proceeding by him for the same relief. We cannot agree to this proposition. The law is well settled to the contrary. A verdict directed by the court is a decision upon the merits of the case. The one important difference in this respect between a judgment of nonsuit and a judgment on a directed verdict is that the latter is a bar to another action for the same cause, while the former is not. Central, etc., Co. v. Pullman, etc., Co., 139 U. S. 39, 11 Sup. Ct. 478, 35 L. Ed. 55; Morgan v. Chicago, etc., Ry. Co., 83 Wis. 353, 53 N. W. 741; Huntt v. McNamee, 141 Fed. 295, 72 C. C. A. 441; McCown v. Muldrow, 91 S. C. 540, 74 S. E. 386, Ann. Cas. 1914A, 139; Wicks v. Sanborn, 72 Or. 324, 143 Pac. 1007; Reams v. Sinclair, 97 Neb. 542, 150 N. W. 826. The appellant relies on the case of McKay v. Montana U. R. Co., 13 Mont. 15, 31 Pac. 999, as authority in his favor on this point. The court was there considering the manner in which the evidence should be brought up on appeal from the judgment on a directed verdict in order to present the question whether or not such direction was authorized by the evidence. The question whether or not such judgment was on the merits and was a bar to another action was not involved. In the course of the discussion the court says that such judgment is "in effect a nonsuit." So it might be, so far as the question of presenting the evidence on appeal is concerned; but such a remark in such a case cannot be deemed a decision on the question here presented. Even if it were so regarded, it is contrary to all other authority on the point and is not sustainable on principle, and we should refuse to follow it. The result is that the verdict ended the case. The appellant was no more entitled to refile his answer and continue the litigation after the entry of such a verdict than he would have been after a verdict had been rendered voluntarily and without direction of the court.

[11] Finally, it may be said as to this, as well as to all other objections to the rulings

of the court, that, under the Constitution as it now exists, the Supreme Court has a limited jurisdiction to consider evidence and determine the merits of the case. It may do so for the purpose of determining from an examination of the evidence whether or not an error as to any matter of procedure, pleading, or the admission of evidence, or in directing the jury, has resulted in a miscarriage of justice. Unless it shall find that such miscarriage has been caused thereby, the error must be disregarded and the judgment cannot be set aside on account thereof. Const. art. 6, § 4½. The evidence in this cause is of such a character that it satisfies this court that the appellant should not prevail and that no miscarriage of justice could have resulted from any ruling or proceeding of the court, of the kind above mentioned, tending to his defeat.

The decree of distribution is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; WILBUR, J.; LORIGAN, J.; RICHARDS, Judge pro tem.

179 Cal. 429

## McGILL v. COWAN. (Sac. 2725.)

(Supreme Court of California. Dec. 23, 1918.)

PUBLIC LANDS ⊂144(2) — UNSEGREGATED SWAMP LANDS—APPLICATION FOR PURCHASE —STATUTORY REQUIREMENTS.

An application to purchase unsegregated swamp and overflowed lands from the state, which complies with the requirements of Pol. Code, § 3493, need not also comply with section 3443, which applies to purchase of all swamp and overflowed land in the state.

Department 1.

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Action by William B. McGill against William V. Cowan. From a judgment for defendant, plaintiff appeals. Affirmed.

L. F. Coburn, of Yreka, for appellant.

A. R. Tabor, J. Fontaine Johnson, and William V. Cowan, all of Sacramento, and Lutrell & Ley, of Yreka, for respondent.

RICHARDS, Judge pro tem. This is an appeal from a judgment in the defendant's favor, after an order sustaining his demurrer to the plaintiff's complaint without leave to amend. The action was brought under the provisions of section 3415 of the Political Code to determine which of the parties thereto was entitled to purchase from the state of California certain unsegregated swamp and overflowed lands in the county of Siskiyou. The defendant's application to purchase said lands was filed in the state surveyor general's office on May 26, 1917; the plaintiff's application to purchase the same lands was filed in the same office July 24, 1917. Both applications are set forth in full in the complaint. The only question presented upon this appeal is that of the sufficiency of the respondent's application.

The appellant concedes that the respondent's application complies with the requirements of section 3493 of the Political Code, but insists that it should have also complied as to its contents with section 3443 of the Political Code, which, according to the appellant's contention, is a general section applicable to the purchase of all swamp and overflowed lands of the state. We cannot give our assent to this contention. The sections of the Political Code having special reference to the purchase from the state of portions of its unsegregated swamp and overflowed lands are sections 3493m to 3493t of article 2a of title 8 of said Code. This article was added to said Code in the year 1907, but was taken bodily from the act of the Legislature of 1893 dealing with the same subject, which earlier act was passed in order to provide for the purchase from the state of lands uncovered by the rescission or drainage of waters of inland lakes and of unsegregated swamp and overflowed lands for the sale of which classes of lands by the state no previous provision had been made. The original act was apparently complete in itself in its provisions as to the application and affidavit for the purchase of such lands and the contents thereof, as to the duties of the surveyor general in respect to the survey of such lands, the approval of such application, the purchase price to be paid, the reclamation of the lands through the formation of reclamation districts, etc. No reference was made therein to any other acts or to any of the sections of the Political Code then in existence dealing generally with the purchase of swamp and overflowed lands; nor is any such reference made in the article of the Code in which said earlier act has been codified. On the other hand, section 3443 of the Political Code became a part of that Code in the year 1872, being derived from the statutes of 1867–68 having reference to the purchase from the state of segregated swamp and overflowed lands. In the cases of Buchanan v. Nagle, 88 Cal. 591, 26 Pac. 512, and Dewar v. Ruiz, 89 Cal. 385, 26 Pac. 832, it was held that no application could be made under this section of the Political Code for the purchase of swamp and overflowed lands prior to their segregation. It was the decision of these two cases in the year 1891 which apparently led to the passage of the act of 1893, providing for the purchase of unsegregated swamp and overflowed lands, from which act, as we have seen, the provisions

of sections 3493m to 3493t, inclusive, were codified.

Since, according to the foregoing cases, section 3443 of the Political Code had no application to the purchase of unsegregated swamp and overflowed lands, it would seem clear that, if it had been the intention of the Legislature in the passage of the act of 1893 to have extended the provisions of section 3443 of said Code, so as to have the same apply to the latter class of lands, it would have expressly so provided in said later act. It did not so provide, but, on the contrary, proceeded to specifically state in said act the requirements of the application and affidavit to be made for the purchase of said lands. We are of the opinion that the provisions of said act and of the sections of the Political Code in which the same are codified are complete and exclusive, and that no other matters are required to be set forth in the application and affidavit of an applicant to purchase unsegregated swamp and overflowed lands than those which are contained in section 3493m of the Political Code.

It follows that the application and affidavit of the respondent herein were sufficient in form and substance to give to him the prior right to purchase from the state the unsegregated swamp and overflowed lands described therein. The defendant's demurrer was, therefore, properly sustained without leave to amend.

Judgment affirmed.

We concur: VICTOR E. SHAW, Judge pro tem.; SLOSS, J.

---

38 Cal. App. 608

HIRONS et al. v. CLARE et al. (Civ. 2705.)

(District Court of Appeal, Second District, California. Nov. 11, 1918.)

1. PLEADING ⊂=294 — GENERAL DENIAL — VERIFIED COMPLAINT—ISSUES.

The allegations of verified complaint were admitted by failure to deny them in answer, a general denial being insufficient to put them in issue.

2. MUNICIPAL CORPORATIONS ⊂=34—CONSOLIDATION—SPECIAL ELECTION.

A petition, signed by more than one-fourth of qualified electors of city, requesting special election for vote upon consolidation with adjacent city, under St. 1913, p. 577, as amended by St. 1915, p. 311, and by St. 1917, p. 26, was sufficient on being filed with board of trustees to require board to call election, without referring petition to city clerk for checking.

3. APPEAL AND ERROR ⊂=939—PRESUMPTIONS —CONTENTS OF CLERK'S TRANSCRIPT.

Where appeal under alternative method comes before court on clerk's transcript alone, papers contained in transcript not identified will not be presumed to be copies of papers which have been received in evidence during trial.

4. CONSTITUTIONAL LAW ⊂=46(3)—CONSTITUTIONALITY OF STATUTE—NECESSITY OF DETERMINATION.

In action for writ of mandamus requiring board of trustees to call special election for vote on consolidation of city with adjacent city, under St. 1913, p. 577, as amended by St. 1915, p. 311, and by St. 1917, p. 26, defendants' objection that such statute is contrary to Const. art. 11, § 18, in that it provides for assumption of indebtedness of adjacent city upon a majority vote, will not be considered; such question not arising unless the assumption of such indebtedness should receive affirmative vote of more than a majority and less than two-thirds of electors.

5. MANDAMUS ⊂=178 — VALIDITY OF JUDGMENT—IMPOSSIBILITY OF COMPLIANCE.

A judgment, providing for issuance of peremptory writ commanding trustees of city to call special election not later than 50 days from service of writ, was not void because of impossibility of taking necessary steps at regular meetings of the board, where such steps, under Municipal Corporation Act, § 763, could be taken at special or adjourned regular meetings.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Mandamus by Charles C. Hirons and another against Montrose W. Clare and others, as members of the Board of Trustees of the City of East San Diego, State of California, and the Board of Trustees of the City of San Diego, a municipal corporation of the State of California. Judgment ordering that a peremptory writ issue, and defendants appeal. Affirmed.

F. G. Blood, of San Diego, for appellants.

Allan Brant, John H. Moore, and Will M. Tompkins, all of San Diego, and Charles E. Sumner, of Los Angeles, for respondents.

MYERS, Judge pro tem. This is an appeal from a judgment of the superior court, after hearing upon the return of an alternative writ of mandate and defendants' answer thereto, adjudging and ordering that a peremptory writ issue commanding and directing said defendants, as trustees of the city East of San Diego, a municipal corporation of the sixth class, to call and hold a special election for the consolidation of said city with the city of San Diego, adjacent and contiguous thereto, pursuant to the provisions of the municipal consolidation act of 1913, and the amendments thereto of 1915 and 1917.

[1] The court below filed findings of fact wherein it found, generally and specifically, that all the material allegations of the complaint are true. It appears, moreover, from an inspection of the record, that all of these allegations were admitted by the failure to deny them in the answer. The complaint be-

ing verified, a general denial was insufficient to put them in issue.

From the facts thus established, it appears that a petition was duly filed with said board of trustees of said city of East San Diego, signed by more than one-fourth in number of the qualified electors of said city, asking and requesting that a special election be called to vote upon the question of such consolidation, and that said defendants refused and ever since have refused to call or hold said election.

[2] Appellants' first contention is that they were not required to call said election because it does not appear that the city clerk, to whom the petition was referred by them for checking, ever reported back to them that it was sufficient. Appellants cite Davenport v. City of Los Angeles, 146 Cal. 511, 80 Pac. 684. That case is not in point here. It arose under a provision of the charter of Los Angeles, which expressly made such certificate of the city clerk a condition precedent to the action of the city council. The statute under which petitioners are proceeding here does not provide for or require any such certificate. It provides as follows:

"Whenever a petition, signed by not less than one-fourth in number of the qualified electors of any municipal corporation, * * * is filed with the legislative body thereof, asking that such municipal corporation and any other municipal corporation contiguous thereto, designated in such petition, * * * be consolidated, such legislative body must, without delay, call a special election," etc.

This case is therefore ruled by the case of People v. Town of Ontario, 148 Cal. 625, 635, 84 Pac. 205, 209, wherein the court says:

"It is the petition signed by the requisite number that gives the power and creates the duty."

Appellants urge that the municipal consolidation act here in question (Stats. 1913, p. 577), as amended in 1915 (St. 1915, p. 311) and in 1917 (St. 1917, p. 26), is in violation of section 18, art. 11, of the Constitution, which provides:

"No county, city, * * * shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose."

The original act, as enacted in 1913, provided for the submission to the voters, at an election held under it, of the question whether or not the city in which they were voting should, in the event of such consolidation, assume and become liable for its pro rata of specified bonded indebtedness which had been theretofore created by the other city with which such consolidation was proposed. It further provided that, in the event of an affirmative two-thirds vote thereon, the property in such city should, after the consolidation, be taxed equally with the property in the other city for the payment of such bonded indebtedness. By the amendments of 1915 and 1917 this provision for a two-thirds affirmative vote was changed to a majority vote; and appellants' contention is that the statute as so amended is in violation of the constitutional prohibition above referred to, and is therefore void.

[3, 4] The first answer which suggests itself is that, so far as disclosed by the record in this case, no question of the incurring or assumption of indebtedness is involved. Appellants in their brief quote what they assert to be a copy of the petition for the election involved in this case, but the record before us does not bear out this assertion. This is an appeal under the alternative method and comes before us on the clerk's transcript alone, which contains duly certified copies of the judgment roll, the peremptory writ of mandamus, Exhibit A (whatever that may be), notice of appeal, and notice to prepare transcript. Bound in with this are certain other papers which we might guess are copies of papers which may have been received in evidence during the trial. But there is nothing in the record which in any way identifies them, and we are therefore wholly unwarranted in making such an assumption. If we should assume, however, that the question of the assumption of such bonded indebtedness was involved in the election here sought to be called, it is apparent that the question of the constitutionality of the statute in this connection would not be raised, unless at that election the proposition should receive an amrmative vote of more than a majority and less than two-thirds of the electors, and we are not called upon here to speculate on the question whether or not in such event it would be held that the amendments of 1915 and 1917 were unconstitutional, thus leaving the statute as originally enacted in 1913 in full force and effect.

In view of what we have just said, we do not deem it necessary to consider appellants' contention that, if the act be unconstitutional, then it follows that the petition was signed by the voters under a misapprehension as to its effect and cannot be made the basis of any action in the premises.

[5] It is further contended that the judgment here is void because of the impossibility of compliance therewith by the defendant trustees. The judgment provided for the issuance of a peremptory writ, commanding defendants to fix the date for the holding of said election not later than 50 days from the service thereof. Appellants call attention to the fact that the regular meetings of the board of trustees of the city of East San Diego are fixed by ordinance to be held on the first and third Tuesdays of each month. They present a schedule of the steps required

to be taken in the calling and holding of such election, from which they conclude that the earliest possible date on which it could have been held would be 68 days after the service on them of the peremptory writ. This is based upon the assumption that no steps would be taken by them except at regular meetings, and wholly ignores the fact that most, if not all, of such steps could have been taken at special or adjourned regular meetings, as provided in section 763 of the Municipal Corporation Act (St. 1883, p. 252).

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; JAMES, J.

---

38 Cal. App. 670

## WAGNER v. MEINZER. (Civ. 2521.)

(District Court of Appeal, First District, Division 1, California. Nov. 15, 1918. Rehearing Denied Dec. 14, 1918; Denied by Supreme Court Jan. 13, 1919.)

ADVERSE POSSESSION ⟸66(2)—HOSTILE POSSESSION—POSSESSION UNDER MISTAKE AS TO BOUNDARY.

If one of two coterminous owners takes possession and claims title to the extent of his possession, he holds adversely, although he was induced to locate his possession through a mistake as to the boundary.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Anna M. Wagner against Gottlieb Meinzer. From a judgment for plaintiff, defendant appeals. Reversed.

Carl W. Mueller, of San Francisco, for appellant.

Russell W. Cantrell, of San Francisco, for respondent.

LENNON, P. J. This is an action in ejectment. The complaint is in the usual form alleging ownership and right to possession of the land described in the complaint to be in plaintiff and the withholding without right by the defendant.

The land sought to be recovered consists of a portion of a lot about 8 feet in width by 100 feet in depth, located in the Barman tract in the city and county of San Francisco. The defendant is the owner of the lot immediately adjoining the land of plaintiff on the north, his dwelling house abutting on the northerly line of plaintiff's land. Before this dwelling house was erected, defendant's predecessor in interest caused defendant's lot to be surveyed by the then city and county surveyor, and the house was erected within the lines delineated and marked by said surveyor, where it has continuously stood for the past 20 years. This litigation is the result of the mistaken boundary line established by said surveyor between these coterminous landowners.

Among other defenses, defendant pleaded the statute of limitations, claiming an acquiescence in the line so established and an actual possession of the land thereunder beyond a period sufficient to establish a title by adverse possession. Plaintiff concedes this fact, but contends that possession under such circumstances is not hostile or under a claim of title, and that the statute of limitations, therefore, avails him nothing.

We do not so understand the law. If one of two coterminous owners takes possession and claims title to the extent of his possession, he holds adversely, although he was induced to locate his possession through a mistake as to the boundary. Woodward v. Faris, 109 Cal. 12, 41 Pac. 781. As is said in the recent case of Silva v. Azevedo, 173 Pac. 929, where there is a continued acquiescence in a line so fixed, and an occupation in accordance with it for a period beyond that fixed by the statute of limitations, and the erection by the defendant of valuable and permanent improvements upon the disputed piece, it would be a manifest injustice to permit defendant to be ousted merely because plaintiff has by a new survey discovered an error in the original establishment of the line.

Considering the conclusion we have reached, a discussion of the other points presented becomes unnecessary.

The judgment and order are reversed.

We concur: STURTEVANT, Judge pro tem.; BEASLY, Judge pro tem.

---

38 Cal. App. 643

## JOHNS v. POND. (Civ. 2556.)

(District Court of Appeal, First District, Division 1, California. Nov. 13, 1918. Rehearing Denied by Supreme Court Jan. 11, 1919.)

1. PHYSICIANS AND SURGEONS ⟸18(8)—ACTIONS FOR MALPRACTICE—EVIDENCE.

In an action by a married woman against a physician for damages from negligence in performing operation, evidence *held* sufficient to sustain the verdict against defendant.

2. APPEAL AND ERROR ⟸1061(3)—HARMLESS ERROR—MOTION FOR NONSUIT.

In an action against a physician for malpractice, an order denying his motion for nonsuit, sought on the ground that plaintiff did not introduce any expert testimony, to sustain her case, will not be disturbed on appeal, where such testimony was produced later in the trial, instead of during the presentation of plaintiff's case in chief.

3. TRIAL ⊂⊃260(8) — INSTRUCTIONS — REQUESTS.

In an action against a physician for malpractice, the refusal of his requested instruction that, if there was more than one method of treatment recognized, a physician may adopt either, etc., *held* proper, in view of other instructions that, if the physician applied reasonable skill and judgment, he is not liable for damages.

4. APPEAL AND ERROR ⊂⊃930(2) — PRESUMPTION—INSTRUCTION—WITHDRAWAL OF EVIDENCE.

It must be presumed that the jury regarded an instruction withdrawing evidence, and error cannot be predicated on the admission of such evidence.

Appeal from Superior Court, Alameda County; W. M. Conley, Judge.

Action by Rose G. Johns against Chauncey P. Pond. Judgment for plaintiff, and defendant appeals. Affirmed.

William P. Hubbard, of San Francisco, and D. C. Dutton, of Oakland, for appellant.

Ostrander, Clark & Carey, of Oakland, for respondent.

PER CURIAM. This is an appeal from a judgment, taken within 60 days after the entry thereof, in an action wherein the plaintiff sought damages against the defendant, a physician, for negligently, and without occasion therefor, performing upon her a surgical operation.

The plaintiff alleges in her complaint that the defendant informed her that she had a fallopian tumor, and operated upon her for its removal, when in fact the symptoms diagnosed as indicating the presence of a tumor were caused by pregnancy; and that five months later she gave birth to a baby boy weighing 9½ pounds. As a result of the operation plaintiff alleges that her health has been permanently injured, and that she has suffered, and will continue to suffer, more or less pain in body and mind. Upon these facts she bases her demand for damages, placing the amount at $25,000.

The plaintiff was a witness in her own behalf, and we may paraphrase her testimony as follows:

"I shall have been married 4 years in January, 1916, and have since my marriage lived with my husband. The defendant attended me during pregnancy and at the time of the birth of my first child in the month of January, 1914. Until just prior to the 23d day of December, 1914, I enjoyed good health. On that day I telephoned to the defendant to call on me, and when he came I told him that I had been having severe pains in my back and head and also in the pelvic region. I also informed the defendant that I had been examined by Dr. Somers, of San Francisco, who said at the time of the examination that he thought I was pregnant five or six weeks. I further told him that I was having a scanty menstruation for almost a day each month. The defendant at that time in my home made what he called a bimanual examination, and concluded that perhaps my uterus had not contracted after my first child was born, but in any event he assured me that I was not pregnant, saying, 'You are no more pregnant than I am.' At that time he gave me a prescription which I was to use four or five days, and if it gave me no relief I was to let him know. A week or ten days later I called up the defendant, and told him that the douche he had prescribed had given me no relief, and that my suffering had in fact increased. He told me to call at his office the following day, which I did, and there, after making a more careful examination, he asked me my age. I told him I was 22 years old, whereupon he said, 'Mrs. Johns, you are a very young woman, but I want to tell you that you have a fallopian tumor that is growing over the mouth of the uterus,' and that I would have to be operated upon at once; that as soon as the tumor should be removed I would be an entirely different woman. I consented to the operation. It was performed. A few days thereafter the defendant said I was in false labor pains. I had bearing down pains in the pelvic region. These pains grew worse, and the defendant was sent for. When he called the nurse in attendance, she told him that she thought I was going to miscarry. He made no reply, but ordered some pills, and left word for them to be given to me as directed. He also ordered hypodermics, which were given to me often during the night, but I suffered intense pain, and got no sleep until about 4 o'clock in the morning. In the morning about 9 o'clock the defendant informed me that I was trying to miscarry, that I was pregnant, and about to feel life. I asked him why he had not performed an abortion, and told him that he had left me in such a condition that my child would be an idiot or deformed. He replied that he could not perform an abortion for it was against the law, and that he thought the operation would have no effect on the child. From that time I worried constantly about the effect the operation would have on the child. Two weeks after the operation defendant took me home from the hospital and carried me up the front stairs to my room. All this time I suffered intense pain, and the defendant told me he expected I would miscarry within nine or ten days. That was the last time he called. He rendered me no further assistance. The baby was born June 18, 1915. About one month after the operation I observed physical changes in my legs; varicose veins came out on them. This condition existed until the child was born, during which time on this account I could hardly walk and suffered pain and was required to wear elastic stockings. Shortly after the birth of the child I suffered from a hernia, and was operated upon for it. I suffered no accident, and do not know what occasioned the rupture other than the bearing down exertions which occurred while I was at the hospital. A physician other than the defendant took care of me at the birth of my child. The baby died within three months after its birth. At one time after the incision I heard the defendant make a statement, with reference to the operation, in which he said he had made a mistake."

As to this last statement by the plaintiff, and in some other respects, she was corroborated by other witnesses.

The defendant testified that in addition to the symptoms related by the plaintiff in her testimony she told him that she had been having hemorrhages between menstrual periods and suffered some dizziness; that she did not suspect pregnancy; that her condition was nothing like it had been with the first child; that considering the history of the case as related by her, she was suffering from a fibroid tumor; that her condition was serious and required the performance of an operation; that the operation consisted of an incision about 2½ inches long in plaintiff's abdomen; that upon making the incision he discovered that the plaintiff was pregnant, and that there was no condition of tumor, whereupon he concluded that the plaintiff had given him an incorrect history of the case; sewed up, dressed and bandaged the incision; that such an incision is called an exploratory incision, and would have been larger had he not found pregnancy.

According to the testimony of several medical witnesses produced by plaintiff, based upon the history of the case as claimed by plaintiff to have been furnished to the defendant, the defendant should have kept the plaintiff under observation for at least six weeks before operating; that if he had done this he would have discovered the error in his diagnosis, for he would have felt the movements of the living fœtus, and he would have heard the fœtal heartbeat.

According to the testimony of nine experts called for the defendant, he was justified in making an immediate operation for tumor only in the event of the presence of hemorrhages between regular menstrual periods; otherwise he should have kept the patient under observation and awaited developments.

[1] From this résumé of the evidence it is quite clear, we think, that if the jury believed, as it appears they did, the testimony of the plaintiff as to what she told the defendant relating to the history of her case, then the operation was unnecessary, and their verdict cannot be disturbed.

[2] Plaintiff closed her case without introducing any expert evidence, whereupon the defendant made a motion for nonsuit, arguing that the mere statement by defendant to the plaintiff and her mother that he had made a mistake in diagnosing plaintiff's case as one of tumor rather than pregnancy was not sufficient to establish negligence, in the absence of testimony that such incorrect diagnosis was arrived at by reason of negligence. Assuming this to be true, still as evidence was introduced later in the case which tended to supply this defect, and as it does not appear that the defendant was prejudiced in the presentation of his defense by the circumstance that the testimony was produced later in the trial instead of during the presentation of plaintiff's case in chief, the judgment will not, upon that ground, be reversed; for, as was said in Peters v. Southern Pacific Co., 160 Cal. 48, 52, 116 Pac. 400, 402, "it is well settled that an order denying a motion for a nonsuit will not be disturbed, although the evidence at the close of plaintiff's case was so weak that it might properly have been granted, if, upon the trial, the defect is overcome by evidence subsequently introduced." See, also, Lowe v. S. F. Ry., 154 Cal. 573, 98 Pac. 678; Vica Valley R. Co. v. Mansfield, 84 Cal. 560, 24 Pac. 145.

Neither do we think that there is any merit in defendant's point that he was prejudiced by the manner in which the court disposed of the motion.

[3] The court committed no error in refusing defendant's requested instruction that, if there is more than one method of treatment recognized by the medical profession, a physician may adopt either, for the reason that the instruction was substantially given by the court in its charge to the jury when it said that if the defendant "applied reasonable skill and judgment with ordinary care, he is not liable for any damages or injuries consequent upon an honest mistake or error in judgment in making a diagnosis, in prescribing treatment, or in determining upon an operation, and if what he did appears from the evidence to be in accordance with recognized authority and good current practice, you must find a verdict for the defendant."

The defendant also complains of the action of the court in refusing certain other proposed instructions. As to those, we think their subject-matter was embraced by what the court stated to the jury on the subjects of proximate cause and preponderance of the evidence.

Other objections to instructions given or proposed have even less merit than those already referred to, and no discussion of them is deemed necessary. The instructions as a whole fully and fairly covered every phase of the case.

[4] Without serious objection from the defendant plaintiff was permitted to testify that the child when born was physically normal, for the purpose of showing, as claimed by plaintiff, that the condition of the uterus was normal when examined by the defendant. Later, however, she testified that while the child upon its birth cried for about five minutes, thereafter for about five days it could not nurse, and any milk gotten into its stomach by other means caused nausea; that the child "would vomit like a person coming out of an anæsthetic." She also testified that this condition of her baby caused her mental anguish. This testimony was objected to on the ground that this was not an action by the parents for the loss of their

child by reason of the acts of the defendant. The court was doubtful of the right of plaintiff to introduce this evidence, and admitted it tentatively, subject to a motion to strike out. Later on, no motion having been made to this end, the court of its own motion instructed the jury as follows:

"You are instructed that you are not to take into consideration any evidence whatsoever as to any mental suffering or worry that the plaintiff may have experienced by reason of any fear that her unborn child might be marked or affected by reason of any act on the part of the defendant. * * * You are instructed that if you should find for the plaintiff in this case you cannot take into consideration any alleged injury to the said child in determining the amount of your verdict."

We are bound to assume that the jury followed this instruction.

For the reasons given, the judgment is affirmed.

---

38 Cal. App. 672

MacCOY v. GAGE. (Civ. 1837.)

(District Court of Appeal, Second District, California. Nov. 15, 1918.)

1. PHYSICIANS AND SURGEONS ⟸24(4)—ACTIONS FOR SERVICES—COMPENSATION.

In a physician's action for services rendered in reducing a fracture, the question of the value of the services *held*, under the evidence, for the jury.

2. EVIDENCE ⟸558(6)—CROSS-EXAMINATION OF EXPERT.

On cross-examination of an expert witness, who had testified hypothetically, objection is properly sustained to a question which assumed facts which did not appear in the evidence, or did not correctly narrate the conditions shown by the hypothetical question, which was the basis of the witness' first answer.

3. APPEAL AND ERROR ⟸1058(1)—REVIEW—HARMLESS ERROR.

In an action by a physician for services the exclusion of question as to whether it was customary to use X-rays was harmless, where it appeared that the diagnosis was correct and such testimony was also later gone into.

4. EVIDENCE ⟸554—EXPERT TESTIMONY.

Where a medical expert testified hypothetically as to the value of medical services, it was within the court's discretion to refuse to allow a discussion, possibly lengthy, as to a course of treatment not included within the facts as shown, upon which he based his testimony.

5. EVIDENCE ⟸538—EXPERT OPINION.

The opinion of a trained nurse is not competent to show that treatment administered by a physician is improper.

6. TRIAL ⟸234(7)—INSTRUCTIONS—BURDEN OF PROOF.

In an action by a surgeon for services rendered in reducing a fracture, where defendant counterclaimed for damages occasioned by negligence, *held* that an instruction as to defendant's duty to establish his counterclaim, etc., was not calculated to mislead the jury into believing defendant had the burden of establishing matters the burden of which was on plaintiff.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by William E. MacCoy against H. R. Gage, who cross-complained. From a judgment for plaintiff, defendant appeals. Affirmed.

Anderson & Anderson, of Los Angeles, for appellant.

H. T. Morrow, of Los Angeles, for respondent.

JAMES, J. The plaintiff, a licensed physician and surgeon, brought this suit to recover the sum of $1,000 alleged to be the reasonable value of professional services rendered by him to the defendant. Defendant filed a cross-complaint, seeking to recover damages which he alleged he had sustained by reason of unskillful treatment which he had received at the hands of the plaintiff. The jury sitting in the case found for the plaintiff in the full amount prayed for in his complaint and against the defendant on his cross-complaint. Defendant has appealed from the judgment, relying upon various errors of law which he asserts were committed by the trial court in the course of the proceedings.

[1] From the evidence, as set out in the bill of exceptions, it appears that the plaintiff, in May, 1910, was called upon to attend the defendant, whom he found suffering from a fracture of the upper portion of the upper leg bone, or, as it was phrased by the professional witnesses, a "fracture of the neck of the femur." At his first visit the plaintiff adjusted the broken part and applied a weight to the limb. A trained nurse was called to attend the case and the plaintiff continued his ministrations during several months, and until the defendant was able to move about on crutches. It was shown that the patient later became able to walk, even without the aid of a cane, at least for short distances. The plaintiff made about 85 visits to the defendant. During the time he attended him, he was called upon to prescribe for other conditions than the broken bone, to wit, pneumonia and rheumatism. From all of the medical testimony, even that produced by the defendant, it appears that so far as the fracture was concerned, the results obtained by the plaintiff were better than the average. Under the evidence as presented, it is very clear, of course, that the matter of the value to be placed upon the services rendered by the plaintiff to the defendant was one exclusively for the jury.

[2] Counsel for appellant first complains of the ruling of the trial judge sustaining objections to certain questions asked by him upon cross-examination of plaintiff's witnesses. Two witnesses for the plaintiff, Drs. Barton and Thorpe, were asked to state their opinion as to the value of the services rendered by the plaintiff. What these services had been were detailed in the questions. On cross-examination of the witness Barton, counsel for appellant, assuming other matters not shown in evidence, inquired as to whether the witness would alter his opinion as to the value of the services. Objection was properly sustained to this question, for the facts assumed did not appear in evidence. Roche v. Baldwin, 143 Cal. 192, 76 Pac. 956.

[3, 4] The same witness was asked, on cross-examination, to which question objection was sustained, as to whether it was not customary, in cases of the character involved, to take an X-ray picture. If we were to concede that the trial judge should have allowed the question to be answered, we cannot see how any prejudice has resulted to the defendant by the sustaining of the objection. Concededly the taking of an X-ray picture was only valuable for purposes of diagnosis, and it seems very clear that the diagnosis made by the plaintiff without the aid of the X-ray was the correct one. More than this, the matter of the advisability and value of X-ray pictures was fully gone into in the testimony introduced later in the case. So we think, also, that the refusal of the court to permit counsel for appellant to require the same witness to give in detail what he considered proper treatment to a patient under the circumstances shown was without error prejudicial to the defendant. The facts upon which the witness had given his opinion as to the value of the services were all embodied in the hypothetical question, and it was upon those facts that the witness answered and was then turned over to the defense for cross-examination. The court did not debar the defendant from cross-examining upon all matters contained in the hypothetical question, and it was within the court's discretion to refuse to allow the witness to enter upon a discussion, possibly lengthy, as to a course of treatment, not included within the facts as shown, and upon which he based his opinion as to the value of the services rendered. The question asked of the witness Dr. Thorpe by counsel for defendant, to which objection was sustained, did not correctly narrate the conditions shown by the hypothetical question which was the basis of the witness' first answer, or conditions shown by the testimony. The objection to that question was therefore properly sustained. Roche v. Baldwin, supra.

[5] There was no error in sustaining objections to questions asked of witness Thatcher, who was a trained nurse and the nurse who had attended the defendant under the direction of the plaintiff. The questions all went to the point as to what the witness had observed other physicians do in like cases, or what she considered good or customary treatment. We do not think that the opinion of the trained nurse was competent evidence to show that the treatment administered by the plaintiff was improper.

[6] Complaint is made of an instruction given by the court which advised the jury that the law required the defendant and cross-complainant to "prove by a preponderance of the evidence, the same as any other matter or matters in the case, * * *" the things relied upon to show lack of skill or care on the part of the plaintiff. The argument is that by the phrase, "the same as any other matter or matters in the case," the intimation of the court to the jury was that all matters of defense should be so established, and that it was not incumbent upon the plaintiff to prove facts relied upon by him by a preponderance of the evidence. While the instruction is somewhat loose in its phraseology, and perhaps not as carefully guarded as it should have been, we do not think that it by any means follows reasonably that the jury was misled by it. There was nothing in any of the other instructions given by the court carrying out the idea that the burden rested wholly upon the defendant to defend against the plaintiff's issues, or that upon a mere balance of the weight of evidence the plaintiff would be entitled to recover. We do observe that the court failed to give any express or precise instruction advising the jury that the burden of proving his case by a preponderance of the evidence rested with the plaintiff. But we find that no such instruction was offered and refused.

A very careful perusal of the record submitted compels the conclusion that in this case there was no miscarriage of justice.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; MYERS, Judge pro tem.

38 Cal. App. 685

## REDHEAD v. PAYNE. (Civ. 2559.)

(District Court of Appeal, First District, Division 1, California. Nov. 18, 1918.)

1. DEEDS ⟸3—TITLE TO LAND—MEMORANDUM.

Where plaintiff held title to land as trustee for himself and defendant, because it was purchased with other land owned by the parties as tenants in common, a memorandum signed by defendant, to the effect that his interest in the land was merely an interest in remainder after liens had been paid, does not affect the title.

2. LIENS ⟸22—FORECLOSURE.

Where plaintiff and defendant, who were tenants in common, traded their land for other land, and defendant signed a memorandum that plaintiff should have a lien upon the land for the amount of his expenditures, *held* that, where defendant refused to contribute his part, plaintiff was entitled to the aid of a court of equity in enforcing the lien.

3. APPEAL AND ERROR ⟸1073(1)—REVIEW—HARMLESS ERROR.

Where it was defendant's contention that plaintiff, who held the legal title to land, in which defendant was interested, could sell the land without the aid of a court, a decree of sale was harmless as to defendant.

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by J. F. Redhead against Jefferson Payne. From a judgment for plaintiff, defendant appeals. Affirmed.

C. K. Bonestell and N. Lindsay, both of Fresno, for appellant.

F. E. Cook, of Fresno, and Jesse F. Water, of Los Angeles, for respondent.

LENNON, P. J. This is an appeal by defendant from a judgment directing the sale of land described in the complaint. The defendant demurred to the complaint. The demurrer was overruled. Defendant declined to answer, and the judgment went by default. Defendant contends that no cause of action is stated in the complaint. The complaint sets forth: That between November, 1912, and January, 1915, plaintiff and defendant were the owners, as tenants in common, of certain lands in Riverside county. That this property was operated at a loss. That the defendant was financially unable to pay his share of operating said property, and plaintiff was obliged to advance and did advance over $5,200 more than defendant in its management and for its protection. That on January 14, 1915, defendant being unable to meet his share of the costs and expenses of the future operation of said Riverside property, the same was traded for certain land in Fresno county, which is the land involved in this action. In order to complete such trade, plaintiff was compelled to pay $5,000 bonus and $269 as costs and expenses. That before making such trade it was verbally agreed that the title to the Fresno county land should be taken in plaintiff's name, and that defendant's entire interest should be one-half of what might be derived from a sale thereof, in excess of the mortgage of $6,000 thereon, after deducting the balance due plaintiff of $10,470.84. That defendant refused to pay any part of the taxes or of the interest due upon the mortgage on the Fresno land and that the plaintiff was forced to pay the same. That plaintiff does not know whether he is the owner of said Fresno county land or whether he holds the title thereto as trustee for defendant and himself, subject to the lien of said mortgage and a second lien for the amount due him as aforesaid, and he therefore submits the question to the court. Plaintiff offers to do anything equitable in the premises and prays for a decree adjudging and determining the rights and interests of plaintiff and defendant in the said land, and that the same be sold under an order of the court and that the amount to which plaintiff may be entitled may be declared a lien on said land, subject only to the lien of the mortgage aforesaid, and that the proceeds of such sale be applied first to the costs and expenses of such sale and second to pay the amount found due to plaintiff and the balance divided between plaintiff and defendant.

[1] The defendant contends that as he had signed a certain memorandum, set out in the record, agreeing that his sole interest in the land was in any remainder after the land was sold and the proceeds applied to the payment of the mortgage and the payment of the indebtedness due to plaintiff, that therefore plaintiff had the absolute title to the land, subject merely to an obligation to pay to defendant one-half of the remainder after paying the aforesaid incumbrances, and that, having the absolute title to the land, he could sell it as he desired and did not require the aid of the court; that there was no right for the court to enforce and no wrong to redress. We think this objection to the judgment is entirely without merit. Title to land is a definite and positive matter and can be passed only in the manner prescribed by law. If the title to this land was in the plaintiff as trustee for himself and the defendant by reason of its having been purchased with other land held by the parties as tenants in common, the memorandum signed by defendant, to the effect that his interest in the land was merely an interest in the remainder after the liens upon the same had been paid, in no way affects the title to the land. Certainly both plaintiff and defendant held their title subject to all valid liens, and a mere declaration of that fact does not affect the legal situation.

[2] The plaintiff and defendant having agreed in writing that the plaintiff should have a lien upon the land for the amount of his expenditures in its purchase and operation, plaintiff was entitled to have the same foreclosed, which is, in effect, what he has asked in the present suit. He has merely set out all the facts and asked the court to determine his rights and then enforce them. This was certainly a desirable, if not a necessary, procedure from the standpoint of keeping the record title clear of all doubt. Certainly, since the defendant would not aid in meeting the expenses of the land, the plaintiff is not bound to bear such expense indefinitely, and he may seek the aid of a court of equity to have his lien foreclosed and the property sold.

[3] Moreover, the defendant asserts that plaintiff might have sold the property without the aid of a court, so defendant is certainly not injured by the judgment.

The judgment is affirmed.

We concur: STURTEVANT, Judge pro tem.; BEASLY, Judge pro tem.

(38 Cal. App. 649)

## OWEN v. CROCKER-HUFFMAN LAND & WATER CO. (Civ. 1609.)

(District Court of Appeal, Third District, California. Nov. 14, 1918.)

NEW TRIAL ⟸165—ORDER—EX PARTE ORDER —"INADVERTENCE OR OVERSIGHT."

The trial court, having entered an order granting a new trial unless plaintiff should consent to a reduction of the verdict, was without jurisdiction to thereafter, on its own motion, modify the first order by changing the amount of the reduction, on the ground that the mistake was one arising through inadvertence in incorrectly recalling testimony, for such an error is not an inadvertence or oversight as usually construed, and the court having entered the order disposing of the motion for new trial, the matter was functus officio and without its jurisdiction (citing Words and Phrases, First Series, Inadvertence, 3489).

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by W. A. Owen against the Crocker-Huffman Land & Water Company, a corporation. From a judgment for plaintiff, and from an order setting aside an order granting a new trial conditionally, defendant appeals. Judgment and order reversed, and cause remanded.

Peck, Bunker & Cole, of Oakland, for appellant.

Tuttle, Landrum & Shaffer, of Merced, for respondent.

CHIPMAN, P. J. The action was commenced to recover damages for land overflowed by an alleged negligently constructed and maintained canal. The cause was tried by the court with a jury, and, on July 1, 1916, the jury rendered a verdict for plaintiff in the sum of $4,611. Judgment on the verdict was rendered on the same day and was recorded July 3, 1916. On July 7th defendant duly served and filed its motion for a new trial. The motion came on to be heard, was argued and submitted, and the court made the following order:

"Motion for new trial having been heretofore argued and submitted, it is ordered that the said motion [be] and the same is hereby granted, unless plaintiff consents to a reduction of the verdict, as follows, to wit: All in excess of $2,151.25 and costs must be remitted by plaintiff to defendant or a new trial is granted."

On September 19, 1916, the court made the following order:

"It is ordered that the order heretofore entered, to wit, on September 18th, relative to motion for new trial in the above-entitled action, be and the same is hereby changed and modified to correct a mistake arising through inadvertence, incorrectly recalling the testimony of plaintiff and other witnesses, and that the following be and is the order of said court: That unless the plaintiff files his written acceptance in this court of a reduction of the judgment heretofore entered in said cause in the sum of $4,611, and $574.05, costs of suit, to the sum of $2,788 and $574.05, costs of suit, the motion for a new trial be granted, and in the event of the filing of said written acceptance, it is ordered that said motion for a new trial be denied."

The second order was made ex parte without notice to defendant, apparently on the court's own motion. The first order was not consented to nor was it accepted by plaintiff, but, on September 19, 1916, plaintiff filed notice of his consent "in accordance with the order entered on motion for a new trial in said cause, on the 19th day of September, 1916." It appeared that defendant had no intimation that the court contemplated making the second order until September 27, 1916, when "defendant was preparing the records for the appeal herein, on the last day allowed by law for giving notice to have the record prepared and certified, under the provisions of law."

Defendant served and filed its notice of motion to set aside the said order of September 19, 1916. Said motion came on to be heard October 16, 1916, on the records in the case and on the affidavit of defendant's attorney, in which the facts above set forth were stated, and, on the same day, to wit, October 16, 1916, the court denied the motion. Defendant appealed from the judgment; also from the order made and entered October 16, 1916; also from the order made and en-

tered September 19, 1916; also from the order made and entered September 18, 1916.

In Carpenter v. Superior Court, 75 Cal. 596, 19 Pac. 174, the court said:

"After judgment upon the verdict had been entered and a motion for a new trial had been regularly made and denied, the court below was not authorized to set aside its action for mere error (citing cases). The foundation of this rule is that the modes in which a decision may be reviewed are prescribed by statute, and the courts are not at liberty to substitute other modes in their place."

In Holtum v. Greif, 144 Cal. 521, 78 Pac. 11, two orders were made, and the court said:

"The question, then, is as to the power of the trial court to vacate an order granting or denying a new trial after it has once been regularly made and entered. The decisions of this court are numerous and uniform to the effect that a judgment or order once regularly entered can be reviewed and set aside only in the modes prescribed by statute. If they have been entered prematurely, or by inadvertence, they may be set aside on a proper showing, * * * and if the order as entered is not the order as made, the minutes may be corrected so as to make them speak the truth, * * * but subject to these exceptions the order is reviewable only on appeal, and, the decision of the trial court having been once made after regular submission of the motion, its power is exhausted—it is functus officio."

The foregoing was quoted with approval in United Railroads v. Superior Court, 170 Cal. 755, 760, 151 Pac. 129, 132 (Ann. Cas. 1916E, 199), where the court also said:

"Nothing is more firmly settled in this state than the doctrine that the superior court may not revoke, modify, or otherwise disturb its judgments and orders regularly made in pursuance of plain statutory provision, where the statute prescribes the method by which such judgments and orders may be reviewed except as authorized by statute" (citing cases).

The contention of appellant is that the first order was duly entered after hearing and argument; that there was no clerical mistake or misprision and no inadvertence in making the order; that the order was not consented to or accepted by plaintiff, and by its terms a new trial was therefore granted. The only exception to the rule as laid down in the cases is where the judgment or order "has been entered prematurely or by inadvertence," as stated in Holtum v. Grief, supra. The second order recited that the first order is modified "to correct a mistake arising through inadvertence incorrectly recalling the testimony of plaintiff and other witnesses." Misapprehension as to the nature and extent of the testimony or of the effect of the testimony is not inadvertence. To warrant a practice by which the trial court, after an order has been regularly and deliberately entered, could after reflection for a day, re-examine or recall the testimony and reach a different conclusion and set aside his order, thus regularly and deliberately made, would introduce a most dangerous rule. The reason for making the order can mean nothing less than that upon a re-examination of the testimony the court has reached a different conclusion. The court added to the amount of recovery the substantial sum of $637.75, and this without notice to defendant. If, as has been held, orders or judgments may be set aside when entered prematurely or by inadvertence, it should be, it seems to us, on a proper showing. "The term 'inadvertence,' in Code sections 4501, 4502, allowing the Supreme Court after the term to vacate or correct mistakes in judgments given through inadvertence or oversight, does not apply to any judgment which was given upon the deliberate consideration and judgment of the court, though the court may have since adopted a different ruling as correct. It will be seen that the case provided is where judgment is given through inadvertence or oversight, and not where an opinion is formed from inadvertence and oversight." Russell v. Colyar, 51 Tenn. (4 Heisk.) 154, 176; 4 Words and Phrases Judicially Defined, p. 3489.

Wiggin v. Superior Court, 68 Cal. 398, 9 Pac. 646, cited by respondent, is not applicable, for that was a collateral attack upon the decree. Baker v. Fireman's Fund Ins. Co., 73 Cal. 182, 14 Pac. 686, is relied on by respondent. In that case it appeared that:

"The motion (for a change of the place of trial) was at first granted, but on the following day the order granting the change as asked for was set aside upon the ground that it 'was inadvertently made,' and an order made denying such motion."

The report of the case does not show what proceedings took place in the trial court or under what circumstances the order was made. All that appears is that an appeal was taken from the order and the point made in the Supreme Court that the second order was void. Wiggin v. Superior Court, supra, is cited in the opinion as having decided the question adversely to appellants' contention. But in that case the attack was collateral. Hall v. Polack, 42 Cal. 218, is also cited in the opinion, but that was a case where the decree was prematurely made. We infer from the opinion that the court treated the reason for making the second order, to wit, inadvertence, either as having been shown or as falling under the rule that all intendments will be indulged in support of the order or judgment of a court of general jurisdiction.

We think defendant's right to a new trial, contingent upon plaintiff's failure to consent to or accept the order first made, was as sacred as plaintiff's right to a denial of a new trial upon his performance of the condition. In the present case, the order was that the motion for a new trial be granted "unless plaintiff files his written acceptance in

this court of a reduction of the judgment," etc. Plaintiff did not file any acceptance under this order. The order, therefore, became operative granting defendant a new trial.

The judgment and the order appealed from are reversed, and the cause remanded for a new trial. It is further ordered that the cause be heard on the testimony and evidence, or such parts thereof as the parties may desire to introduce, submitted at the former trial, and upon such further evidence as the parties, or either of them, may deem proper to offer.

We concur: HART, J., BURNETT, J.

---

38 Cal. App. 569

Ex parte SELOWSKY. (Cr. 456.)

(District Court of Appeal, Third District, California. Nov. 7, 1918.)

1. NUISANCE ⊂⊃86 — RED LIGHT ABATEMENT ACT.

Red Light Abatement Act, § 6, prescribing penalty, as for contempt of court, for violation of injunction or order provided for in the act, relates to any injunction or order issued or made under such act, including the preliminary as well as the permanent injunction.

2. NUISANCE ⊂⊃84 — RED LIGHT ABATEMENT ACT—DECREE.

The Red Light Abatement Act, § 7, is not mandatory, and a decree of injunction need not contain a direction that the personal property should be sold or that the building or place where the nuisance was maintained should be closed to all use and for any purpose for the period of one year.

3. CONTEMPT ⊂⊃54(4), 63(4) — JUDGMENT — RECITAL OF FACTS.

A judgment adjudging one guilty of contempt need not contain a recital of facts, where the contempt was committed out of the immediate view and presence of the court or judge at chambers, but in such case it is necessary that the affidavits contain a recital of facts sufficient to show that a contempt has been committed, under Code Civ. Proc. § 1211.

4. NUISANCE ⊂⊃84 — RED LIGHT ABATEMENT ACT—VIOLATION OF INJUNCTIVE ORDER—SUFFICIENCY OF AFFIDAVITS—CONTEMPT OF COURT.

In a contempt proceeding under the Red Light Abatement Act, affidavits *held* to sufficiently charge facts constituting a violation of an injunctive order under such act.

5. NUISANCE ⊂⊃84—RED LIGHT ABATEMENT ACT—CONTEMPT—SUFFICIENCY OF AFFIDAVIT.

If affidavits disclose circumstances from which the conclusion must inevitably follow that acts constituting a nuisance enjoined by a decree in a proceeding under the Red Light Abatement Act, are carried on in defiance of the mandates of such decree, they are sufficient to invest the court with jurisdiction of a contempt proceeding.

6. NUISANCE ⊂⊃60—RED LIGHT ABATEMENT ACT — CONTEMPT — CONSTITUTIONALITY OF STATUTE.

Red Light Abatement Act, § 6, prescribing penalty for violation of the terms of any order or injunction made under such act, is not unconstitutional, as the Legislature has power to prescribe any reasonable penalty for contempt.

7. NUISANCE ⊂⊃60—VIOLATION OF INJUNCTION ORDER IN ABATEMENT ACTION.

Red Light Abatement Act, § 6, prescribing penalty for violation of an injunction order under such act, is not in conflict with Code Civ. Proc. §§ 1209, 1218, relating to contempt.

8. CONTEMPT ⊂⊃2—"CONTEMPT OF COURT"—NATURE OF OFFENSE.

The phrase "contempt of court," like the word "crime," is generic and expresses within its legal signification a variety of different acts which involve different elements, which, like the different acts constituting different crimes, differentiate the several acts, and the Legislature may fix the punishment according to the gravity of the offense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contempt.]

9. HABEAS CORPUS ⊂⊃92(3)—SCOPE OF INQUIRY.

In a habeas corpus proceeding brought to obtain release from imprisonment for constructive contempt, the inquiry is limited to the consideration of the question whether the court was, by affidavit filed, invested with jurisdiction to hear and determine the contempt proceedings.

Petition by Mary M. Selowsky for a writ of habeas corpus to secure her release from imprisonment. Alternative writ discharged, and prisoner remanded.

Frank J. Murphy, of San Francisco, for petitioner.

Nathan F. Coombs and Frank L. Coombs, both of Napa, for respondent.

Uren, Beard & Linn, of Napa, amici curiæ.

HART, J. The petitioner has applied for a writ of habeas corpus to secure her release from imprisonment following a judgment of conviction of contempt of court, rendered by the superior court of Napa county, for the violation of the terms of a certain decree previously rendered by and entered in said court.

It appears from the petition that on the 20th day of March, 1917, the district attorney of Napa county filed a petition in the superior court of said county alleging that the petitioner here was using certain premises owned by her and known as the "Stone Bridge Saloon," being situated in Napa county, "for the purpose of lewdness, assignation, and prostitution," and praying for a judgment of the court that said premises be de-

clared a nuisance and that the same be perpetually enjoined; that, subsequently (on the 28th day of June, 1917), a trial was had upon the said petition and the answer thereto of the defendant (petitioner here); and that, on the 19th day of November, 1917, the court, upon findings that said premises were owned, in the possession of, maintained, and conducted by the petitioner as a place of lewdness, assignation, and prostitution, entered its decree in said action, adjudging and declaring the said premises to be a nuisance and enjoining the further maintenance thereof by the defendant or any other person.

The petition here further shows that, on the 21st day of June, 1918, the district attorney of Napa county presented to the superior court of said county a verified petition, together with certain supporting affidavits, charging and alleging the petitioner here (Mary M. Selowsky) with violating the judgment and the injunction above mentioned, and praying for an order and citation directed to her, requiring her to appear before said court and show cause why she should not be punished for contempt of court therefor; that, upon the filing of said petition, an order was made requiring the said Selowsky to appear and show cause before said court on the 1st day of July, 1918, at the hour of 2 o'clock p. m.; that said order, together with a copy of the petition upon which it was made, having been served upon Selowsky, and she having made an answer to the same, a hearing on said petition was had on the day last above named, and on the 8th day of July, 1918, and thereupon the petitioner here was adjudged guilty of contempt of court in violating the judgment and injunction first above referred to and to pay a fine in the sum of $1,000 and in addition thereto to be imprisoned in the county jail of the county of Napa for a period of six months.

Annexed to and made a part of the petition for the writ here applied for are the judgment adjudging the premises mentioned a nuisance and enjoining the further maintenance of the same and the judgment adjudging the petitioner, Selowsky, guilty of contempt of court in that she violated the injunction and punishing her therefor.

The general proposition submitted for decision here is, of course, that the court below was without jurisdiction to adjudge the petitioner guilty of contempt and to punish her therefor. In support of this general proposition, a number of points are made and presented, and are submitted for decision on the petition for the writ and a demurrer interposed thereto by the respondent upon the general ground that said petition does not state sufficient facts to justify the granting of the writ.

It is contended by the petitioner that, for reasons to be hereinafter considered, the proceeding instituted against her in the superior court for the abatement of the nuisance complained of therein was not inaugurated under the so-called "Red Light Abatement" statute, but was brought under the general law of the state authorizing the abatement of nuisances. It is hence argued that, if the petitioner was guilty of contempt of court in that she violated the terms of the injunction issued in said proceeding, she must have been tried and should have been punished for contempt under the sections of the Code of Civil Procedure providing generally for the trial and punishment for contempt of court. See Code Civ. Proc. §§ 1209–1218, inclusive. It is further contended that the affidavits upon which the proceeding in contempt was founded do not state facts sufficient to constitute a violation of the injunction order of the judgment in the original action and hence insufficient to have clothed the court with jurisdiction to try and punish the petitioner for contempt; that the facts recited in the judgment in the contempt proceeding do not show that the petitioner violated the terms of the original judgment. It is also claimed that section 6 of the abatement act, establishing the measure of punishment for any violation of the decrees entered under the provisions of said act, is unconstitutional, or, at least, in conflict with the law prescribing generally the power of courts in the matter of punishing for contempt, and is therefore void.

It would, perhaps, be the more orderly course first to set forth the salient provisions of the abatement act.

Section 2 provides that—

> Any "building or place used for the purpose of lewdness assignation or prostitution," or wherein or upon which such acts "are held or occur, is a nuisance which shall be enjoined, abated and prevented as hereinafter provided, whether the same be a public or a private nuisance."

The third section provides that whenever there is reason to believe that such a nuisance is kept, maintained, or exists, in any county, etc., the district attorney of said county must, or any citizen of the state, residing within said county, in his own name may, maintain an action in equity to abate and prevent the nuisance and to perpetually enjoin the person or persons so conducting or maintaining the same, and the owner or lessee or agent of the building, or place, in or upon which such nuisance exists, from directly or indirectly maintaining or permitting such nuisance.

Section 4 provides that, when the existence of such nuisance is shown by a verified complaint, or an affidavit, the court or judge may issue a temporary injunction for its abatement.

The sixth section provides the penalty, as for a contempt of court, for the violation or disobedience of any injunction or order expressly provided for in the act, which is not less than $200 nor more than $1,000, or im-

prisonment in the county jail for not less than one month nor more than six months, or by both such fine and imprisonment.

Section 7 is as follows:

"If the existence of the nuisance be established in an action as provided herein, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building or place of all fixtures, musical instruments and movable property used in conducting, maintaining, aiding or abetting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of one year, unless sooner released, as hereinafter provided. While such order remains in effect as to closing, such building or place shall be and remain in the custody of the court. For removing and selling the movable property, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution, and for closing the premises and keeping them closed, a reasonable sum shall be allowed by the court."

Section 9 reads:

"If the owner of the building or place has not been guilty of any contempt of court in the proceedings, and appears and pays all costs, fees and allowances which are a lien on the building or place and files a bond in the full value of the property, to be ascertained by the court, with sureties to be approved by the court or judge, conditioned that he will immediately abate any such nuisance that may exist at such building or place and prevent the same from being established or kept thereat within a period of one year thereafter, the court, or judge thereof, may, if satisfied of his good faith, order the premises, closed under the order of abatement, to be delivered to said owner, and said order of abatement canceled so far as the same may relate to said property. The release of the property under the provisions of this section shall not release it from any judgment, lien, penalty or liability to which it may be subject by law." Stats. 1913, pp. 20, 21.

[1] The contention that the original action for the abatement of the nuisance complained of against the petitioner cannot be held to have been brought under the "Red Light Abatement Act" is based upon the proposition, pressed by petitioner with apparent earnestness, that the act does not clothe a court of equity with power to grant a perpetual injunction. The argument is that the power perpetually to enjoin nuisances of any kind or character existed in courts of equity long before the passage of said act; that the provision therein giving the courts power to issue perpetual injunctions adds nothing to the power already exercised by courts of equity; and that therefore the provision prescribing a penalty for a violation of any injunction or order issued or made in a case arising under said act has reference solely to the violation of the terms of the preliminary restraining order which the law authorizes the court to make upon the filing of a petition for the abatement of the alleged nuisance.

There is no merit in the contention or the argument. The law plainly provides, in the third section thereof, that an action may be brought for the purpose of "perpetually" enjoining the nuisance denounced by the act. The fourth section, properly construed, means that the court may, upon the filing of a verified complaint or affidavit showing the existence of the nuisance, issue a temporary injunction for the purpose of stopping a continuance of the nuisance pending the final adjudication, and section 7 provides for a perpetual injunction upon the establishment of the existence of the nuisance after a trial of the action. The provision of section 6, prescribing the penalty, relates to "any" injunction or order issued or made in the action, and, of course, includes the preliminary as well as the permanent injunction.

[2] But it was further pointed out, in oral argument, in support of the proposition that the action was not instituted under the abatement act, that the judgment entered in said action does not contain the order provided for by section 7 of said act, directing the removal from the building wherein the nuisance is alleged to have been maintained and the sale of "all fixtures, musical instruments and movable property used in conducting * * * the nuisance," nor directing the "effectual closing of the building * * * against its use for any purpose, and so keeping it closed for a * * * year."

One answer to that proposition is to be found in the fact that the complaint and the judgment in the original action closely follow the language of the abatement act, except in so far as that the judgment fails to direct a sale of the personal property, if any, used in the maintenance of the nuisance, and does not order that the building in which said nuisance was alleged and found to have been maintained shall not be used for any purpose for the period of one year. But, as to that provision of the statute, it is to be remarked that, while the language thereof appears to be mandatory, we do not believe that it was intended by the Legislature that in all cases, regardless of the particular circumstances thereof, the judgment, to be valid, so far as its injunctive feature is concerned, should contain a direction that the personal property should be sold or that the building or place where the nuisance was maintained should be closed to all use or for any purpose for the period of one year. Cases under the act may arise which are not so flagrant in the law's violation as in others. As, for instance, a building may be used by a tenant for the immoral purposes denounced by the statute without the knowledge of the owner thereof and in defiance of his wishes or sentiments regarding such a business. In

such a case, it would, indeed, be manifestly unjust to deprive the owner of the building of its use for the period of a year for a lawful and decent purpose. On the other hand, the owner of the building himself might let it for use for the immoral purposes referred to or he might have knowledge that it was being so used, and, for the sake of the compensation received for its use for such purposes, close his eyes to the nuisance and thus tacitly indorse, if not in effect connive at, the maintenance of the same. Thus it is to be observed that the circumstances of all cases arising under the statute may not be similar—some cases calling for decrees as drastic in their effect as the statute will permit and others for a more temperate treatment. It is therefore very clear that, if the provisions of the statute as to what the judgment may contain must be held to be mandatory and applied alike in all cases, gross injustice would, in many conceivable cases, necessarily follow the enforcement of the statute. The court would be without discretion to model its decree so that it could be justly appropriate to the peculiar circumstances of certain cases. In other words, the court would be without the power to differentiate between cases arising under the act according to the peculiar circumstances thereof.

The above reasoning is equally pertinent to the proposition that the judgment must direct a sale of the personal property used in connection with the maintenance of the nuisance. Such property might be owned by a person wholly innocent of and, indeed, opposed to the immoral purpose for which it was used, and certainly it would not be a just law that would sanction the confiscation of such a person's personal property.

A judgment similar to the one here was entered in the case of People ex rel. Bradford v. Dillman et al., 174 Pac. 951, and, while the question now under discussion was not raised in that case, the judgment therein was, nevertheless, affirmed; the assumption of both the attorneys and the court being, evidently, that the judgment, in substance as well as in form, was one which might appropriately be rendered and entered under the statute.

[3] As to the point that the judgment in the contempt proceeding does not itself show contempt, it may be observed that it is only where the alleged contempt is committed in the immediate view and presence of the court that the judgment in such a proceeding must contain a recital of facts sufficient to show that a contempt has been committed. In the case of a constructive contempt—that is, where the alleged contempt is committed out of the immediate view and presence of the court or judge at chambers—the proceeding must be inaugurated by the filing of an affidavit or of affidavits, reciting the facts constituting the contempt. Code Civ. Proc. § 1211.

In Overend v. Superior Court, 131 Cal. 284, 63 Pac. 372, 374, the court said:

"In the case of a contempt committed in the presence of the court, the section (1211, C. C. P.) says that the order adjudicating the contempt must contain a recital of the facts. This provision can only mean that the order must contain a recital of those facts * * * *which, in a case of constructive contempt, the law says must be incorporated in an affidavit.*" (Italics ours.)

But, of course, in the case of a constructive contempt the affidavit or affidavits must contain a recital of facts sufficient to show that a contempt has been committed. Or, as this proposition is stated in Hutton v. Superior Court, 147 Cal. 159, 81 Pac. 409, 410:

"The affidavit or affidavits upon which the contempt proceeding is based constitute the complaint, and unless they, upon their face, charge facts constituting a contempt, the court is without jurisdiction to proceed."

See, also, Batchelder v. Moore, 42 Cal. 415; Overend v. Superior Court, 131 Cal. 284, 63 Pac. 372; Rogers v. Superior Court, 145 Cal. 91, 78 Pac. 344; Frowley v. Superior Court, 158 Cal. 220, 226, 110 Pac. 817; Mitchell v. Superior Court, 163 Cal. 423, 125 Pac. 1061.

The present question, then, is whether the affidavits upon which the contempt proceeding against the petitioner was based show facts sufficient to constitute a contempt.

Two affidavits were filed as the basis of the proceeding—one by John de Vries and the other by E. A. Kelton, sheriff of Napa county. In the affidavit of De Vries it is alleged:

That, on the 1st day of May, 1918, affiant visited the building in which the nuisance interdicted by the court's decree was maintained by the petitioner; that, at that time, said building was occupied by the petitioner and two other women; that, at said time, the petitioner sold and served affiant with intoxicating liquors in said building, for which he paid petitioner $1, and that the liquors so served in said house were drunk by affiant, the petitioner, who was acting as landlady of said house, and the two other women; "that said building was then and there run, operated, and conducted as a house of lewdness, assignation, and prostitution by the said Mrs. M. Selowsky; * * * that two of said women, inmates and prostitutes of said house of prostitution, then and there solicited from affiant acts of sexual intercourse for hire, stating that they would commit acts of prostitution with affiant for prices of $2 for each act of prostitution, and also solicited affiant to stay all night with one of them for the purpose of prostitution for a price of $6; that affiant has investigated many houses of prostitution and is familiar with the manner in which houses of prostitution are conducted, and knows of his own knowledge that the aforesaid place was conducted as a house of prostitution, that two of the women were dressed in the garb

usually worn by prostitutes in many houses of prostitution, being loose fitting, short dresses; and that said place was conducted only in a manner in which a house of prostitution is conducted."

The affidavit of Sheriff Kelton alleges:

"That on the 18th day of May, 1918, he, in company with officers of the law, visited the premises belonging to Mrs. M. Selowsky, mentioned and set forth in the judgment in said cause, made, signed, and filed herein on the 19th day of November, 1917, and that at said time said Mrs. M. Selowsky was still the owner and in charge of said premises, and was keeping and maintaining a house of lewdness, assignation, and prostitution, assisted by one Florence Ponta, as follows: That at said time, said Florence Ponta occupied a room at said premises with a man, and affiant verily believes committed with him then and there the acts of illicit sexual intercourse; that thereafter, and on the same day, said Florence Ponta occupied a room at said premises with another man and, as affiant believes, committed such acts; that said premises set forth in said judgment hereinbefore referred to, and occupied by said Mrs. M. Selowsky, sometimes known as and called Mary M. Selowsky and Mrs. M. Krueger, on the 18th day of May, 1918, were in charge of said Mrs. M. Selowsky, and was conducted as a house of lewdness, assignation, and prostitution; that Florence Ponta, one of the inmates thereof, is a prostitute, and was working in said house for said Mrs. M. Selowsky as a prostitute. That affiant, by reason of his long experience as a sheriff, is familiar with houses of prostitution and knows of his own knowledge that said premises, on said date, were being maintained, conducted, and operated by said Mrs. M. Selowsky as a house of lewdness, and that all of said acts of lewdness, assignation, and prostitution, committed on said premises, were committed with the knowledge and approval of said Mrs. M. Selowsky, and for her personal financial gain, and for the purpose of lewdness, assignation, and prostitution."

The specific objections to the affidavits are that they do not charge that the alleged solicitation of the acts of sexual intercourse referred to therein was carried on with the knowledge of the petitioner; that it is not made to appear therefrom that the women mentioned would or intended to commit the proposed acts of prostitution upon the premises, "or that they solicited affiant to stay all night upon the premises"; that the allegations in the affidavits that the building was at the time mentioned being conducted as a house of prostitution involve the mere conclusions or unsupported opinions of affiants.

[4, 5] We shall not attempt to follow the ramifications of the very able argument advanced in support of the claim that the affidavits, either taken alone or together, do not make out a sufficient case of contempt against the petitioner to have given the court jurisdiction to inquire into the charge. It will be enough to say that, in our opinion, in the character of cases arising under the abatement act, the affidavits sufficiently charge facts constituting a violation of the injunctive order made against the petitioner in the original action and hence a contempt of court.

It is obviously true that, to prove that a building or a house is maintained for the purposes of lewdness, assignation, and prostitution, circumstantial evidence must necessarily be relied upon, for, particularly as to acts of prostitution or assignation, it is rarely the case that direct evidence in support of such a fact may be obtained or is available. Sexual relations between the sexes are, of course, always carried on clandestinely. Such performances, it is to be apprehended, are seldom ever witnessed by persons save those engaged therein. Hence, in proving illicit sexual relations between the opposite sexes, where the proof of such acts is indispensably necessary to the establishment of a case, either civil or criminal, circumstances sufficiently potent in probative force must always or invariably be wholly relied upon. For instance, it is a crime under section 647 of the Penal Code for any person to live in or about houses of ill fame or to be a common prostitute. To show that a person is a vagrant because he lives in and about houses of ill fame, which generally are houses of prostitution, the character of the house where the accused is charged with living in and about must necessarily be shown. The character of a female charged with being a common prostitute must, of course, be proved, for her character as such is the gist of the charge. Again, a charge based on section 315 of the Penal Code, which penalizes the act of keeping a house of ill fame, resorted to for the purposes of prostitution or lewdness, cannot be sustained without proof that prostitution or lewdness is practiced therein. Neither of these offenses could ever be established if it were requisite under the law to show by positive evidence that specific acts of prostitution had been practiced in the house or by the females. So it is true as to cases arising under the abatement act in which it is essential, to establish the nuisance thereby denounced, to prove that the building or place is maintained for the purposes of lewdness, assignation, or prostitution. While, as we shall later see, lewdness may with little difficulty be shown by direct proof, prostitution or assignation, or the essential acts constituting the same, cannot be so proved. In any of the cases thus referred to, the fact that a female is a prostitute or the fact that a house is one where prostitution or assignation is carried on may be proved by evidence of the general reputation of the female or of the house in that respect. Indeed, the abatement act, as is also true of section 315 of the Penal Code with reference to the crime therein denounced, expressly provides that such proof is admissible in

support of the charge that a nuisance of the character of that at the suppression of which said act is particularly aimed is being maintained in a building or place, and that provision was undoubtedly predicated upon common knowledge of the fact that the specific acts which must of necessity habitually be practiced in a building or house to constitute the nuisance denounced by said act cannot well be proved by direct evidence. No more, so far as the character of the proof is concerned, should be or is required in laying the foundation for a contempt proceeding arising under the abatement act by reason of an alleged violation of the terms of any injunction or order issued or made thereunder. In other words, if the affidavit or affidavits disclose circumstances from which the conclusion must inevitably follow that the acts constituting the nuisance enjoined by the decree entered in the action for the abatement of said nuisance are carried on in defiance of the mandates of such decree, then they must be held to be sufficient in the statement of a case of contempt, and to invest the court with jurisdiction of the contempt proceeding.

In the present case, as will be noted, the affidavit of De Vries declares that one of the women in the house in question solicited him to have sexual relations with her at a specified price. This was not only of itself an act of lewdness (see Webster's Dict.; Cyclopedic Law Dict.), but tended to show that the building or house was carried on as a place of prostitution or assignation. He further declared that he had had considerable experience in the investigation of houses of prostitution and stated without qualification that the place was conducted as a house of prostitution; that liquors were therein dispensed; and that the women inmates of the house were garbed in the attire usually worn by prostitutes.

Sheriff Kelton's affidavit states that the petitioner was conducting a house of prostitution at the place in question, assisted by one Florence Ponta, a female; that the latter occupied a room in said house on two different occasions on the day he (affiant) was there with two different men; that said Florence Ponta is a prostitute, and that he verily believes that she practiced sexual acts with the two men referred to; that said acts were committed with the knowledge and approval of said Mary M. Selowsky.

Upon the facts set forth in the affidavits a judgment or verdict would, in our opinion, safely rest in any case where it is legally requisite to prove acts of prostitution or of assignation or of lewdness to establish the ultimate fact or a crime, and, if they are sufficient for such purposes, then certainly they are sufficient to show that the decree in the original action was knowingly violated by the petitioner and consequently a contempt of court committed by her.

It is, of course, to be conceded that the belief of the affiant that the Ponta woman cohabited and had illicit relations with the two men cannot be accepted as evidence of that fact, but that allegation in the affidavit may be eliminated and still there remain sufficient facts to show that the building was then being conducted for the purposes of prostitution or assignation, or, at any rate, that lewdness was practiced therein.

[6, 7] We now come to the consideration of the question whether section 6 of the abatement act, prescribing the penalty for the violation of the terms of any order or injunction made or issued in an action arising under said act, is or is not valid. As stated above, the contention is that the section is unconstitutional and is in conflict with sections 1209 and 1218 of the Code of Civil Procedure. The same contention was made in People v. Barbiere, 33 Cal. App. 770–780, 166 Pac. 812, 816, and therein we expressed our views upon the question as to the validity of said section of the act. In that case, among other things, it was said:

"But we do not acquiesce in the view that section 6 of the abatement law either affects or is affected by the Code section referred to. We know of no constitutional limitation upon the right of the Legislature to fix reasonable penalties for contempts of the judgments, decrees, orders, or processes of courts of justice, and, in admeasuring such punishments, to assign, as it may do and has done in cases of public crime, to certain acts of contempt a greater or less penalty than is annexed to others, according to the nature of the contempt with respect to the subject-matter of the adjudication violated and the consequences of such violation to the public or to individual rights."

We have found no occasion to recede from the views thus expressed. Certainly it cannot justly be contended that the Legislature may not amend section 1218 of the Code of Civil Procedure by prescribing a more severe penalty for any contempt of court than is now thereby prescribed. If therefore section 6 of the abatement act is void, it is not because the Legislature is without the power and the right under the Constitution to prescribe any reasonable penalty it may see fit for contempt in the violation of decrees, judgments, orders, processes entered, made, or issued by the courts, or for other misbehavior affecting or militating against the dignity of a court of justice or which is calculated to circumvent the ends of its judicial mandates, but solely for the reason that said section is in conflict with the provisions of section 1218 of the Code of Civil Procedure, to which proposition, as seen, we have expressed an adverse opinion in the Barbiere Case.

[8] Counsel for the petitioner says, however:

"While contempt of court may consist of a variety of acts, it is always the same offense. Contempt of court is not punished as a crime, strictly speaking, but purely as a vindication of the authority of the court."

In support of the proposition last stated by counsel, the case of Anargyros v. Anargyros & Co. (C. C.) 191 Fed. 208, and 13 Corpus Juris, pp. 4, 5, are cited; but neither of those authorities supports the statement of counsel, but, to the contrary, both distinctly recognize the proposition that there are two general classes of contempt, divided into criminal and civil. The contempt charged here very clearly comes within the category of criminal contempts. As to the proposition first stated by counsel, it is to be observed that the phrase "contempt of court," like the word "crime," is generic, and, as counsel says, embraces within its legal signification a variety of different acts, but such acts involve different elements which, like the different acts constituting different crimes, differentiate the several acts. No one has ever questioned the right of the Legislature to fix the punishment for crime according to the gravity of the offense or according to the degree of moral turpitude inhering in the particular criminal act. Why should not the same right be exercised by the Legislature in the matter of contempts of court? Should there in reason be meted out to the individual who violates an injunction against hydraulic mining, for instance, the effect of the general prosecution of which industry it has been shown is to destroy thousands of acres of the earth's soil, the direct and fundamental source of all material prosperity and happiness, than to the person who has been guilty of some refractory conduct in the presence of the court, or who has violated, to the damage or detriment of the rights of a single person only, some injunction? The violation of an injunction issued or made a part of the judgment rendered and entered in an action instituted under the abatement act involves the commission of acts which have been denounced by the Legislature as a crime (Pen. Code, §§ 315 and 316), and in this case the petitioner by her act in violating the injunction issued by the court to restrain her from maintaining the nuisance described in the act not only set at defiance a solemn judgment of a court of justice but committed a crime for which she could be prosecuted and punished under the sections of the Penal Code above named. Such a case, it will not be denied, calls for the infliction of a much more severe penalty than does the case where the contempt grows out of the violation of mere individual rights, in which society generally has only an indirect or a comparatively indifferent interest. It is true that the object of all contempt proceedings is to vindicate the authority of the court as well as to uphold the majesty of the law, yet, as above stated, there are, in their effect upon individual rights as well as upon society, degrees of turpitude in contempts of court which make the variety of acts constituting such contempt as different from each other as petit larceny is from grand.

We read nothing in the case of Ex parte Clancy, 90 Cal. 552, 555, et seq., 27 Pac. 411, which conflicts with the foregoing views. In that case, the petitioner had been adjudicated an insolvent debtor under the state insolvent act. The petitioner refused to obey an order of the court made in the insolvency proceeding commanding him to turn over and pay to the receiver in said proceeding certain assets of the value of $4,000. He was proceeded against in contempt and was adjudged guilty of contempt of court. Section 64 of the insolvent act provided that—

"All sections of the Code of Civil Procedure of the state of California relating to contempts are hereby made applicable to all proceedings under this act."

But it further provided that—

"An appeal shall be allowed to the Supreme Court from any order adjudging any person guilty of a contempt of court."

In a concurring opinion, joined in by Justice De Haven and Chief Justice Beatty, Justice Harrison held that the provision allowing appeals from judgments of contempt growing out of proceedings had under the insolvent act was in conflict with section 1222 of the Code of Civil Procedure, providing that "the judgment and orders of the court or judge, made in cases of contempt, are final and conclusive," and remarked:

"To give effect to this provision of the insolvent act is to permit an appeal from judgments of contempt in one class of cases which, under the general law applicable to contempts, is denied to all other judgments for the same offense. Such construction would except cases arising in insolvency from the uniform operation of this general law, and thereby destroy its uniformity and violate the provisions of section 11 of article 1 of the Constitution."

Judge Harrison further said:

"Any law for the punishment of this offense is necessarily of a general nature, and must have a uniform operation. It was not competent for the Legislature to provide a different procedure for contempts of the superior court committed while in the exercise of its jurisdiction in proceedings for insolvency from that which is provided for those committed while it is exercising its jurisdiction in any other matter."

It is the language just quoted from which the petitioner derives the notion that the court in that decision held that it is not within the competence of the Legislature to fix different penalties for different acts of

contempt. But that language cannot be so construed in our opinion. Obviously, the point that Judge Harrison was making and did make was that the procedure for proceedings in contempt was required to be the same in all cases and that any law providing punishment for contempt—that is, a law authorizing punishment to be enforced for contempt of court—"is necessarily of a general nature and must have a uniform operation." In other words, it is not held by Judge Harrison that, to make the law conform to the Constitution, the punishment shall be uniform or the same in all cases.

[9] We have no reason for doubting that the affidavits contain sufficient facts to show that a contempt of court had been committed and to have given the court jurisdiction of this proceeding. What the evidence taken at the trial of the contempt proceeding disclosed, we are not advised by the record before us, nor is it necessary to the decision here that we should know what such evidence showed, since the scope of the inquiry in this proceeding is limited to the consideration of the question whether the court was by the affidavits filed herein invested with jurisdiction to hear and determine the contempt proceeding.

The alternative writ is discharged, and the prisoner remanded.

We concur: CHIPMAN, P. J.; BURNETT, J.

---

38 Cal. App. 676

CO-OPERATIVE JUNK CO. OF CALIFORNIA v. BOARD OF POLICE COM'RS OF CITY OF LOS ANGELES et al. (Civ. 2746.)

(District Court of Appeal, Second District, California. Nov. 15, 1918.)

1. LICENSES ⟸16(11)—JUNK DEALERS.

That thieves frequently dispose of their plunder to junk dealers is sufficient to bring those occupations within the field wherein, in the exercise of its police power, a city may vest in its police commission a discretion in the matter of granting permits for licenses.

2. LICENSES ⟸22—PROCEEDINGS TO PROCURE —DISCRETION—REVIEW.

Where a municipal ordinance provided that a license to conduct the business of a junk dealer should not be granted until the police commissioners shall have granted a permit therefor, *held*, that an applicant for a license to conduct the business of a junk dealer is not entitled to a permit upon compliance with the formal requirements, but the police commissioners have a discretion which will not be interfered with by the courts in the absence of positive proof of abuse.

3. APPEAL AND ERROR ⟸840(1) — REVIEW — SCOPE.

Where the judgment itself showed that the trial court abandoned the trial upon the facts and rendered judgment on the pleadings, the facts found cannot be considered by the appellate court; it appearing that the judgment on the pleadings was improper.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Application by the Co-operative Junk Company of California, a corporation, for a writ of mandate against the Board of Police Commissioners of the City of Los Angeles and others. From a judgment on the pleadings, granting the writ, defendants appeal. Reversed.

Albert Lee Stephens, City Atty., W. P. Mealey, Deputy City Atty., Erwin W. Widney, City Prosecutor, and W. K. Crawford, Deputy City Prosecutor, all of Los Angeles, for appellants.

Shapiro & Shapiro, of Los Angeles, for respondent.

CONREY, P. J. The defendants appeal from a judgment awarding to the plaintiff a writ of mandate. Although the case went to trial upon the complaint and answer, the court did not make any findings of fact or conclusions of law, and the judgment seems to have been entered pursuant to a motion for judgment on the pleadings. The judgment states that the case came on regularly to be heard before the court sitting without a jury, and that—

"Witnesses for the plaintiff and defendant having been sworn and examined, whereupon counsel for petitioners moved the court for an order directing that a writ of mandate issue herein, upon the pleadings of the respective parties, and, now being fully advised in the premises, the court doth adjudge and order that the defendants and each of them issue to the said Co-operative Junk Company of California a permit for a license to conduct a junk dealer business in the city of Los Angeles," etc.

[1, 2] The plaintiff's claim of right to a permit for a license to conduct the business of junk dealer in the city of Los Angeles is based upon a city ordinance, a copy of which is set out in the complaint. That is an ordinance regulating certain businesses, including the business of junk dealers and the business of junk collectors. It is provided that the city clerk shall not issue a license to any person to conduct the business of junk dealer until the board of police commissioners shall have granted a permit therefor; that any person desiring to obtain a permit to carry on that business shall file an application in writing therefor with the board of police commissioners, specifying by street and number the place where such business is proposed to be conducted; that it shall be unlawful for any person to carry on the business of junk dealer without first applying for and receiving a permit therefor in writing from the

board of police commissioners. The ordinance contains numerous regulatory provisions which the city council deemed to be appropriate in order that businesses of that kind might be conducted in accordance with public welfare.

The complaint shows that the plaintiff was a corporation duly organized for the purpose of conducting the business of junk dealer; that the plaintiff made and filed its application in writing for a permit, as required by the terms of the ordinance, and complied in all respects with the formalities necessary under the ordinance to bring its application before the board of police commissioners. It is alleged that the board of police commissioners denied the application of the petitioner and refused to issue a permit for the demanded license; that the petitioner demanded from the board an explanation of the reasons for such refusal, but the board refused to make any statement of such reasons; that the petitioner "is being discriminated upon and improperly oppressed by the said board of police commissioners." There is no allegation that the board or its members refused to hear the application upon its merits, or that they were actuated by malice or by desire to promote a monopoly or by any corrupt motive.

The argument of counsel for respondent shows that the plaintiff is proceeding upon the theory that the issuance of a permit of the kind here demanded is a ministerial act, concerning which no discretionary power is vested in the board of police commissioners.

Counsel for respondent claim that it was not incumbent upon respondent to establish abuse of discretion by appellants. They insist that it must be assumed that, upon complying with the formal requirements incident to an application for a permit as provided by the ordinance, the applicant is entitled as of right to have the permit issued. As authority for this rule, they rely upon such cases as Henry v. Barton, 107 Cal. 535, 40 Pac. 798. There a judgment was affirmed which awarded a writ of mandate requiring the issuance of a retail liquor license. The court says:

"The ordinances of the city of San Bernardino, as they now stand, entitle every man who complies with their provisions to a retail liquor license, and this respondent complied with these provisions. Trustees of cities have no power except that given them by express provision of law, and we find no power in any of these ordinances vesting in them discretion as to the granting or denying an application for a liquor license. In the absence of some express legislative enactment granting such right, there is no principle of law that will allow the trustees of any city to say that a liquor license shall be granted to A. and the same right denied to B."

We think, however, that there is a very great difference between the ordinance upon which plaintiff's claim was based in that case and the ordinance in question here. The city of San Bernardino at that time did not by its ordinance attempt in the exercise of its police power to vest in any officer or board the right or duty to examine into applications for licenses and grant or withhold permits therefor by the exercise of a supervisory discretion in such matters. But the city of Los Angeles, in the exercise of its undoubted police powers, has determined that the business of junk dealer is one which requires constant police supervision, and that licenses to conduct such business shall not issue as of course to every applicant. It is perfectly plain that, when by ordinance it was provided that a license shall not issue until a permit therefor shall have been granted by the board of police commissioners, it was intended that the board shall examine into every such application and determine for itself whether or not the proposed place of business is appropriately located, and whether or not the applicant is a fit and proper person to be permitted to conduct such business. Considering the nature of the business and the special dangers to the public which would follow from the improper conduct thereof, there is no doubt in our minds that the business is one peculiarly appropriate to police supervision, although when properly conducted it is a perfectly legitimate business. Without casting any imputation upon the integrity and honesty of junk dealers, junk collectors, or pawnbrokers, it must be admitted that those occupations furnish a market where thieves frequently seek to turn into cash their ill-gotten plunder. This fact is sufficient to bring these occupations within the field wherein, in the exercise of its police power, the city may vest in its police commission a discretion in the matter of granting permits for licenses.

"Holding as we do the right of the city under the charter to enact the ordinance under consideration, a court will not interfere with the discretion reposed in a proper board or tribunal, but will assume that official duty has been properly and lawfully performed, in the absence of positive proof to the contrary." Goytino v. McAleer, 4 Cal. App. 655, 88 Pac. 991.

[3] The fact that the court heard evidence in this case cannot be considered by us, since the judgment itself shows that the court abandoned the trial upon the facts and rendered judgment upon the pleadings. For the reasons which have been stated, we are of the opinion that the complaint did not state a cause of action. It follows that the court erred in granting judgment upon the pleadings.

The judgment is reversed.

We concur: JAMES, J.; MYERS, Judge pro tem.

38 Cal. App. 680

## FARQUHARSON v. SCOBLE et al.
(Civ. 2520.)

(District Court of Appeal, First District, Division 1, California. Nov. 16, 1918.)

1. COVENANTS ⊂=20 — RESTRICTIVE COVENANTS—IMPLICATION.

The mere fact that a landowner made and filed a map showing different subdivisions and sold lots in conformity therewith does not by implication raise a covenant in favor of purchasers which will prevent the landowner from disposing of the unsold portion of his lots singly or in bulk, or by subdivisions into smaller parcels; this being particularly true where the map itself showed the lots to be irregular in size.

2. COVENANTS ⊂=20 — RESTRICTIVE COVENANTS—IMPLICATION.

Where a landowner who platted premises for an exclusive residential subdivision incorporated in deeds side-line restrictions, but such restrictions were varied and there was no general scheme, it appearing that when fixed they were subject to change by agreement by contiguous or abutting owners, *held*, that there was no restrictive covenant that purchasers could enforce and require the owner to incorporate in its deeds to unsold portions.

Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Suit by Charles D. Farquharson against Thomas Scoble and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Houghton & Houghton and Edward T. Houghton, all of San Francisco, for appellant.

Harding & Monroe, of San Francisco, for respondent John Brickell Company.

Robert H. Borland, of San Francisco, for respondent Thomas Scoble.

LENNON, P. J. This is a suit in equity to enforce certain alleged building covenants claimed to be provided for under a general building plan designed by defendant John Brickell Company for the improvement, subdivision, and sale of a certain tract of land situated in the city and county of San Francisco, fronting on the Golden Gate and known as Seacliff. Demurrers to the complaint were interposed by the defendants, and were sustained by the trial court mainly upon the ground that the complaint did not state a cause of action, and this appeal is from the judgment entered in favor of the defendants upon failure on the part of plaintiff to amend. The sufficiency of the complaint, therefore, is the single question presented by this appeal.

It is unnecessary to recite in detail the elaborate matters of inducement indulged in by plaintiff in stating his cause of action. The substance of the allegations necessary for a discussion of the case is: First, that the Brickell Company adopted in the subdivision of the tract of land above referred to what courts have called a "general building plan," under which the parcels subdivided were to be used for high-class restricted residences. The complaint then alleges that in the formation of such plan an elaborate and detailed map was prepared by defendant showing the subdivision of the tract into lots, and that sales were made to plaintiff and others in accordance therewith and under the representation that all the subdivisions would be disposed of in conformity with such map and subject to certain restrictive building covenants designed for the development of the tract as a whole and for the benefit of every purchaser in particular. It further alleges that the defendant John Brickell Company had sold to the defendant Thomas Scoble parcels of land contiguous to the lots owned by plaintiff not in accordance with the subdivision as contained on the map under which it had represented the land would be sold, and subject to restrictive building covenants relating to the location of residence building with respect to side-line boundaries less onerous than those imposed on the adjoining property of plaintiff. It also avers by affirmative allegation and by the recital of certain facts a knowledge on the part of Scoble of the general building plan adopted by his codefendant, John Brickell Company, and of the restrictive covenants contained therein relating to the location of buildings that might be erected on the various subdivisions, and a further knowledge on the part of Scoble of the map showing the dimensions of the different parcels. The allegations as to notice, however, refer to a period of time subsequent to the purchase by Scoble of the lots in question. Other allegations show the commencement of the construction of a residence by Scoble in violation of these restrictive covenants.

In the prayer of the complaint the plaintiff asks for relief by injunction restraining the defendant Scoble from erecting a residence except in accordance with the general plan under which all sales prior to the sale to Scoble had been made. Cancellation of the conveyance is also asked for on such terms as the court deems just.

The theory of plaintiff's case and the principle upon which his claim for relief is based is that where, as here, the owner of a tract of land has laid it out and offered it for sale under a general plan, he has no right to change or modify such plan, either by subdivision of the tract into smaller lots than originally laid out, or by releasing the unsold portion from restrictive conditions imposed on the sold portion, or modifying such condi-

tions, to the disadvantage of the latter and the benefit of the former.

Respondents do not deny the correctness of this doctrine, but claim that the facts of the case afford no foundation for its application.

The restrictive building covenants contained in plaintiff's deed provided that all residence buildings erected on the lots in question should be placed back at least eight feet from the front, and at least three feet from one and seven feet from the other side boundary lines of said lots as platted and designated on the map. There is no restriction in the Scoble deed fixing the distance a residence must be set back from the front line, and the restrictions of three and seven feet imposed upon plaintiff's lots in respect to certain side boundary lines is reduced and cut down to one foot on the easterly and increased to eight feet on the westerly line. It is not claimed by defendants that a general plan as to street-line restrictions has not been properly pleaded, and defendants admit that through error no front-line limitation was inserted in the Scoble deeds. There is, however, no allegation in the complaint showing any violation of this restriction, nor is it claimed that the building being erected is not in accord therewith. Plaintiff's cause of complaint is thus narrowed down to the proposition as to whether or not under his pleadings the defendant John Brickell Company is precluded from selling, and the defendant Thomas Scoble from purchasing, any land in this particular subdivision of Seacliff: First, other than in the parcels and lots as platted and shown upon the map which the former caused to be prepared to assist in presenting that general scheme under which the tract was offered for sale; and, second, with restrictive building covenants less onerous or burdensome than those imposed on other lots in the tract similarly located.

[1] With reference to the first question, plaintiff does not claim that any express restrictive covenants are contained in any of the deeds of the company against the sale of lots in dimensions contrary to the subdivisions as claimed on the map. Upon this subject he alleges that defendant Brickell Company had represented to all purchasers of lots that sales would be made in accordance therewith. This allegation, however, is merely a general one, for it appears from other recitals in the complaint that such allegations as to representations is predicated upon the legal effect of the company's act in filing its map. In our opinion, the covenant here claimed cannot be implied from the mere making and filing of the map showing the different subdivisions, or by selling lots in conformity therewith. The right of an owner in such a case to dispose of the unsold portions of his lots singly or in bulk, or by subdivision into smaller parcels, is in no manner limited or impaired thereby. Herold v. Real Est. Co., 72 N. J. Eq. 857, 67 Atl. 608, 14 L. R. A. (N. S.) 1067, 129 Am. St. Rep. 718, 16 Ann. Cas. 580. Of course, limiting and restrictive covenants when valid will be enforced; but when claimed courts will construe them strictly against the person seeking their enforcement, and when none are contemplated, they will not be created. In their absence a vendee cannot be held to a restrictive use of his property. That uniformity in the dimensions of the lots was never contemplated is shown by the map itself, for no uniformity exists with reference to the size or shape of the lots as laid out in the subdivision. We are therefore of the opinion that the complaint in this particular fails to state a cause of action, and we are of the further opinion that there is no merit in appellant's second contention with reference to the alleged side-line building restrictions. That some restrictive covenants with respect to open spaces and areas between and around the residences to be erected were contemplated there is no question, but that their exact dimensions were ever fixed and established is not shown by the complaint.

[2] Plaintiff claims that they should be in conformity with those established in his deeds. But even as to those, no uniformity is shown to exist, for the dimensions as to the easterly and westerly boundaries are not uniform. That no general scheme or plan in this particular was ever contemplated is further indicated by other pleaded facts. None are contained in the printed form of deed adopted by the company. In that instrument the provisions as to the dimensions of the side-line restrictions are left blank, presumably to be filled in when fixed and determined by the company when selling a particular lot. In addition thereto, it affirmatively appears by the allegations in the complaint that the side-line distances, even when established and adopted, were subject to change by agreement of contiguous or abutting owners. Under such circumstances, the side-line restrictions could be entirely done away with. How, then, can it be said that such restrictions were in accordance with any general plan? We conclude there was none.

From what we have said we are of the opinion that the sale by the company of the lots to Scoble was not destructive of, or violative of, or inconsistent with, any general building plan adopted by the company.

Judgment affirmed.

We concur: STURTEVANT, Judge pro tem.; BEASLY, Judge pro tem.

179 Cal. 540

BAILEY v. SECURITY TRUST CO. (PLATZ, Intervener). (L. A. 4754.)

(Supreme Court of California. Jan. 2, 1919. Rehearing Denied Jan. 30, 1919.)

1. ESCROWS ⟸1—CONSTRUCTION OF INSTRUMENTS.

Documents, including option, assignment, agreement for commission, and order on escrow holder to pay commission, together with letter of instructions, *held* to constitute an escrow, within Civ. Code, §§ 1053, 1057.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Escrow.]

2. ESCROWS ⟸1—CONSTRUCTION OF INSTRUMENTS.

Although option and assignment of shares of stock which were deposited in escrow did not specifically name the assignee, transaction was valid transfer, for the purposes of the escrow, where from all the documents deposited in escrow the name of the transferee was ascertainable.

3. ESCROWS ⟸1—AGREEMENTS FOR COMMISSION—EFFECT.

Where owner of corporation stock made option and assignment, depositing them in escrow, fact that he also gave the intended transferee agreement for commission and order on escrow holder to pay commission did not, as to the escrow holder, deprive the transaction of its escrow character.

4. ATTORNEY AND CLIENT ⟸123(2) — CONTRACTS—GOOD FAITH.

There is no rule which prohibits attorney from becoming transferee of his client's corporate stock, and collecting a commission for the sale thereof, in the absence of a showing of unfaith or unfairness.

5. ATTORNEY AND CLIENT ⟸129(2)—CONTRACTS — BAD FAITH — EVIDENCE — SUFFICIENCY.

Where owner of corporation stock gave attorney option, assignment, and agreement to pay commission, evidence *held* insufficient to show that attorney obtained such documents by misrepresentation.

6. ATTORNEY AND CLIENT ⟸123(2) — CONTRACTS—BAD FAITH.

The mere fact, as found by the trial court, that attorney secured option and transfer of corporate stock from client at price of $16,000, when real value was $18,000, did not show bad faith or misrepresentations, in the absence of showing that the client was deceived as to the value.

In Bank.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Matthew Bailey against the Security Trust Company, wherein Matthew S. Platz intervened. From judgment for plaintiff and order denying new trial, defendant and the intervener appeal. Judgment and order reversed.

See, also, 34 Cal. App. 348, 167 Pac. 409.

J. W. Wiley and Wiley & Lambert, all of Bakersfield, for appellant.

C. E. Arnold, of Bakersfield, for intervener and appellant Platz.

Heller, Powers & Ehrman, of San Francisco, amicus curiæ.

E. L. Foster, Chas. A. Barnhart, and Geo. E. Whitaker, all of Bakersfield (Sullivan & Sullivan, Theo. J. Roche, Leon E. Morris, and M. C. Lynch, all of San Francisco, of counsel), for respondent.

RICHARDS, Judge pro tem. This action was commenced by the plaintiff against the defendant Security Trust Company and certain fictitious defendants to recover the possession of a certificate of stock for 4,166⅔ shares of the capital stock of the Kern Mutual Telephone Company, a corporation, and also of certain documents relating to said stock, which the plaintiff alleged had been delivered by him to said defendant corporation, and the possession of which was being unlawfully withheld by it from plaintiff, who at all times since its said delivery had been entitled thereto. The stock was alleged to be of the value of $18,000, for which sum the plaintiff demanded an alternative judgment, with costs and damages, in the event a redelivery of the same could not be had. The answer of the Security Trust Company, while admitting the delivery to it by plaintiff of the stock and documents in question, denied that it unlawfully held the same or that the plaintiff was entitled to their possession; and in support of such denial alleged that on the 16th day of May, 1913, the said plaintiff, together with one Matthew S. Platz, had delivered to it the stock and other documents in question, accompanied by the following letter of instruction, viz.:

"Bakersfield, California, May 16, 1913.

"Security Trust Company, Bakersfield, Cal.—Sirs:

"We hand you herewith option to purchase, and assignment executed by Matthew Bailey. You will kindly hold the same to the first day of September, 1913, unless sooner exercised, at which time, if not exercised, you will redeliver the same to Matthew Bailey. There is also handed you herewith certificate of stock of Matthew Bailey for 4,166⅔ shares of the capital stock in the Kern Mutual Telephone Company. In the event that the said Matthew S. Platz or his assigns shall deliver to you, for the benefit of Matthew Bailey, on or before the first day of September, 1913, the sum of $16,000 lawful money of the United States, then you will deliver to him or his said assigns the said assignment, together with the certificates of stock.

"Matthew S. Platz.
"Matthew Bailey."

The said defendant further averred that subsequently to the delivery to it of said stock and papers, and on July 23, 1913, the said Matthew S. Platz had tendered to said defendant the sum of $16,000, and demanded from it the delivery to him of the stock and papers referred to in said letter of instruction; wherefore the said defendant prayed that the plaintiff take nothing by his action, but that said defendant recover certain costs and expenses incurred by it in defending its right to the possession of said property.

The said Matthew S. Platz, shortly after the commencement of said action, filed a complaint in intervention therein, wherein he set forth that on or about the 16th day of May, 1913, while the said plaintiff, Matthew Bailey, was the owner of the stock in question, he had for a valuable consideration made, executed, and delivered to said intervener a written option to purchase the same, in the words and figures following, to wit:

"For and in consideration of the sum of five dollars, the receipt of which is hereby acknowledged, I hereby give and grant to Matthew S. Platz, of Bakersfield, Kern county, California, the option to purchase on or before the first day of September, 1913, all of my right, title, and interest in and to the shares of stock distributed to me in the estate of said John E. Bailey, deceased, in the Kern Mutual Telephone Company, a corporation, together also with all of my right, title, and interest distributed to me in the estate of said John E. Bailey, deceased, in and to that certain contract and agreement entered into among the said J. E. Bailey, Phil Blankenship, and James T. McGuire, on the 22nd day of September, 1911, regarding the division of the shares of stock in the said Kern Mutual Telephone Company, also all of the right, title, and interest distributed to me in the estate of said John E. Bailey, deceased, in, to, and under that certain other agreement made on the said 22nd day of September, 1911, among C. S. Garfield, Grace M. Garfield, J. E. Bailey, Phil Blankenship, and James T. McGuire, regarding the purchase of certain shares of and from the said C. S. Garfield and Grace M. Garfield, which said agreement herein mentioned, and also the shares of stock in said Kern Mutual Telephone Company, in said agreements mentioned, is now in escrow in the First National Bank of the City of Bakersfield, Kern county, California.

"Said shares of stock, and all the interest in said Kern Mutual Telephone Company herein mentioned may be purchased under this option for the sum of sixteen thousand dollars, lawful money of the United States, cash at the exercise of this option.

"It being understood that this option to purchase may be exercised by the said Matthew S. Platz by depositing, by him or by his assignees, with the Security Trust Company of the city of Bakersfield, Kern county, California, the said sum herein mentioned.

"Witness my hand this the 16 day of May, A. D., 1913. Matthew Bailey."

The intervener further alleged that, at the same time of the execution and delivery to him of the foregoing option to purchase said property, the said plaintiff, Matthew Bailey, had executed the following assignment of said property, viz.:

"For and in consideration of the sum of five dollars, the receipt of which is hereby acknowledged, I hereby sell, transfer, and set over all of my right, title, and interest in and to the shares of stock distributed to me in the estate of John E. Bailey, deceased, in the Kern Mutual Telephone Company, a corporation, together also with all of my right, title, and interest distributed to me in the estate of said John E. Bailey, deceased, in and to that certain contract and agreement entered into among the said J. E. Bailey, Phil Blankenship, and James T. McGuire on the 22nd day of September, 1911, regarding the division of the shares of stock in the said Kern Mutual Telephone Company, also all of the right, title, and interest distributed to me in the estate of said John E. Bailey, deceased, in, to, and under that certain other agreement made on the said 22nd day of September, 1911, among C. S. Garfield, Grace M. Garfield, J. E. Bailey, Phil Blankenship, and James T. McGuire, regarding the purchase of certain shares of and from the said C. S. Garfield and Grace M. Garfield, which said agreement, together with that certain other agreement herein mentioned, and also the shares of stock in said Kern Mutual Telephone Company, in said agreements mentioned, are now in escrow in the First National Bank of the City of Bakersfield, Kern county, California.

"Witness my hand this the 16 day of May, A. D. 1913. Matthew Bailey."

The intervener further alleged that on or about May 16, 1913, the said plaintiff and the said intervener placed in escrow with the defendant Security Trust Company the said option and the said assignment, together with the certificate of stock in question, accompanying the same with the written escrow instructions set forth in the answer of the said defendant Security Trust Company, which said Trust Company then and there accepted and since held in such escrow. The intervener alleged that he had on July 23, 1913, tendered to said Security Trust Company the sum of $16,000, and demanded the delivery to him of the said certificate of stock and said assignment, but that the said Security Trust Company had refused to comply with such demand; wherefore the intervener, alleging that he had performed all of the terms and conditions of said escrow to be by him performed, prayed judgment for the possession of said property. To this complaint in intervention the plaintiff, Matthew Bailey, filed his answer, admitting that he had executed and delivered the documents set forth in the said answer of the defendant Security Trust Company and in the complaint in intervention, but denied that the same constituted either an assignment, an option, or an escrow in respect to said property. He also denied that he had received any consideration for the same, and alleged that the

said documents were prepared by the said intervener and signed by the said plaintiff without any knowledge by the latter of the contents of said instruments, but that he signed the same on account of representations made to him by said intervener at the time. He also denied that the Security Trust Company had been delivered, or had received or accepted, said stock and documents in escrow, or that it was entitled to hold the same. He further denied that the sum of $16,000 was a just or adequate value of said properties, and denied that the said intervener had performed the conditions of the said agreements to be by him performed.

The plaintiff further alleged in his said answer to the complaint in intervention that in the month of April, 1913, the said plaintiff had employed the said intervener as his attorney for the purpose of having the latter inform said plaintiff as to the value of the stock in question, and that the said plaintiff had relied upon and accepted as true the statements of said intervener, as his said attorney, that the said stock was only worth the sum of $16,000 at the time of his signature of said documents, and that subsequently the said plaintiff had been offered and had accepted the sum of $18,000 for said stock. The plaintiff also alleged that his understanding and purpose in the signature and delivery of said documents were that they should not constitute an option giving said intervener himself the right to purchase said stock, but that they simply, according to the intervener's representation, amounted to an agreement making the intervener his agent for the sale of said stock, and giving the intervener a commission of 5 per cent. upon such sale by him of said property.

The cause went to trial upon the issues presented by these respective pleadings, and upon said trial the foregoing documents were produced and presented in evidence. It appeared that said documents had, at the time of their delivery to and acceptance by the defendant Security Trust Company, been accompanied by two other documents which read, respectively, as follows:

"It is agreed that I will pay to Matthew S. Platz the commission of five per cent. upon the sale or disposition of all of my interest in the Kern Mutual Telephone Company, a corporation, as per that certain option entered into between the said Matthew S. Platz and myself regarding said interest on the 16 day of May, 1913. Matthew Bailey."

"To the Security Trust Company, Bakersfield, Cal.—Sirs:

"You are hereby instructed to pay to Matthew S. Platz, of Bakersfield, Cal., out of the money coming to me for the sale of my interest in the Kern Mutual Telephone Company as by the certain option entered into between said Matthew S. Platz and myself on the 16 day of May, 1913, five per cent. commission, and that you are to take the said amount out of the money coming to me. Matthew Bailey."

It also appeared that all of the foregoing documents had been joined together in one cover, which was indorsed on the back, "Option, Letter of Instructions to Security Trust Company, Assignment, and Agreement to pay Commission, between Matthew Bailey and Matthew S. Platz." It also appeared in evidence that, while the certificate of stock to which these documents referred as having been delivered with them was not in fact so delivered until several days after their deposit with the Security Trust Company, it was at length so delivered by said plaintiff, Matthew Bailey, and was then attached to the other documents.

Upon the trial of the cause the plaintiff, Matthew Bailey, did not appear as a witness, and no evidence was offered on his behalf supporting the averments of his complaint as to any misrepresentations made by the intervener as his attorney, to him, as to the value of the stock or the import and contents of the documents which were executed by him. On the other hand, the intervener testified that while he was, in respect to certain other matters, the attorney for Matthew Bailey, at the time of the transaction in question, he made no misrepresentations upon either subject to him, and that as to the contents of the documents in question they were dictated by him to his stenographer in the presence and hearing of said Matthew Bailey, and he was given copies of the same, which he took and retained after the signature of the originals and their delivery in escrow. The intervener also testified, without contradiction, as to the consideration for the execution and delivery of these documents. There was no evidence offered which in any wise tended to show that the defendant Security Trust Company had any knowledge as to the relations or understandings between the plaintiff and the intervener, other than those which the face of the documents delivered to it imported.

The cause having been submitted to the trial court for decision, it filed its findings of fact and conclusions of law in favor of the plaintiff, and against both the defendant Security Trust Company and the intervener Matthew S. Platz, finding that the documents executed between said plaintiff and said intervener did not constitute an option to purchase the stock in question in favor of said intervener, but that the same were to be construed to be merely an agency authorizing said intervener to sell said stock to other persons for the price of $16,000, which agency was revocable at any time at the will of the plaintiff; and that the delivery of said documents, together with the letter of instruction to the Security Trust Company, did not constitute an escrow so as to entitle the said Security Trust Company to hold said stock in accordance with said letter of instruction, or to deliver said stock to said intervener, as

provided by the terms of said documents, but that the Security Trust Company held said documents and said stock subject to the right of the plaintiff at any time to demand and receive their possession. The court further held that the sum of $16,000 was not a fair or adequate value of the property described in said documents, but that the value thereof was not less than $18,000. The court accordingly rendered its judgment that the plaintiff do have and recover the possession of the said stock and of the assignment thereof from the said defendant Security Trust Company, or the sum of $18,000, in case delivery could not be had, together with costs as against both said defendant and said intervener.

From this judgment two appeals have been taken, one by the said defendant and said intervener, the other by the plaintiff, claiming that the court should have given to said plaintiff a further judgment for interest upon the sum of $18,000, as damages for the withholding of said stock from said plaintiff from and after the 5th day of June, 1913, the date of his demand therefor. The trial court also denied the motions of the defendant and the intervener for a new trial.

[1] Dealing with the first of these appeals, in so far as the rights and liabilities of the defendant Security Trust Company are involved therein, we are satisfied that upon the record before us the findings and judgment of the trial court cannot be sustained. The rights and liabilities of the said defendant Security Trust Company are to be determined by the face of the several documents of which, by the written agreements between the plaintiff and the intervener, it was made the custodian and charged with the duty set forth in their letter of instruction. These documents are all to be read together, and when so read they amount, in our opinion, as a matter of clear and unmistakable construction, to the creation of an escrow, based upon an option to purchase, by the express terms of which escrow the said defendant Security Trust Company was to receive and hold, and did in fact receive, accept, and hold, the said certificate for 4,166⅔ shares of the capital stock of the Kern Mutual Telephone Company in escrow, charged by its letter of instruction to deliver the same to Matthew S. Platz on or before the 1st day of September, 1913, provided the said Matthew S. Platz or his assigns should on or before said date deliver to said Security Trust Company the sum of $16,000 for the benefit of said plaintiff, Matthew Bailey. Section 1057 of the Civil Code provides that "a grant may be deposited by the grantor with a third person, to be delivered on performance of a condition, and, on delivery by the depository, it will take effect. While in possession of the third person, and subject to condition, it is called an escrow." By section 1053 of the Civil Code the term "grant" is made to apply to every transfer in writing, and hence to transfers of personal property. The foregoing documents, when read together, clearly contemplate a transfer of the stock in question to Matthew S. Platz or his assigns upon the fulfillment of the condition prescribed therein, and the delivery of such stock, with its accompanying documents, to the depository constituted an escrow within the intent and meaning of the foregoing sections of the Civil Code. The cases of Miller v. Sears, 91 Cal. 282, 27 Pac. 589, 25 Am. St. Rep. 176, Fitch v. Bunch, 30 Cal. 209, and the recent case of Holland v. McCarthy, 173 Cal. 597, 160 Pac. 1069, are not in point upon this question, since each of those cases had reference to transactions which were inchoate in character, and not to transactions like that in the instant case, where nothing remained to be done except the fulfillment of the agreed condition and the delivery of the property by the escrow holder in accordance with its express letter of instruction.

[2] The only two contentions worthy of mention which the respondent in this first appeal makes against the foregoing construction as to the nature of this transaction are these: First, that the document which purports to be a transfer of the right, title, and interest of the plaintiff in said stock does not contain the name of any transferee, and hence does not constitute a valid assignment or transfer thereof. But, conceding that this would be correct if the said document was to be construed alone, when all of these several documents are construed together the conclusion is irresistible that the said Matthew S. Platz or his assigns was intented to be, and was in fact in one or the other of these documents stated to be, the transferee thereof. In addition to this showing, the stock itself, properly indorsed, was delivered with and attached to these several documents; and this being so, had there been no other or separate instrument purporting to be an assignment thereof, such delivery to the escrow holder would of itself have been sufficient to constitute a transfer thereof for the expressed purposes of such escrow. This contention, therefore, has no merit.

[3] The second contention of the respondent is that the two documents, by the terms of the first of which the plaintiff agreed to pay "to Matthew S. Platz a commission of five per cent. upon the sale or disposition of all of my interest in the Kern Mutual Telephone Company as per that certain option, etc.," and by the terms of the second of which the Security Trust Company was instructed to pay said Matthew S. Platz said 5 per cent. commission out of money coming to him as a result of the exercise of said option, destroyed the character of the option and escrow by

rendering the former simply an agency for the sale of said stock upon commission. We cannot agree with the contention of the respondent in this regard in so far as the rights and liabilities of the defendant Security Trust Company are concerned. The latter as the escrow holder was entitled to have its mutual obligation to each of the parties to the intended transfer of the stock in question determined by a fair and liberal construction of the documents themselves, in the absence of a showing of any knowledge on its part of the relations or dealings between the parties other than as disclosed in the writings committed to its charge. Were it otherwise, there would be an end to the common and convenient practice, which has of recent years found general acceptance in the business world, of consummating transfers of real and personal property through deposits in escrow. In the instant case the letter of instruction to the escrow holder explicitly describes the documents delivered with it as constituting an "option to purchase," and as an "assignment executed by Matthew Bailey," and also explicitly declaring the condition upon the fulfillment of which the "said assignment, together with the said certificate of stock," is to be delivered by the said escrow holder to Matthew S. Platz or his assigns.

To hold that a mere subsidiary agreement between the parties to the proposed transfer providing that, after its consummation, a certain percentage of the purchase price to be paid by Matthew S. Platz, or his assigns into the hands of the escrow holder, in performance of the condition of the option and escrow, was to be repaid to him as a commission, should have the effect of nullifying the letter of instructions, and destroying the obvious intent and explicit terms of the main document and agreements between the parties, would be to violate a most essential rule governing the construction of written instruments by giving to a minor portion of the agreements between the parties an implied meaning and effect contradicting the express terms of the main agreements between them, and rendering abortive the very option and escrow out of the fulfillment of which the commissions provided for in the minor stipulations between the original parties to the transaction were to flow. As to the escrow holder no such consequence should be permitted if its avoidance is possible by such a construction of the agreements between the parties as shall give effect to all their terms and carry out the main and the express purpose of their creation, and this is done by the interpretation of the several instruments embraced in this escrow which we have above given. This being so, the transaction between the original parties being on the face of the documents before us a valid option to purchase the stock in question, and the delivery of said documents with said stock and with their attached letter of instruction to the depository constituting a valid escrow, it follows that as to the Security Trust Company the judgment herein must be reversed.

[4-6] As to the appellant Matthew S. Platz it is insisted by the respondent herein that a different conclusion as to the nature of the transaction between himself and the plaintiff must be reached. In making this contention the main reliance of the respondent is upon several considerations alleged to have existed outside of the face of the agreements. These considerations, according to the plaintiff's pleadings, were that at the time of making of the agreements between the plaintiff and the intervener the latter was the attorney of the former in regard to certain matters connected with his possession and ownership of said stock, and that as such attorney the said Matthew S. Platz made certain misrepresentations as to the value of said stock, and also as to the contents of the documents which he had drawn, giving him the option to purchase the same at the price he had represented it to be worth, upon which misrepresentations the plaintiff had relied in the execution and delivery of said documents. The plaintiff also alleged that there was no consideration for the giving of the option in question. In so far as the relation between the parties of attorney and client is concerned we know of no rule preventing dealings of this character between them in the absence of a showing of unfaith or unfairness on the part of the attorney. In so far as the alleged misrepresentations as to the value of the stock in question and as to the contents and meaning of documents creating the option to purchase said stock, the evidence entirely fails to sustain the averments of the plaintiff as to these matters. The plaintiff himself, by whom these matters, if they existed, might have been proven, did not take the witness stand. The intervener, as a witness, assuming the burden which the law cast upon him as the attorney for the plaintiff, at the time expressly denied any misrepresentations made by him as to either of said matters or the existence of any unfairness therein. The court made no finding thereon. It is true that the court did find that the sum of $16,000 was not the fair or adequate value of the stock in question at the date of the creation of the option, but the court makes no finding indicating that the plaintiff was in any way deceived in that regard. Upon the issue of consideration the court found against the plaintiff. It thus appears that there is neither any evidence nor any finding which would justify the trial court or this court in arriving at any different conclusion upon the construction to be placed upon the documents

in question as between the plaintiff and the intervener than that above arrived at in relation to the rights of the escrow holder.

Judgment and order reversed.

We concur: ANGELLOTTI, C. J.; VICTOR E. SHAW, Judge pro tem.; WILBUR, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.

---

179 Cal. 815

BAILEY v. SECURITY TRUST CO. (PLATZ, Intervener). (L. A. 4704.)

(Supreme Court of California. Jan. 2, 1919. Rehearing Denied Jan. 30, 1919.)

In Bank.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Matthew Bailey against the Security Trust Company, wherein Matthew S. Platz intervened. From the decree rendered, plaintiff appeals. Appeal dismissed.

Foster & Barnhart and George E. Whitaker, all of Bakersfield (Leon E. Morris, of San Francisco, of counsel), for appellant.

J. W. Wiley and Wiley & Lambert, all of Bakersfield, for respondent.

C. E. Arnold, of Bakersfield, for intervener.

PER CURIAM. The facts out of which this appeal arises are fully set forth in the case of Bailey v. Security Trust Co. (L. A. No. 4754), 177 Pac. 444, this day decided. The conclusions arrived at in that case render unnecessary for decision the sole question presented upon this appeal, and for that reason the appeal herein is dismissed.

---

179 Cal. 468

LEADBETTOR et al. v. INDUSTRIAL ACCIDENT COMMISSION. (S. F. 8602.)

(Supreme Court of California. Dec. 30, 1918.)

1. MASTER AND SERVANT ⟸398 — WORKMEN'S COMPENSATION ACT — "ACCIDENT" — "INJURY."

There is a distinction between the terms "accident" and "injury" as used in Workmen's Compensation Act, § 20, providing that actual knowledge of injury shall be equivalent to service of notice, etc.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accident; Injury.]

2. MASTER AND SERVANT ⟸405(1)—WORKMEN'S COMPENSATION ACT—KNOWLEDGE OF INJURY BY FOREMAN—EVIDENCE.

Evidence *held* to justify Industrial Accident Commission in concluding that employer's foreman had knowledge that some injury had been suffered, though no report of accident was made, within proviso of Workmen's Compensation Act, § 20, that actual knowledge of injury shall be equivalent to notice.

3. MASTER AND SERVANT ⟸393½—WORKMEN'S COMPENSATION ACT—MEDICAL ATTENTION — SELECTION OF PHYSICIAN BY SERVANT.

An injured servant is authorized, by Workmen's Compensation Act, § 15 (a), to select his own physician at the expense of the employer only where the latter has neglected or refused to provide the necessary services.

4. MASTER AND SERVANT ⟸393½—WORKMEN'S COMPENSATION ACT — EXPENSE OF MEDICAL ATTENTION.

In view of letter received by employer from injured servant, employer *held* under no duty to offer further medical attention, servant having previously consulted physician of his own choice, to render employer liable for expense of further treatment.

In Bank.

Proceedings under the Workmen's Compensation Act by Frank G. Pryor, opposed by William Leadbettor, employer, and the Georgia Casualty Company, insurer. Compensation was awarded, and the employer and insurer bring certiorari. Award annulled, and proceeding remanded to make a new award in accordance with the opinion.

Redman & Alexander, of San Francisco, for petitioners.

Christopher M. Bradley, of San Francisco, for respondent.

SLOSS, J. Certiorari to review an award of the Industrial Accident Commission. The applicant, Frank G. Pryor, was a bridge carpenter, employed by the petitioner Leadbettor. On July 22, 1916, he was working at Hermosa Beach. Pryor and a number of other men were handling a heavy "bent" made of steel, when the bent settled down, crushing Pryor to the ground and resting upon his back. An injury to the ninth dorsal vertebra resulted.

[1, 2] One of the points made by the petitioners, Leadbettor and his insurance carrier, is that the applicant failed to give timely notice of his injury, as required by section 20 of the Workmen's Compensation Act (St. 1913, p. 291). That section contains the proviso, however, "that actual knowledge of such * * * injury on the part of such employer, or his managing agent or superintendent in charge of the work * * * shall be equivalent to such service." The commission found that the employer had such knowledge, and we think there was evidence to warrant this finding. The foreman in charge of the work was present when the accident occurred. After visiting a physician for examination, Pryor returned to his work. Apparently he then thought, as did the foreman, that he had suffered no substantial injury. In fact, he rejected the foreman's suggestion that a report of the accident be made. The claim of the petitioners is, ac-

cordingly, that while the employer had knowledge of the occurrence of an accident, neither he nor his foreman was made aware that any injury to Pryor had resulted. There is, no doubt, a distinction between the terms "accident" and "injury," as used in section 20. Smith v. Ind. Acc. Comn., 174 Cal. 199, 162 Pac. 636. But the evidence is that for some time after his return Pryor was suffering pain, and was not fully able to do his usual work, and that these facts were known to the foreman. The commission was therefore justified in concluding that the foreman had knowledge that, however slight in degree, some injury had been suffered.

[3] A further contention is made on the allowance of charges for medical attendance. The statute (section 15a) imposes upon the employer the duty to provide medical, surgical, and hospital treatment, and, "in case of his neglect or refusal seasonably to do so," makes him liable for the reasonable expense incurred by the employé in providing the same. The intent of the act obviously is that the employer shall, in the first instance, have the right to designate and select the physicians who are to give treatment to the employé. The latter is authorized to make his own selection at the expense of the employer only where the employer has neglected or refused to provide the necessary service. City of Milwaukee v. Miller, 154 Wis. 652, 144 N. W. 188, L. R. A. 1916A, 1, Ann. Cas. 1915B, 847. See Mass. Bonding Co. v. Pillsbury, 170 Cal. 767, 151 Pac. 419. In this case Pryor made his own arrangements for medical and hospital aid, and the question is whether there was any evidence of neglect or refusal on the part of his employer to supply him with this service.

It appears that immediately after the accident Pryor went to see a physician, who merely examined him and permitted him to return to work. He had no further medical care while he remained at Hermosa Beach. Thereafter he went to Porterville, and while there consulted a physician, by whom he was sent to an osteopath for treatment. In October, 1916, some three months after the accident, Pryor left for Portland, Or. While there he incurred further bills for medical treatment and hospital service.

On the original submission of the application, the commission found that the employer had neglected to furnish medical and surgical services, and charged him and the insurance carrier with the value of all services rendered by physicians at the place of injury, at Porterville, and at Portland, Or. A rehearing was granted on the single issue of medical expense, and thereafter the commission made its final order, reciting that Pryor had, on the day following the accident, declined the medical treatment then tendered him by his employer, but that the employer had actual knowledge, while the applicant was in Porterville, that he was receiving further medical treatment, and had neglected thereafter to again offer medical treatment. Accordingly the employer was held liable for the charge of the physician consulted at the place of the accident, and for bills incurred in Portland, Or.

[4] No question is made of the propriety of allowing the charge of Dr. Hembree, the physician who first examined Pryor. No medical service was provided or tendered at the time of the accident, and the injured man was entitled to consult a physician of his own choice. The briefs discuss to some extent the question of whether the applicant's conduct on the next day was such as to relieve the employer from any obligation to then furnish medical service. On this question the commission, on its final hearing, decided in favor of the employer, and we must therefore start with the assumption that when Pryor went to Porterville the employer had not been guilty of any neglect upon which it could be charged with expenses thereafter to be incurred by him. At that time there was nothing to indicate to Leadbettor or the insurance carrier that Pryor either desired or needed medical attention. The conclusion that there was a subsequent neglect, and a consequent liability to pay for the bills incurred in Portland, is based upon the view that the employer had actual knowledge, while Pryor was in Porterville, that he was receiving further medical treatment, and that the defendants should, upon receiving such knowledge, have immediately offered medical treatment of their own choice. Pryor testified that he had told Leadbettor that he was receiving treatment at Porterville. But the commission found that the date of this communication could not be fixed, and made no allowance for the treatment obtained by Pryor at Porterville. On October 16th, when he was leaving for Portland, Pryor wrote a letter to Leadbettor. In it he said:

"As for myself, I was injured, while on a job at Hermosa Beach by a bent falling on me. My back was merely examined by Dr. Melvin [a physician at Porterville] and I was sent to an osteopath for treatment. Is the policy made out so I can send the bill to the insurance company, as it hasn't been paid yet?"

Under no reasonable interpretation can it be said that this letter conveyed to its recipient information that Pryor still required medical treatment for his injury. The plain import of the communication is that he had already received the needed treatment. The purpose of the communication is shown by the closing sentence, in which he inquires whether the bill may be sent to the insurance company for payment. The only fair interpretation of the letter is that the service had ended, and the claim on that account matured. There is no warrant for saying, in the face of this statement, that there rest-

ed upon the employer a duty to tender or supply additional medical treatment, or that his failure to do so constituted any neglect on his part. The award should therefore be modified by eliminating the provision charging the petitioners with liability for the surgical and hospital bills incurred in Portland.

The award is annulled, and the proceeding remanded to the Industrial Accident Commission for the making of a new award in accordance with the views expressed in this opinion.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; WILBUR, J.; RICHARDS, Judge pro tem.

---

179 Cal. 552

## In re FLINT'S ESTATE. (Sac. 2854.)

(Supreme Court of California. Jan. 3, 1919.)

1. WILLS ⟸324(2, 3) — UNDUE INFLUENCE AND INSANITY—QUESTIONS FOR JURY.

On petition for revocation of probate of will on account of undue influence and unsoundness of mind, if there was substantial evidence on either subject, it was duty of court to submit case to jury.

2. EVIDENCE ⟸568(2) — OPINION — INSANITY OF TESTATOR—WEIGHT.

On petition for revocation of probate of will for undue influence and unsoundness of mind, opinion evidence of testator's daughter, a trained nurse, and business acquaintances, that testator was of unsound mind, was of no greater value than the reasons given in support.

3. WILLS ⟸324(2) — INSANITY — QUESTION FOR JURY.

On petition for revocation of probate of will for undue influence and unsoundness of mind, opinion evidence of daughter of testator, a trained nurse, and business acquaintances, that testator was of unsound mind, *held* insufficient alone to require submission of issue to jury.

4. EVIDENCE ⟸65 — PRESUMPTION OF KNOWLEDGE OF LAW BY TESTATOR.

Testator is presumed to know that his wife would be entitled to one-half of all his property, which was community property, as acknowledged by him in his will.

Department 2.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

In the matter of the estate of Daniel Flint, deceased. On petition for revocation of probate of the will by Russell Flint. From judgment of nonsuit, petitioner appeals. Affirmed.

C. E. McLaughlin, C. P. McLaughlin, Arthur M. Seymour, and Sheridan Downey, all of Sacramento, for appellant.

Devlin & Devlin, of Sacramento, for respondent.

WILBUR, J. The will of the decedent having been probated, appellant petitioned for its revocation, alleging undue influence and unsoundness of mind. Issues were joined, and upon the trial thereof a judgment of nonsuit was rendered, and Russell Flint appealed, claiming that there was sufficient evidence of unsoundness of mind and of undue influence to be submitted to a jury.

[1] If there was substantial evidence on either subject, it was the duty of the trial court to submit the case to the jury. No useful purpose will be subserved by a lengthy statement of the evidence bearing upon the question of unsoundness of mind.

[2, 3] There was evidence of the daughter, of a trained nurse, and business acquaintances, that, in their opinion, the decedent was of "unsound mind." This evidence, however, as we have heretofore in effect held (Estate of Collins, 174 Cal. 663, 164 Pac. 1110; Estate of Purcell, 164 Cal. 300, 306, 128 Pac. 932), is of no greater value than the reasons given in support of the opinion, and is not alone sufficiently substantial to require the presentation of the case to the jury. The decedent was about 85 years old. The will was drawn three months and five days before he was accidentally killed while crossing a railway track. At the time of the execution of the will, the wife of the testator (to whom he had been married 65 years) and their six sons and two daughters were living; their ages ranging from 36 to 58 years. The wife predeceased her husband, dying about one month after the execution of the will. The point most strongly insisted upon by appellant is that the will itself, when compared with the actual facts concerning the decedent's property and his dealings with his wife and children, show that the will was the product of insane delusions directly operating upon him at the time it was executed. The provision in regard to the wife is as follows:

"Secondly, all of my property, both real and personal and mixed of which I am now possessed is the community property of myself and my wife Mary E. Flint, but inasmuch as I have heretofore deeded to her valuable property as and for her own separate property, the income of which is more than she will need for the remainder of her life I make no provision for her in this will, my intention being at the time of the execution of said deeds that they should be an advancement of her interest and title in my estate. Should she, however, decline to accept said property so deeded to her as her share and demand her community share of my estate, then I desire such property to be appraised and considered as part of her share of said community property."

The provision in regard to the daughters is as follows:

---

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

"I declare that my daughters Lillian Bruner and Alice Lampert have each heretofore received advancements in cash from me on their shares of my estate and for that reason I give and bequeath them only the following amount, to wit: To the said Lillian Bruner the sum of $5,000; * * * to the said Alice Lampert the sum of $5,000." It is provided that these amounts should be a lien upon real estate left to the sons, and to be paid in annual installments of not less than $1,000, but without interest. "* * * my intention being not to hamper them (the sons) in the enjoyment of their said real property by the immediate payment of said large legacy."

[4] Evidence was introduced on behalf of respondents tending to show that at the time the will was executed the decedent had conveyed to his wife their residence, consisting of a house and lot valued at $9,500, and that he had given each daughter upon her marriage a house and lot, and that from time to time he had made small gifts to his daughters. The estate of the deceased was appraised at $180,467. With regard to the provisions for the wife in the will, it will be observed that she takes, notwithstanding the will, one-half of all the property by reason of its community character. This seems to be fully recognized by the testator, who specifically declares that all the property "of which I am now possessed, is the community property of myself and my wife, Mary E. Flint." It is recognized also that she was entitled to "demand her community share of my estate." The legal effect of this provision of the will was that the wife was entitled to the $90,000 interest in the estate of the deceased, and that it was his desire that the home place, theretofore deeded to her, should be considered in making up her one-half. We need not pause to inquire as to the effect of this express desire on the part of the decedent with relation to the property theretofore conveyed to the wife. Appellant's claim with relation to this clause is that it seems to be founded upon a belief on the part of the testator that he had theretofore conveyed to his wife property, "the income of which is more than she will need for the remainder of her life," and also the suggestion in the will that the deed to her of this property had been made as an equivalent of her half interest in the community property. With reference to the question of the income of the property theretofore conveyed to the wife being sufficient for her support, it may be said that at the time the will was executed the wife was and had for some time been in a hospital, having been operated upon for cancer of the face; and, from the circumstance that she had been bedridden for some time and unable to use even a wheeled chair, it may be inferred that her condition was very serious. And, while it is true, as testified by appellant, that the will should be read in the light of the circumstances existing at the time it was executed, and not in view of the fact that the wife died before the testator, it is nevertheless obvious that, owing to her extreme age and physical condition, her wants in this world were not for long. The expectancy of persons of her age was about three years. The decedent does not say that the property conveyed to his wife was of equal value to her share in the community property, as seems to be contended by appellant, but that it was his intention at the time of the execution of the deeds "that they should be an advancement of her interest and title in my estate." It is evident from an examination of the will that it was drawn by an attorney. The language used is not the language of the decedent, but of the attorney.

There is not the slightest evidence that these statements in the will, however erroneous they may have been, were the product of an insane delusion. There is not the slightest evidence, other than the language of the will itself, that the decedent believed that he had conveyed to his wife anything other and different from that which he had actually conveyed to her. There is no evidence from any source that he believed the property conveyed to his wife would yield any larger income than it would in fact yield. There is no evidence whatever that decedent had any erroneous belief concerning his property which he adhered to against reason and without foundation. It is useless to speculate upon the reason why the decedent made the statements that he did concerning his bequest to his wife. He is presumed to know, and the evidence is that he did in fact know, that she would be entitled to one-half of all he possessed, and that this would have been ample for her maintenance is conceded. It is also true that an investigation of the amount of gifts of the decedent to his daughters, their adequacy in view of the size of his estate, speculation as to whether or not $5,000 should be considered a "large" or small amount, interesting though they may be, are not determinative of the question of an insane delusion. There is no evidence whatever that the testator believed that he had given either of his daughters a dollar more or less than he had in fact given to them. There is no evidence to show that he had made other statements concerning his gifts to them which were incorrect. There is no evidence of the persistence of an erroneous belief, such as is characteristic of an insane delusion. Estate of Kendrick, 130 Cal. 360, 364, 62 Pac. 605. Much is said by the appellant concerning the inadequacy of the provisions for the wife and the two daughters. Such an argument, no doubt, is entitled to due consideration. But the decedent had a perfect right to dispose of his property as he saw fit. If we assume, as it is contended we should, that the testator believed that his

wife would survive him, as has already been pointed out, her half of the community property would be ample for her maintenance, and at her death she could make such provision for the daughters as seemed to her just and proper. In addition to the statements contained in the will, there is evidence of a number of witnesses tending to prove that the decedent was forgetful, penurious, irritable, and unreasonable in some of his conduct. It is suggested that his treatment of his wife was unfeeling, in that he manifested little interest in her while in the hospital, and apparently begrudged the expense of a wheeled chair and of hospital attention. It would be useless to attempt to analyze the reason and motive for the conduct of the testator. It is sufficient to say that his conduct must be construed in the light of the presumption of sanity, and that the evidence falls far short of proof that the decedent entertained any insane delusions whatever, or that he was suffering from general insanity or incompetence. He managed and supervised the household, kept up his interest in the management of two large ranches which he owned, but which the sons were operating, deposited in and drew large amounts of money from the bank, was strong-minded in his dealings with others, but realized that his mental powers were waning, sometimes saying that he was forgetful. In short, the evidence proves, what his age indicates, that his mental and physical powers were waning.

Without further analysis of the testimony, and without discussion of the well-settled principles of law so often declared by this court on this subject, we conclude that the proof of incompetence was too unsubstantial to justify its submission to a jury. There was no evidence of undue influence operating upon the decedent at the time of the execution of the will.

Judgment affirmed.

We concur: MELVIN, J.; LORIGAN, J.

---

179 Cal. 510

## In re MORTON. (Cr. 2202.)

(Supreme Court of California. Dec. 31, 1918. Rehearing Denied Jan. 30, 1919.)

1. ATTORNEY AND CLIENT ⇐57 — DISBARMENT PROCEEDING—WEIGHT OF EVIDENCE—REVIEW.

In disbarment proceedings, as in other cases, a court of review cannot determine the weight to be given conflicting evidence, but such determination is the peculiar and exclusive province of the tribunal wherein the hearing is had.

2. ATTORNEY AND CLIENT ⇐53(2)—DISBARMENT—ACCOMPLICE—CORROBORATION.

In proceeding to disbar attorney for having knowingly received from his clients funds stolen by them, the uncorroborated testimony of such clients was sufficient to support judgment of disbarment; Pen. Code, § 1111, requiring corroboration of an accomplice, not being applicable, since it defines an accomplice as one liable to prosecution for the "identical offense charged," and the offense of which the clients were guilty is different from that of which the attorney was accused.

In Bank.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Proceedings by the Los Angeles Bar Association for the disbarment of W. Ona Morton, an attorney and counselor at law. From a judgment of disbarment respondent appeals. Affirmed.

Nathan Newby, Matteson B. Jones, and Claude B. Morton, all of Los Angeles (H. M. Barstow, Will H. Anderson, Tom C. Thornton, and Harry A. Hollzer, all of Los Angeles, of counsel), for appellant.

Leonard B. Slosson and Richard J. Culver, both of Los Angeles, for Los Angeles Bar Ass'n.

VICTOR E. SHAW, Judge pro tem. Upon an accusation filed by the Los Angeles Bar Association, charging W. Ona Morton, an attorney at law, with a violation of his professional duties, a hearing was had by the superior court of Los Angeles county, which caused a judgment to be entered, depriving the accused of the right to practice as an attorney and counselor in the courts of the state of California. From this judgment the accused has appealed.

No attack is made upon the sufficiency of the accusation, which clearly charged the accused with the commission of acts which, if true, fully warranted the rendering of the judgment of which he complains.

Briefly stated, the facts in support of the charge made are as follows: Some time in August, 1917, one Robertson, then assuming the name of Butler, and his wife, robbed a man by the name of Smith of about $1,000. They left Los Angeles, where the crime was committed, going to Arizona, where they, on September 18, 1917, deposited $800 of the stolen funds in three different banks. They returned to Los Angeles on September 22, 1917, where they were immediately arrested and at once confessed their guilt to the arresting officers. Being committed to the county jail, they, on the day following, sent for Morton, to whom they admitted the fact that they had stolen the money, and also informed him that they had made a confession of the theft. As a result of the negotiations between Robertson and Morton, the latter was employed to defend them, and, being informed of the deposit of the stolen funds in said banks, he induced them to draw

a check upon one of the accounts and deliver the same to him, by means whereof he obtained as his fee, $300 of such stolen funds. Thereafter, by suggesting that they should be released upon bond, he induced them to draw another check in favor of one D. M. Hidey for $300, of which sum $200 was to be paid him for securing the bond and $100 of which he was to hold for the use of Robertson and his wife. A short time thereafter, induced by the same instrumentality, Robertson drew another check for $200, the balance of the deposit, in favor of one Hayes, with which he was assured better board while in jail, the unused portion thereof to be paid to him upon their release. Under Morton's advice, Robertson and his wife entered a plea of not guilty, which later, likewise under his advice, was withdrawn and a plea of guilty entered, after which they applied to the court for probation. After their entering the plea of guilty, and pending the proceedings for probation, Robertson wrote a letter to one of the judges of the superior court, purporting to inform him of what had occurred, whereupon he and his wife were brought before the judge, and, under oath, examined with reference to the transaction had with Morton and matters in connection therewith. At the hearing of the disbarment proceedings, Robertson and his wife, both upon direct and upon an exhaustive cross-examination, testified in great detail as to the occurrences, and as to the relationship with Morton, his knowledge of their thefts, and that the moneys secured from them, by and through him, were the funds stolen from Smith, all of which he obtained and accepted, knowing the same to be stolen property, and advised them to give false testimony as to their disposition of the same.

[1] Basing his contention upon the fact that a proceeding for the disbarment of an attorney is in the nature of a criminal proceeding (In re Alameda County Bar Ass'n, 170 Pac. 432), counsel insists that, to warrant disbarment, the evidence, like that required to justify a verdict of guilty in a criminal case, must be clear, positive, and such as to establish both the motive and commission of the act charged beyond a reasonable doubt. In support of this proposition he cites a number of authorities from other jurisdictions, an examination of which, however, shows that none of them involved cases on appeal where the court was called upon to review the sufficiency of the evidence in support of the finding, but what was said therein related to proceedings of disbarment over which the court, in some of the cases having recourse to a referee in the taking of the evidence, assumed original jurisdiction, acting as a trial court, as in Re Houghton, 67 Cal. 511, 8 Pac. 52. None of them constitute authority for appellant's claim, when applied to a court charged with the duty of reviewing the testimony, but do announce the rule that in such cases the accused should not be convicted unless the trial court is convinced, by clear and satisfactory evidence, or, as said in some cases, beyond a reasonable doubt, of his guilt. However this may be, this court, in a like case involving a like question (Matter of Danford, 157 Cal. 425, 108 Pac. 322) has, in effect, held that in disbarment proceedings, as in other cases, a court of review cannot determine the weight to be given conflicting evidence, but that such determination is the peculiar and exclusive province of the tribunal wherein the hearing is had.

Conceding, as claimed by appellant, that Robertson and his wife were confessed thieves, and had theretofore, in an inquiry concerning their crime, lied to the court and perjured themselves, all of which, at the hearing in this proceeding, they fully, freely, and frankly admitted, the trial court, notwithstanding their story was contradicted by the accused, a lawyer theretofore of conceded good character and standing, accepted their testimony as true and disbelieved that of accused.

[2] In their reply brief, counsel insist that the accusation against appellant charged him with the commission of a felony, wherein Robertson and his wife were accomplices, and that, as provided in section 1111, Penal Code, a conviction cannot be had upon the uncorroborated testimony of an accomplice who is defined to be "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." Assuming the accusation charged appellant with the commission of acts which constituted a felony, namely, that of receiving personal property, knowing the same to have been stolen, Robertson and his wife could not be deemed liable to prosecution for such offense, since they were the ones who committed the theft. The case of People v. Kraker, 72 Cal. 459, 14 Pac. 196, 1 Am. St. Rep. 65, upon which appellant relies in support of his proposition, is not in point, for the reason that, among others, it was decided before the amendment of 1915 of section 1111, which added the clause above quoted.

Moreover, the proceeding wherein these witnesses testified was a prosecution for an offense alleged to have been committed by the accused in his professional capacity as an officer of the court, the penalty for which, upon conviction, is the depriving him of the right to practice as an attorney and counselor in the courts of this state, an offense with which, since they were not attorneys at law, the witnesses could not be deemed liable to prosecution.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; WILBUR, J.; MELVIN, J.; RICHARDS, Judge pro tem.

179 Cal. 472

## PARKS v. PARKS. (L. A. 4491.)

(Supreme Court of California. Dec. 30, 1918.)

1. TRUSTS ⊂⊃88—PAROL EVIDENCE.

Generally the true intent and purpose of parties in taking a conveyance in their joint names or in that of one of them can be investigated and determined, unless interests of bona fide purchasers have intervened.

2. TRUSTS ⊂⊃81(4) — RESULTING TRUST — JOINT CONVEYANCE.

Where mother and son contracted for purchase of land the son paying one-twelfth of price, which mother subsequently repaid son, the son, upon being joined with mother as grantee, took legal title in trust for mother under Civ. Code, § 853.

3. DESCENT AND DISTRIBUTION ⊂⊃98—ADVANCEMENT—JOINT CONVEYANCE.

Where son joined with mother in contract for purchase of land, but contributed none of the price, that mother did not have deed, made jointly to herself and son, changed, did not disclose intention to make gift to son of half interest in nature of advancement, where son was not held in greater affection than other children.

Department 2.

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by Isaac Parks against Jesse Parks. From judgment rendered and from order denying defendant's motion for new trial, defendant appeals. Affirmed.

John M. Clayton, of Hemet, for appellant.

George A. French and Miguel Estudillo, both of Riverside, for respondent.

LORIGAN, J. Plaintiff and defendant are brothers and sons of Frances E. Parks, who died intestate in December, 1912, leaving considerable estate. Her personal property she left to other of her children, and devised to the plaintiff and defendant, in equal shares, all her real property, which thereafter was inventoried in her estate as consisting of 600 acres of land in Riverside county—referred to in the evidence as section 29—and subsequently distributed in said estate to plaintiff and defendant in equal shares. Nearly a year after distribution plaintiff brought this action for a partition of said 600 acres of property, asserting equal undivided ownership therein in himself and defendant. In his answer, however, defendant set up a claim of ownership to three-fourths of the property, and the extent of ownership between the parties is the only question involved in the case. The finding of the court was that each of the parties was the owner of an undivided one-half of said property and awarded a judgment of partition, from which judgment and an order denying his motion for a new trial defendant appeals.

The facts in this case are few and simple. The land in question was originally a part of what were known as "railroad lands" of the Southern Pacific Railroad Company, and about 1889—the exact date not shown—a contract for the purchase of said section 29 for $3,000 was negotiated between said railroad company and Mrs. Frances E. Parks, said mother of the parties. What the terms of payment were to be is not shown, other than it appears they were to be made in two installments. A written contract of purchase from the railroad company was made and taken in the joint names of Mrs. Parks and the defendant, Jesse Parks, and of the first payment made on the purchase price of the land said Jesse Parks advanced $250, the rest, which must have amounted to some $1,000, being paid by his mother. Mrs. Parks then went into possession and control of the property, though it was used as a common pasturage for the stock of all the members of the family. The second and final payment on the land to the railroad company, which exceeded some $1,800, was made about 1893 by Mrs. Parks alone. Long prior to said last payment Mrs. Parks had repaid to Jesse Parks and he had accepted the $250 which he had handed to his mother when the contract with the Southern Pacific Railroad Company for the purchase of the land was originally made. Before this repayment to him Jesse Parks had been assisting in the payment of the taxes on the land, but afterwards he made no further advancement for that purpose, and for 20 years prior to her death, Mrs. Parks, in addition to having full charge and control of the property, had alone been paying the taxes on it. Although the final payment on the property was made to the railroad company about 1893, no deed to the land was made until about April 9, 1897 (a patent to the land not having probably been issued by the United States to the railroad company until about that date), and the deed which was then made by said company ran to Frances E. Parks and the defendant, Jesse Parks, the original parties in the contract of purchase from the railroad company. This was the situation in which the title stood at the time of the death of Mrs. Parks and the entry of the decree of distribution in her estate, and it is quite evident therefrom the attitude which each party takes in this litigation. Plaintiff claims that his mother was in legal effect the sole owner of the entire tract of 600 acres of land at her death, and that he became the owner of an undivided one-half thereof through her will and the decree of distribution in her estate. The claim of ap-

pellant is that he is the owner of an undivided three-fourths of the 600 acres—an undivided half under the deed from the railroad company to his mother and himself, and an undivided one-quarter in addition under the decree of distribution of the undivided half interest of his mother to himself and the plaintiff.

The trial court obviously concluded from the evidence that the property belonged to Mrs. Parks alone at the time of her death notwithstanding the deed from the railroad company to appellant, her son Jesse, and herself, and that the only title acquired by both parties to this action was derived solely under the will and decree of distribution in the estate of their mother, and we are satisfied that this conclusion of the trial court was fully warranted by the evidence in the case independent of any consideration of the question of the conclusiveness of the decree of distribution in the estate of the mother on title to the property, a matter asserted by respondent and denied by appellant, but a question which we find unnecessary to discuss or pass on.

[1] There is, it is true, evidence in the case of a deed from the Southern Pacific Railroad Company to Mrs. Parks and the appellant, Jesse Parks, to the 600 acres in question. The existence of this deed in his favor at the time of the death of his mother was prima facie evidence of title in him. But it was not conclusive on the question of title. The general rule is that the real nature of the transaction concerning property conveyed, the true intent and purpose moving parties in taking a conveyance to property in their joint names, or in that of one of them, can be investigated and determined unless where in good faith interests of third parties have intervened and would be injuriously affected. It may be shown that the taking of a conveyance in the name of the grantee, or one of them, was a mistake, or that it was a matter merely of convenience, or as security for a loan, or was taken under such circumstances as created a resulting trust or trust of some other character. Such an inquiry was the main feature in this case and the evidence shows quite satisfactorily, we think, that while, in fact, the contract for the purchase of the property was made with the railroad company by appellant and his mother, and years afterwards a deed made to both of them, it was never the intent of appellant or his mother that appellant should acquire a legal title to any portion of said property, and that appellant, though a party to the conveyance, never asserted or claimed any interest in it until long after the death of his mother and the settlement of her estate, and then only when respondent brought this action for a partition of the property. Even then his claim under the deed from the railroad company is not a definite and emphatic one, but rather of a hesitating and indefinite character.

Considering now the evidence in the case. It appears from the record that the appellant is the only one who could speak fully of the arrangement, if any, between his mother and himself relative to this land and their intentions respecting it, and his testimony is not only meager, but, as to those matters, as well as in other respects, unsatisfactory. We get no information from him how he became connected with his mother as a party to the original contract with the railroad company; how, if he was to acquire one-half of the property, his payment of $250 was but one-twelfth of the purchase price; whether the $250 was not really a loan to his mother to be used by her with her own larger funds in making the first payment on the land; how she came to return him the said $250, or why he accepted it if it was a part of the purchase price and not a loan; and why right thereafter he ceased advancing anything further towards payment of the taxes. In fact, he does not undertake to enlighten us on those important matters at all. As to the deed from the railroad company, all the evidence we have on that subject is that Mrs. Parks paid the entire purchase price for the property, having refunded to appellant the $250 he advanced, and that the deed was made by the railroad company some 7 years after final payment and ran—the same as the contract did—to both Mrs. Parks and the appellant. We stated that the claim of appellant under this deed was not explicit and definite. In that respect it appears from his testimony that he was making a claim in this case that his mother had made a deed in his favor at some time to all of section 29; that she promised to give him the whole section and that he had seen a deed made by her years before her death whereby she had done so. His own assertion of having seen such a deed or of such a promise having been made is all we have on the subject. No such deed was produced. No member of the family or any one else seems to have heard of such an instrument, and certainly no deed was ever delivered by his mother to appellant. Having testified as to the return to him by his mother of the $250 advanced by him when making the original payment on the purchase price of the land, he was asked by the court:

"Q. How do you claim to own one-half interest in this if you got your money back? A. Well, I claim I seen a deed that mother gave me of all of section 29—600 acres. * * * I claim the property because I seen the deed she gave me of all the land. I claim it on the railroad deed, the railroad deed and then this other deed that is now missing."

The only reasonable view to be taken from the evidence as far as the payment of the $250 by appellant is concerned, and the incorporation of his name in the contract of purchase, and the view doubtless taken by the trial court, is that the payment of the $250 was only a loan by appellant to his mother, and the insertion of his name in the contract was made simply as evidence thereof and to secure its repayment. The payment for the property might not be consummated for some years, and in case anything should happen to the mother during that time, and a question should arise among her heirs as to payments made and interests in the property, the right of appellant would be declared. That this money was not to be deemed a payment by appellant as a purchaser of the property with his mother is clear from the fact that she paid him back his advancement and he accepted it without any protest or question, but that its repayment to him was the proper and expected thing. His conduct in that respect is inconsistent with the idea of his being a purchaser with his mother. When he got his money he considered himself out of the transaction. He thereafter paid no taxes, and he assumed no control over the property, nor did he assert or claim any interest in it until this action was commenced.

[2] There is less room for the assertion by him of real actual ownership under the deed. It is true that it gave him a paper or record title, but that is all he can assert. His real interest under the deed would not be any broader than his interest might have been under the contract which the deed followed. He never paid any valuable consideration, or, in fact, any consideration at all, for the title under either the contract or deed. In fact, he does not claim that he paid any, asserting practically as to the deed that by allowing it to be made in his name his mother intended thereby to make him an advancement to the extent of one-half of the property. It does not appear that it was through any direction of the mother that the deed was made by the railroad company to both herself and the appellant. It will be observed that the deed was not made until several years after the final payment for the land, and was doubtless issued by the railroad company as soon as it obtained a patent to the land. In doing so it followed the contract, as it would have doubtless done anyhow, unless there was some assignment showing to it that appellant had disposed of his interest under the contract to his mother. It is true that it would have been more regular for the mother to have had the deed issued to herself. The only effect, however, of a failure to do this was, under the circumstances, to vest in appellant an apparent title to an undivided interest in the property. This was the apparent effect, but the legal effect was to make him a trustee for his mother under the familiar doctrine of a resulting trust, which occurs where the consideration for the purchase of real property is paid by one person and the title thereto is taken in the name of another. Civ. Code, § 853. All the purchase price of this property was paid by the mother, and the legal title to half of it taken in the name of appellant. This was the simple transaction; and, this being all that was shown in the matter, the principle of a resulting trust applies under which the apparent title which appellant held was held solely in trust for his mother.

[3] While appellant does not question the rule of resulting trusts, he contends that it should not apply here because the fact of having the deed run to both his mother and himself must be treated as disclosing an intention on her part to make a gift to him of one-half the property in the nature of an advancement. But it does not appear that she had the deed made to him. It was doubtless simply made by the railroad company after it received its patent running to the parties appearing on the original contract of purchase. The most that appears is that the mother let it stand that way. There is no evidence in the case warranting any inference that the mother had a greater affection for the appellant than for her other children, or that his circumstances of life were such that an advancement to him above her other children might naturally be expected from her, nor is there evidence of anything he ever did with respect to the property or for or on behalf of his mother or her interests which would prompt her to treat him with more consideration than her other children. Nor did the facts that she paid him back his money, never demanded a conveyance from him after the making of the deed by the railroad company, or bring suit to quiet title or have a trust declared, establish the advancement theory. The mother knew the true fact as did the appellant. Both knew that appellant had no real interest in this property, as did also the rest of the family. The family seem to have lived in entire harmony, the mother having confidence in all her children. She, if she ever gave the matter a thought, rested content that appellant would make no claim under a conveyance which, while it purports to give him an interest in the property, in truth did not do so, a fact which he recognized in her lifetime by never making any claim of interest under it. It is not at all an uncommon thing for parents who repose that confidence in their children to fail to take every precaution with respect to their property which may obviate subsequent disputes among the heirs. It does, however, sometimes occur.

From these considerations we are satisfied that the trial court was warranted in concluding, notwithstanding the conveyance from the railroad company to appellant and his mother, that in effect the real and true title to the property, both equitable and legal, was vested in Mrs. Parks at the time of her death, and that by her will and the decree of distribution in her estate, and solely thereby, appellant and respondent succeeded each to an undivided one-half of section 29, or 300 acres each, and that the court properly entered a judgment of partition.

The judgment and order appealed from are affirmed.

We concur: MELVIN, J.; WILBUR, J.

---

179 Cal. 507

PEOPLE v. SHORTRIDGE. (Cr. 2189.)

(Supreme Court of California. Dec. 31, 1918.)

1. HOMICIDE ⇐203(7)—DYING DECLARATIONS —ADMISSIBILITY.

Where a surgeon's testimony showed that a wound inflicted by defendant upon deceased was fatal, and district attorney, before questioning deceased, asked if his statement was made because he believed he was going to die, to which he replied affirmatively, deceased's statement then made to district attorney was admissible as a dying declaration.

2. HOMICIDE ⇐338(3)—ADMISSION OF DYING DECLARATION—HARMLESS ERROR.

Any error in the admission of deceased's statement as a dying declaration was not prejudicial to defendant, where his own statements, in the presence of different persons and at different times, as to the subject-matter of the declaration, were substantially identical with it.

3. CRIMINAL LAW ⇐547(3)—BEST EVIDENCE —PRELIMINARY TRIAL—STATEMENT OF ACCUSED.

Where accused, after warning by magistrate at his preliminary hearing that he might make a statement, but that it might be used against him at trial, made a free, voluntary statement, taken down as required by Pen. Code, § 869, a witness present at hearing might testify as to such statements, against objection that record was the best evidence.

4. CRIMINAL LAW ⇐829(1)—REQUESTED INSTRUCTIONS—GIVEN INSTRUCTIONS.

In a prosecution for murder, the refusal of defendant's requested instructions, though mainly correct statements of law, was not error, where the jury were elsewhere fully, fairly, and favorably instructed thereon.

In Bank.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Will Shortridge was convicted of murder in the first degree, and sentenced to execution, and from the judgment and from an order denying his motion for new trial, he appeals. Affirmed.

Oscar Hudson, of San Francisco, for appellant.

Ray Manwell, of Marysville, U. S. Webb, of San Francisco, J. Charles Jones, of Sacramento, and Edward B. Stanwood, of Marysville, for the People.

VICTOR E. SHAW, Judge pro tem. Following his conviction of murder in the first degree, defendant was sentenced to execution. He appeals from the judgment so pronounced, and from an order denying his motion for a new trial.

Briefly stated, the facts surrounding the homicide, and concerning which there is no dispute, are as follows: At about 2:30 o'clock on the morning of May 7, 1918, James Mock, a police officer of Marysville, was informed that defendant had robbed a person in a certain rooming house, and started out to apprehend him. Finding defendant in some brush near the railroad track, he placed him under arrest, and with his prisoner proceeded a distance of some 30 or 40 feet, when he stopped and whistled twice for the apparent purpose of attracting attention of other officers engaged in the search for defendant. Receiving no reply, he, in accordance with an expressed intention so to do, proceeded to place handcuffs upon defendant, who strenuously resisted his efforts, as a result of which the handcuffs were either knocked or dropped upon the ground. Thereupon the officer drew his gun, which, in the scuffle that ensued, defendant secured, and with it, after backing away some distance, fired the shot that caused the death of Mock about seven days thereafter. The defense was based upon insanity and self-defense.

As grounds for a reversal of the judgment, appellant insists that the court committed prejudicial error in, first, receiving in evidence a statement of the deceased, purporting to be offered as his dying declaration, without proper foundation laid therefor; second, that the court erred in admitting parol evidence of the statements made by defendant at his preliminary hearing before the magistrate; and, third, that he was prejudiced by the rulings of the court in refusing to give certain instructions requested by him.

[1, 2] As to the first alleged error, it was made to appear by the testimony of the surgeon that this wound, the character and seriousness of which he described, was a fatal one, and the stenographer who took the statement testified that the district attorney, prior to questioning deceased, said, "Jim, you know what statement you make is made because you believe you are going to die," to which he assented by replying, "Yes, sir." Upon

this showing, defendant's objection to the reception of the statement in evidence, as a dying declaration of the deceased, was overruled, and the same admitted. While the evidence is meager, nevertheless it sufficiently appears from the statement of the district attorney, which deceased adopted as his own, that he later made the declaration and answers to the questions put by the district attorney, believing that his wound would prove fatal, and under a sense of impending death. However, even if this were not so, we would be constrained to hold that defendant suffered no prejudice by reason of the ruling, for the reason that his own statements, in the presence of different persons, and at different times, made by him as to the subject of the declaration, were in substance identical therewith.

[3] As to the second alleged error, it appears that at defendant's preliminary hearing, he, after being informed of his rights by the magistrate, was told that, in addition to his right to question the witnesses on the part of the state, he could make any statement he desired, but that such statement must be free and voluntary and subject to its use against him in the trial court. Defendant's objection that such statement so made at said time by defendant was taken down by the reporter as required by section 869, Penal Code, and hence the record thereof was the best evidence, was overruled, and Richard Barrett, present at said hearing, was permitted to testify to certain statements so made at the time by defendant. We perceive no merit in appellant's contention. As shown by the record, the statements as to which Barrett testified were voluntarily made by defendant, and they were subject to the same rules and mode of proof as though made elsewhere than at the preliminary hearing. Counsel for appellant has attached to the record herein a transcribed copy of the deposition taken at the hearing, upon which he attempts to argue that defendant's preliminary hearing was unfair, and calculated to deprive defendant of some of his lawful rights. But such deposition was not offered in evidence at the trial, and hence has no place in the record, and cannot be considered here for any purpose.

[4] Defendant requested the court to give to the jury 28 separate instructions, all of which were refused. His counsel, without argument, other than that he believes them to be correct statements of the law, assigns as prejudicial error 16 of the rulings so made. No purpose could be served by an extensive review of the instructions so refused. Suffice it to say that we have, owing to the gravity of the case, with painstaking care, considered each and every one of them; that, as claimed by counsel for the appellant, they are, in the main, correct statements of the law applicable to the case as tried, but in so far as correct, and upon every question presented by the evidence which could possibly avail defendant, the jury were elsewhere fully, fairly, and, we may say as to defendant, favorably instructed.

As appears from defendant's own testimony, the case is one where a police officer, knowing of, or having good reason to believe, that defendant had committed a felony, arrested him therefor, using no unnecessary force in so doing, and the latter, for the sole reason that he objected to having handcuffs placed upon him, resists the officer, takes his gun from him, with which, because the officer was using his club to protect himself and subdue his prisoner, he fires the fatal shot and makes his escape.

In addition to the plea of insanity, defendant urged, at the trial, that he was justified in killing deceased in self-defense, both of which questions, upon proper instructions, were submitted to the jury, which found adversely to him. The sufficiency of the evidence to warrant its verdict is not questioned.

The judgment and order denying a new trial are affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SLOSS, J.; MELVIN, J.; RICHARDS, Judge pro tem.

---

179 Cal. 514

Ex parte McCREADY. (Cr. 2216.)

(Supreme Court of California. Dec. 31, 1918.)

1. HABEAS CORPUS ⊜69—FEDERAL COURT—SUPERIOR COURT—PENDENCY OF HABEAS CORPUS PROCEEDINGS.

Where superior court having imposed void sentence pronounced a second sentence, pendency of habeas corpus proceedings in United States District Court for purpose of having first sentence declared void did not invalidate second sentence under Rev. St. U. S. § 766 (U. S. Comp. St. § 1292), superior court treating first judgment as void in pronouncing second sentence, not acting in any matter pending and in process of being heard in United States District Court.

2. COURTS ⊜97(5) — DECISIONS — FEDERAL COURTS—SUPERIOR COURT.

Decisions of federal courts of last resort construing and applying Rev. St. U. S. § 766 (U. S. Comp. St. § 1292), providing that, pending habeas corpus proceedings in federal court, any proceeding in any state court against prisoner for any matter heard and determined under habeas corpus writ shall be void, will be deemed controlling by the Supreme Court in action involving applicability of such statute.

In Bank.

In the matter of the application of L. D. McCready for a writ of habeas corpus. Writ dismissed, and petitioner remanded.

---

L. D. McCready, in pro. per.

U. S. Webb and John H. Riordan, both of San Francisco, for respondent.

RICHARDS, Judge pro tem. A writ of habeas corpus was issued upon the petitioner's application and hearing had thereon. The admitted facts of the case are these: During the year 1917 the petitioner pleaded guilty of the crime of rape in the superior court of the county of Los Angeles, Cal., and by the judgment of said court entered upon such plea was on August 1, 1917, sentenced to an indeterminate term in the state prison at San Quentin of not less than 1 year nor more than 50 years; and was on August 3, 1917, confined in the said state prison under such judgment and sentence. After serving therein for a period of about 10 months, the petitioner herein applied for a writ of habeas corpus to the District Court of the United States for the Northern District of California, claiming that said judgment and sentence were void, for the reason that the offense to which he had pleaded guilty was committed prior to the taking effect of the statute providing for indeterminate sentences. The said District Court returned the petitioner to the custody of the warden of the said state prison pending the determination of that matter; and thereupon and on May 21, 1918, the petitioner herein was taken before the superior court of the said county of Los Angeles and was there and by the judgment of said court resentenced to be imprisoned in said state prison for a term of 12 years; and on May 25, 1918, was again received and retained in said state prison by virtue of said second judgment and sentence. Thereafter and on August 23, 1918, the said District Court of the United States dismissed the said application of the petitioner for a writ of habeas corpus. Thereafter and on October 25, 1918, the petitioner filed the pending application for a writ of habeas corpus in this court.

Two points are made by him upon the hearing thereon. The first of these is that the first judgment and sentence of the petitioner being void under the authority of In re Lee, 171 Pac. 958, the superior court which had pronounced the same had no jurisdiction to pronounce a second judgment and impose a second sentence in his case, and hence that the said second judgment and sentence under which he is now being held is also void. The action of the said superior court in the matter of having the petitioner herein returned for a second judgment and sentence was taken under and by virtue of the express suggestion of this court in the case of In re Lee, supra, as applicable to all similar cases, which suggestion we have since approved in the case of In re Fritz, 177 Pac. 157, decided December 18, 1918, and to which we adhere in the instant case.

[1, 2] The second point urged by the petitioner is that the second judgment and sentence under which he is now being held was pronounced against him by the said superior court of Los Angeles at a time when he was subject to the exclusive jurisdiction of the District Court of the United States for the Northern District thereof by virtue of the writ of habeas corpus which had been issued out of said court on his behalf and which was still pending and undetermined in said court at the time of the rendition of said second judgment by the superior court of the county of Los Angeles. The petitioner cites as his authority for this contention section 766 of the Revised Statutes of the United States (U. S. Comp. St. § 1292), which, in so far as it relates to habeas corpus proceedings in the federal courts, provides that pending such proceedings "and until final judgment therein, and after final judgment or discharge, any proceeding against the person so imprisoned or confined or restrained of his liberty, in any state court, or by or under the authority of any state, for any matter so heard and determined, * * * under such writ of habeas corpus, shall be deemed null and void." The petitioner contends that under the authority of this section of the Revised Statutes of the United States the second judgment and sentence of the superior court of Los Angeles county under which he is now confined is null and void. The difficulty with this contention on the part of the petitioner is twofold: In the first place, it appears by the return and hearing upon this writ that the same contention was urged by him upon the final hearing upon the writ of habeas corpus issued on his behalf in the District Court of the United States, and that court, construing said section 766 of the Revised Statutes of the United States, held that the same was not applicable to the case of the petitioner for the reason that the proceeding which had been instituted by the petitioner in said court was one wherein he sought to have determined that the first judgment and sentence pronounced against him by said superior court was void; and that the said superior court, in treating its said first judgment and sentence as void and in proceeding to enter and enforce its second judgment and sentence against him, was not acting in any matter pending and in process of being heard and determined in said District Court. In support of this construction of said federal statute, the court cited the case of In re Strauss, 126 Fed. 327, 63 C. C. A. 99, which is precisely in point and which in its turn relies upon the cases of Jugiro v. Brush, 140 U. S. 291, 11 Sup. Ct. 770, 35 L. Ed. 510, and McKane v. Durston, 153 U. S. 684, 14 Sup. Ct. 913, 38 L. Ed. 867, wherein the section 766 of the Revised Statutes of the United States has been similarly construed and limited. We are not only in entire accord with the views ex-

pressed by the District Court of the United States in its decision of this matter, but we are also disposed to regard the decisions of the federal courts of last resort construing and applying this federal statute as controlling in the determination of the instant case.

The writ is dismissed, and the petitioner remanded.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SLOSS, J.; WILBUR, J.; LORIGAN, J.

---

179 Cal. 497

PEOPLE v. DENMAN. (Cr. 2187.)

(Supreme Court of California. Dec. 31, 1918.)

1. HOMICIDE ⟸18(1)—MURDER IN COMMISSION OF OTHER OFFENSE—DEGREE.

Under Pen. Code, § 189, one who kills another in perpetration, or attempt to perpetrate, arson, rape, robbery, burglary, or mayhem, is guilty of murder in the first degree, regardless of whether the killing was intentional.

2. CRIMINAL LAW ⟸485(2)—HYPOTHETICAL QUESTIONS—INSANITY.

In prosecution for murder, where defense was insanity, district attorney could properly state hypothetical question to medical witness, based upon facts given in testimony but omitting certain defensive facts, though the testimony in regard thereto was not contradicted.

3. CRIMINAL LAW ⟸485(1) — HYPOTHETICAL QUESTIONS—BASIS.

While hypothetical question must be based upon facts claimed to be shown by evidence, it need not embrace all the evidence, may be addressed to any reasonable theory taken by counsel, and counsel may frame question to accord with his theory and to disregard facts which he believes to have no material bearing.

4. CRIMINAL LAW ⟸1160 — REVIEW — NEW TRIAL—CONFLICTING EVIDENCE.

Where the evidence presented on motion for new trial was conflicting, the decision of the trial court denying the motion is conclusive upon the court on appeal.

5. WAR ⟸32—OFFENSES BY SOLDIERS—JURISDICTION.

Any changes in articles of war in years 1913 and 1916 did not alter rule that courts-martial do not have exclusive jurisdiction for trial of a soldier for murder committed in time of war, but that the state courts have jurisdiction until it is assumed by military authorities.

6. WAR ⟸32 — COURTS-MARTIAL—JURISDICTION.

Provision of Articles of War, art. 15 (U. S. Comp. St. § 2308a), preventing construction of article conferring jurisdiction on courts-martial, so as to deprive military commissions, provost courts, or other military tribunal of concurrent jurisdiction, did not impliedly deprive civil courts of concurrent jurisdiction.

7. WAR ⟸32—OFFENSES BY SOLDIERS—JURISDICTION.

Conceding paramount right of military authorities in time of war to custody of soldier notwithstanding criminal charges against him in the courts of a state, the right inures solely to military authorities, and cannot be raised by the offender.

In Bank.

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Harold Denman was convicted of murder in the first degree, and he appeals. Judgment and order denying new trial affirmed.

Earl Rogers, Paul W. Schenck, Charles Williams, V. J. Cobb, Frank Dominquez, and O. G. Kuklinski, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn and Jerry H. Powell, Deputy Attys. Gen., for the People.

ANGELLOTTI, C. J. The defendant was convicted in the superior court of Los Angeles county of the crime of murder in the first degree, and adjudged to suffer death. He appeals from the judgment.

No claim is made that the evidence was in any way insufficient to support the verdict. The deceased was shot to death by the defendant on a public street in the city of Los Angeles. The theory of the prosecution, amply sustained by the evidence, was that the killing was done in the perpetration of a robbery of the deceased by defendant and two companions. The defense was insanity. The defendant was most ably defended, and apparently was accorded every substantial right. The suggestions of error in the proceedings are very few, considering the length of the trial, and we find nothing of substance in any of them.

[1] We regard it as settled law in this jurisdiction that one who kills another in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is guilty of murder of the first degree by force of the provision of section 189, Penal Code, altogether regardless of any question whether the killing was intentional or unintentional. As said in one of the cases:

"Nor is it of the slightest consequence that the conspirators may not have intended to bring about their victim's death. The killing, having occurred in the perpetration of robbery, was murder of the first degree. Pen. Code, § 189." People v. Raber, 168 Cal. 318, 143 Pac. 318; People v. Milton, 145 Cal. 169, 78 Pac. 549; People v. Witt, 170 Cal. 108, 148 Pac. 928.

We see no reason to doubt the correctness of the views expressed in the cases cited. Appellant's claim of error in the instructions in this behalf must be held to be unfounded.

[2] Objection was made to certain hypothetical questions propounded by the district attorney to medical witnesses called by him as experts on the issue of insanity, the objection being in substance that the questions did not contain all the material facts claimed to have been shown by defendant's witnesses, without contradiction by any of the witnesses for the prosecution. The objection is based upon the fact that there was some evidence given by witnesses for defendant which, it is claimed, tended to show a hereditary predisposition to insanity, certain head injuries to the defendant in his early youth, which resulted in a disordered mind, and the inordinate use, by smoking, of a Mexican weed known as marihuana, the constant use of which for a more or less extended period of time was calculated, according to testimony given by witnesses for the defendant, to produce insanity; that this testimony was not contradicted by any witness for the prosecution; and that the district attorney in his hypothetical questions to his expert witnesses failed to refer to any of these elements. It is not claimed that any of the facts stated in the hypothetical questions of the district attorney was without support in the evidence. The district attorney elected to confine his hypothetical questions to evidence as to the acts, course of conduct, and statements of the defendant from a date shortly prior to the alleged crime, including, of course, the facts, as claimed by him to have been shown, as to the preparation for the robbery and the killing in the perpetration thereof, and the subsequent conduct and statements of the defendant. His theory, whether correct or not, doubtless was that, in view of the evidence as to the facts stated in his questions, the evidence as to other matters relied upon by counsel for defendant had no substantial importance in the matter of the determination of the issue of insanity. In view of the well-settled law in this jurisdiction, it cannot be held that the trial court erred in overruling the objections to these questions.

[3] It is thoroughly settled here that, while a hypothetical question must be based upon facts claimed to be shown by evidence in the case, it is not essential that it embrace all the evidence in the case upon the subject of inquiry, that it may be addressed to any reasonable theory which may be taken by counsel, and that counsel has the right to frame a question to accord with his theory of what the material facts are as shown by that evidence, and in so doing may omit facts which, from his point of view, have no material bearing upon the subject under inquiry. See People v. Durrant, 116 Cal. 216, 48 Pac. 75; People v. Hill, 116 Cal. 566, 48 Pac. 711; Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 716, 103 Pac. 190. See, also, Lawson on Expert and Opinion Evidence (2d Ed.) pp. 166 and 167; 2 Jones, Commentaries on the Law of Evidence, § 371; Burt v. State, 38 Tex. Cr. R. 445, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330. Counsel for defendant had the right on cross-examination to question these expert witnesses fully as to the effect of such additional facts as he deemed shown by evidence and material to the issue, and the record shows that he was fully accorded this right. There is no basis whatever for any claim of prejudicial error in the matter of rulings on hypothetical questions.

Examination of the record has failed to indicate to us that there was any prejudicial misconduct on the part of the district attorney during the trial of this cause.

[4] We see no force in the claim that the trial court erred in denying defendant's motion for a new trial. As to the matters complained of, in so far as we regard them as important, the evidence afforded by the affidavits presented on the motion was conflicting, and the decision of the trial court thereon is conclusive on us. We see no reason to doubt the correctness of that conclusion.

The main contention on this appeal is that the superior court was without jurisdiction to try the defendant. This claim, made for the first time on this appeal, is based upon certain facts disclosed by the evidence as to which there is no dispute. At the time of the commission of the homicide a state of war existed between the United States and the governments of Germany and Austria-Hungary, and the offense of defendant was therefore one committed in time of war. The defendant was at the time of such offense a private soldier in the army of the United States, regularly enlisted and mustered into service, and subject to the articles of war and the provisions of the United States statutes with respect to the jurisdiction of courts-martial. The evidence shows further that at the time of the homicide he had been absent from his station, Camp Kearny, for several days. He was not engaged during this time in the performance of any military duty. The day after the homicide he was arrested in the city of Los Angeles by the civil authorities, and has ever since been in the custody of the state. No demand for his custody has ever been made by the military authorities, or any claim urged by them or on their behalf that the state courts are without jurisdiction to proceed in his case. The defendant alone makes this claim. It does not appear that any court-martial proceeding has ever been initiated against him. The claim is that under the articles of war the offense of defendant, although a crime under the law of the state, was cognizable only by a court-martial, and that the courts of the state were entirely without jurisdiction to try him therefor, or to adjudge punishment in the event of his conviction. This claim is based

solely on the fact that defendant was at the time of the offense a member of the army of the United States, and that the offense was committed in time of war. Admittedly the offense was not committed in the performance of any military duty, or in any place under the exclusive jurisdiction of the United States.

The right of Congress to provide for exclusive jurisdiction in courts-martial and other military tribunals as to persons in the military service of the United States for offenses of any kind committed in time of war may be freely conceded. It is not disputed by the Attorney General in this case. But it is claimed on behalf of the state that, while Congress has invested courts-martial with jurisdiction to try and adjudge to punishment any person subject to military law who commits murder or rape in time of war within the geographical limits of the states of the Union and the District of Columbia, it has not deprived or attempted to deprive the civil courts of the state of jurisdiction in such cases; has not made the jurisdiction of the military tribunals exclusive of that of the state courts.

That this was true prior to the revisions of the articles of war in 1913 and 1916 is amply evidenced by the decisions of both federal and state courts, there being practically no conflict of authority on the proposition. It was almost universally understood and declared by the courts wherever the question was raised that the design of those provisions of the articles of war which confer jurisdiction on courts-martial to try and adjudge to punishment persons in military service for such offenses as murder, rape, etc., committed in time of war, was simply to confer a jurisdiction concurrent with that of the state courts under the laws of the state; it being deemed essential to the enforcement of discipline and the protection of citizens that such offenses should be cognizable by a military court. Especially was this true in view of the fact that the efficiency of the service in time of war made it essential that the military authorities should not be required to deliver to the civil authorities soldiers charged with offenses under the laws of a state, and the articles of war have always so in effect provided. But there was no intent to thereby oust the courts of a state of jurisdiction of any person committing an offense under the laws of the state. As was substantially said in People v. Gardiner, 6 Parker Cr. R. (N. Y.) 143, an intention to exclude the jurisdiction of the state courts in such cases should not be inferred except upon the most clear and explicit language.

While, by reason of the right of the military authorities in time of war to retain the custody of one in military service charged with an offense under the laws of a state, and the possible right of such authorities to take such a person from the custody of the civil authorities (see Ex parte King [D. C.] 246 Fed. 868), the state courts might be practically without power to proceed with the trial or punishment of the offender where the prior right was being asserted by the military authorities, the jurisdiction of such courts still existed. There was nothing in the articles of war to prevent the military authorities from delivering the alleged offender to the civil authorities if they saw fit to do so, or from refusing to assert any claim to his custody when held by the state authorities if they so desired. Having his actual custody without any claim therefor on the part of the military authorities, the state could proceed, through its tribunals, with his trial and punishment, if adjudged guilty, in the same way and to the same extent as in the case of any other offender against its laws. The correctness of the views expressed by the United States Supreme Court in 1878 on this subject, in Coleman v. Tennessee, 97 U. S. 509, 24 L. Ed. 1118, which may fairly be said to be the leading case thereon, has never been questioned by any later decision of that august tribunal. As late as 1909, that court, in Franklin v. United States, 216 U. S. 559, 30 Sup. Ct. 434, 54 L. Ed. 615, referred to this case as holding that the articles of war did not confer upon courts-martial exclusive jurisdiction for the trial of a soldier for murder committed in time of war, and declared that undoubtedly the general rule is that the jurisdiction of civil courts is concurrent as to the offenses triable before courts-martial. See, also, People v. Gardiner, supra.

[5] We cannot see that any change in this well-settled doctrine has been effected by the revisions of the articles of war in the years 1913 (Act March 2, 1913, c. 93, 37 Stat. 721) and 1916 (Act Aug. 29, 1916, c. 418, 39 Stat. 619 [U. S. Comp. St. § 2308a]). Prior to the revisions the article conferring jurisdiction on courts-martial for murder, etc., committed in time of war and declaring the punishment, was article 58 (Act March 3, 1863, c. 75, § 30, 12 Stat. 736), which provided that:

"In time of war, * * * larceny, robbery, * * * murder," etc., "shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided for the like offense, by the laws of the state, territory, or district in which such offense may have been committed."

It was this article and prior provisions substantially the same that were involved in the decisions to which we have referred. Prior to the revision there was no other article relative to the jurisdiction of courts-martial as to the offenses specified. The article conferred the jurisdiction and declared

the punishment. When it came to the revisions, the offenses of murder and rape were dealt with in article 92, and other crimes theretofore specified in the old article 58 were dealt with in article 93. In the revision article 92 is as follows:

"Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the states of the Union and the District of Columbia in time of peace."

Article 93 simply provides that as to the crimes specified therein "any person subject to military law * * * shall be punished as a court-martial may direct." Appellant's contention that by the revision exclusive jurisdiction was given to courts-martial is based entirely on the change in phraseology from "shall be punishable" in old article 58 to "shall suffer death or imprisonment for life, as a court-martial may direct" in article 92, and to "shall be punished as a court-martial may direct" in article 93, in view of certain language of Mr. Justice Field in Coleman v. Tennessee, supra, when, in holding that the jurisdiction given courts-martial by article 58 was not exclusive, he pointed out, "among other reasons for his conclusion," that the article "simply declares that the offenses shall be 'punishable,' not that they shall be punished by the military courts," saying further that this was merely saying that they may be thus punished. This was only one of the considerations suggested by the learned justice for his conclusion that no clear intent on the part of Congress to confer exclusive jurisdiction on courts-martial in such cases was shown by the articles of war. We think that, even in the entire absence of other considerations, it would be going far beyond any justifiable limit to conclude that by this mere change of phraseology in a revision of the articles more than 30 years after Coleman v. Tennessee was decided, any such radical change was designed. But, in view of other changes made by the revisions, we are satisfied that no change from the well-settled rule in the matter of jurisdiction was designed. Under the revisions, articles 92 and 93 like the many other articles defining and specifying offenses and prescribing penalties, are no longer the articles conferring jurisdiction. The matter of jurisdiction is specially covered by articles 12 to 16, under the heading "Jurisdiction," by which the jurisdiction of the various kinds of courts-martial is specified. Article 12 declares that—

"General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles," etc.

Under the scheme of the revision the office of such articles as 92 and 93 is simply to declare the crimes and offenses punishable by the articles, and to make such provision as was deemed proper for the punishment to be imposed by the court-martial. That article 92 contains an express provision that, as to murder and rape committed in time of peace within a state or the District of Columbia, no person shall be tried by court-martial, does not affect our conclusion as to this. This being the situation, there was no particular significance in the change made in phraseology on which so much reliance is based. Naturally, we look to the articles conferring jurisdiction to ascertain any intent on the part of Congress to make the jurisdiction of courts-martial thereby conferred exclusive, and, certainly, no such intent is to be found in those articles, or, in our judgment, in any part of the articles of war, when the same is considered in connection with the other parts.

[6] We see no force whatever in the claim that article 15, to the effect that the provisions of the articles conferring jurisdiction upon courts-martial shall not be construed "as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by" such tribunals, shows an intent to exclude the jurisdiction of civil tribunals. This provision was manifestly designed to make it clear that even as to other military tribunals the jurisdiction of courts-martial was not to be considered exclusive with relation to offenders or offenses that by the law of war might lawfully be tried by such other tribunals. It had no relation whatever to the matter of jurisdiction of the civil courts.

[7] Of course, if the jurisdiction of the courts of the state in such a case as this has not been taken away by Congress, the fact that a concurrent jurisdiction exists as to courts-martial or other military tribunals, or that the military authorities could, if they so desired, take the accused from the custody of the state, is immaterial here. As was said by the Supreme Court of the United States in Ex parte Mason, 105 U. S. 696, 26 L. Ed. 1213, concerning a claim somewhat similar in principle:

"Choice of the tribunal by which he is to be tried has not been given to the offender. He has offended both against the civil and the military law."

Conceding the paramount right of the military authorities in time of war to the custody of any person in the military service of the United States, notwithstanding criminal charges against him in the courts of a state, the right is solely that of the military authorities, to be enforced as the best interests of the military service may seem to them to require. In the absence of some showing

of a claim by such authorities, no question of want of jurisdiction can arise.

Decisions to the effect that the jurisdiction of the courts of the United States as to offenses committed within the territorial limits of a state, but upon land over which the state has ceded jurisdiction to the United States, is exclusive of the courts of the state, are not in point. The statute applicable in those cases expressly so provided. See Battle v. United States, 209 U. S. 36, 28 Sup. Ct. 422, 52 L. Ed. 670.

Likewise, decisions in cases where the act complained of in the prosecution in the state court was done by one in the proper discharge of his duty as a soldier of the United States or in pursuance of any law of the United States are not in point here. In such a case, the courts of a state are without power to adjudge punishment. And where the facts entitling the accused to exemption from state control are undisputed, the accused will be discharged on habeas corpus in advance of his trial. Such was held to be the situation in Re Neagle, 135 U. S. 1, 10 Sup. Ct. 653, 34 L. Ed. 55, and the decision was based on this condition. This, likewise, was the real basis of the decision in Re Wulzen (D. C.) 235 Fed. 362, Ann. Cas. 1917A, 274, relied on by appellant. See, generally, on this subject, United States v. Lewis (C. C.) 129 Fed. 823. Necessarily these cases and the principle therein upheld have no application to the question before us.

We are of the opinion that the claim of appellant that the superior court of Los Angeles county was without lawful jurisdiction in this matter is not well based.

This disposes of all points made for reversal.

The judgment and order denying a new trial are affirmed.

We concur: SLOSS, J.; WILBUR, J.; MELVIN, J.; LORIGAN, J.; RICHARDS, Judge pro tem.; VICTOR E. SHAW, Judge pro tem.

---

179 Cal. 518

## NICKERSON v. SAN BERNARDINO COUNTY et al. (L. A. 4610.)

(Supreme Court of California. Dec. 31, 1918.)

1. CONSTITUTIONAL LAW ⊜70(1)—JUDICIAL INTERFERENCE WITH LEGISLATIVE FUNCTIONS.

When the Legislature has committed to a municipal body the power to legislate on given subjects or has committed to it judgment or discretion, as to matters on which it is authorized to act, equity courts will not interfere with the exercise of such legislative or discretionary functions.

2. COUNTIES ⊜23—DISCRETION OF SUPERVISORS—JUDICIAL CONTROL.

Legislative and discretionary power having been conferred upon a county board of supervisors to purchase land for a county hospital, the board's action as to the amount and price and from whom the land was to be purchased is not subject to review or control by any court.

3. COUNTIES ⊜23—DISCRETION OF SUPERVISORS—JUDICIAL CONTROL.

Whether, in the exercise of legislative powers, a county board of supervisors acts wisely or unwisely, does not concern the courts, and they cannot interfere unless the board is exceeding its legislative powers, or if its judgment or discretion is being fraudulently or corruptly exercised.

4. COUNTIES ⊜54—RESOLUTIONS OF SUPERVISORS—ATTACK.

A resolution by a board of county supervisors, authorized to purchase land for a county hospital, that a certain quantity of land is necessary, cannot be attacked, in a taxpayer's suit to recover money paid for the land, by evidence of a member of the board that such quantity was unnecessary.

5. COUNTIES ⊜104—ACTION OF SUPERVISORS—JURISDICTIONAL PREREQUISITES.

Where a county board of supervisors has been authorized to purchase land for hospital purposes, the publication of proper notice of intention to purchase is a jurisdictional prerequisite to the power of the board to act.

6. COUNTIES ⊜104—NOTICE OF SUPERVISORS' INTENTION TO PURCHASE LAND—SUFFICIENCY.

A notice of intention by county supervisors to purchase land for hospital purposes, part of which land was held in common by a husband and wife, mentioning the husband's name only as the party from whom the purchase was to be made, was not insufficient under Pol. Code, § 4041, subdiv. 6, requiring the notice to state the name of the person from whom the purchase is to be made.

7. COUNTIES ⊜104—NOTICE OF SUPERVISORS' INTENT TO PURCHASE LAND — SUFFICIENCY.

That a notice of intention, under Pol. Code, § 4041, subdiv. 6, by county supervisors to purchase land for hospital purposes, disclosed an intent to purchase from a named person, was not defective, merely because such person had died and the property could only be purchased from his estate.

8. COUNTIES ⊜104—NOTICE OF SUPERVISORS' INTENT TO PURCHASE LAND—SUFFICIENCY.

That a notice, under Pol. Code, § 4041, subdiv. 6, given by county supervisors to purchase lands for hospital purposes, gave the acreage to be purchased and the price per acre, was not defective as failing to state the price, merely because the acreage was to be "more or less."

9. COUNTIES ⊜104—CLAIMS AGAINST COUNTY — NECESSITY OF PRESENTATION — RIGHTS OF TAXPAYERS.

Where supervisors had made an order directing payment to be made for land purchased

for hospital purposes, a taxpayer cannot raise the point that Pol. Code, §§ 4074, 4075, and 4076, requiring all claims against the county to be presented to the board for allowance, had not been complied with; neither he nor any other taxpayer having been injured.

Department 2.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by A. E. Nickerson against the County of San Bernardino and others. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Goodcell & Goodcell and Cecil H. Phillips, all of San Bernardino, for appellant.

Ralph E. Swing, Byron Waters, Holcomb & Coy, and T. W. Duckworth, all of San Bernardino, for respondents.

LORIGAN, J. The plaintiff, as a taxpayer of San Bernardino county, brought this action against said county and the other defendants, consisting of three members of its board of supervisors, its county treasurer, and county auditor, together with the owners of certain lands, the purchase of which is involved in this suit.

It appears that on September 10, 1914, the board of supervisors of San Bernardino county authorized and called a special election and submitted to the voters of the county the question of incurring a bonded indebtedness in the sum of $150,000, the money raised thereby to be expended "for purchasing necessary county hospital grounds, to construct thereon necessary county hospital buildings, and equip and furnish the same with necessary appliances, furniture and hospital equipment." The bonded indebtedness was favorably voted, bonds were issued and sold by the board of supervisors, the proceeds placed in the hospital improvement fund, and thereupon the said board called for the submission to it of sealed proposals for furnishing tracts of land for a hospital site. In response to said call, C. J. Anderson, one of the defendants, submitted a proposal for the sale to the county of a tract of land containing 93½ acres, the offer stating that the entire tract consisted of several tracts of land owned by said Anderson and several others named in the proposal and in whose behalf the offer was made. The price was stated as $645 per acre.

On June 2, 1915, the board of supervisors, by resolution, declared its intention to purchase the said land and thereupon published a notice of intention to do so. Thereafter and in due course it passed a resolution purporting to consummate the purchase of the land at the price stated, which price was to be paid when a favorable report on the title to the property was made by the district attorney. At the same time it ordered the money to be placed in escrow to pay for the land.

It is then alleged in the complaint that the land so purchased contains more than 60 acres that are not necessary for necessary hospital grounds, and that the board purchased this tract of land of 93½ acres for the purpose of using all of the portion thereof not necessary for hospital grounds for a county farm; that it was the intention of the members of the board of supervisors and those who voted for the purchase of said tract to purchase it for necessary hospital grounds and for use by said county as a county farm; that 30 acres is all the land necessary for necessary county hospital grounds; and that the amount of money which would be left in the treasury after the purchase of said tract of land exceeding 30 acres will be wholly inadequate and insufficient to carry out and fulfill the purpose for which said bonds were issued and sold. It was further alleged by plaintiff that notice was served on the defendants, the treasurer and auditor of the county, that the purchase of said land was illegal, and that neither of them should authorize or pay any money on account thereof, and that each, notwithstanding said notice, paid the sum of $46,968.90 on account of the purchase of said land; that no claim was ever filed with the board of supervisors in the manner required by law for the payment of said money, nor was its payment authorized or allowed by the board of supervisors after the presentation to them of a claim therefor; that unless restrained from so doing said auditor and treasurer intend to pay over the balance of $13,338.60 for the purchase of said property. It is also alleged that $645 an acre, agreed to be paid as the purchase price of said land, is greatly in excess of its value, and that at the time this action was commenced deeds to the land in favor of the county had been made and delivered to it by the various owners of the tracts of land purchased except one. This one consisted of the property of the J. A. Anderson estate. A deed to the county of that land had been executed by all the heirs of said estate except one, whose whereabouts was unknown, and proceedings were then being taken in the estate of said J. A. Anderson to have a probate sale of said Anderson tract made to the county, thus vesting the title in the county against the absent heir; that it was for this Anderson tract for which the $13,338.60 was still to be paid from the hospital fund. The prayer of the complaint was that plaintiff recover from the defendants other than the county of San Bernardino, but for its benefit, the moneys expended and paid for the purchase of the various tracts of land of which conveyances were made to the county; for a decree restraining the payment of any money for the Anderson tract; and for general relief.

The defendants, in their answer, denied all the material allegations of the complaint upon which plaintiff asserted a right of action

against any of them, and denied that the land purchased was not necessary for necessary hospital grounds. They averred that a tract of land of 28.5 acres, theretofore used by the county for hospital grounds, was inadequate, and that at the time of the purchase of the land in question the board of supervisors found and determined that the amount of land purchased was necessary for necessary county hospital grounds, and denied that the land purchased, or any part of it, was purchased to provide the county with a county farm, or for any other purpose than as specified in the proceedings authorizing its purchase.

On the issues joined, the cause went to trial, which resulted in a motion of defendants for a nonsuit being granted, and a judgment of nonsuit accordingly entered, from which plaintiff appeals.

Appellant makes several points for a reversal which, however, may be considered under two general heads which are: First, that the court erred in refusing to allow him to introduce certain testimony; and, secondly, in refusing to sustain appellant in his attacks upon the validity of certain proceedings of the board of supervisors and the action of the other county officers defendant.

As to the claim of error in rejecting certain testimony: Appellant called as a witness one of the members of the board of supervisors, who had voted for the purchase of the land in question, and sought to prove by him that the greater portion of said land was purchased for a county farm; that the amount of land purchased greatly exceeded in acreage the amount of land necessary for necessary county hospital grounds; and that the money paid for the land was grossly in excess of its value. The court sustained objections to this line of testimony.

[1-3] It is not necessary to enter into any extended discussion of this assigned error. The ruling of the court was clearly within a well-recognized principle of law controlling the power of courts with respect to the review of proceedings of municipal bodies acting in their legislative or discretionary capacities. When the Legislature has committed to a municipal body the power to legislate on given subjects or has committed to it judgment or discretion as to matters upon which it is authorized to act, courts of equity have no power to interfere with such a body in the exercise of its legislative or discretionary functions. That the power conferred on the board of supervisors by law relative to the purchase of land for a hospital site, the erection of hospital buildings, and their equipment, was both legislative and discretionary in character, is not open to dispute. The law cast upon the board the duty of determining whether in its judgment the public necessity required that the county should acquire a new county hospital and conferred upon it the power necessary to accomplish this if it should so determine. The money to do so was, it is true, to be furnished through the action of the voters of the county; but it was left to the board to determine how much money would be needed to acquire a site and construct the hospital buildings and to determine the quantity of land necessary for such site, to call for proposals of land from which to make a selection, to make the selection and determine the price which should be paid for it, and to adopt and approve the style and extent of the buildings to be erected upon the proposed site. All these matters were committed by the statute solely to the board, and their determination involved both legislative action and the exercise of discretion, neither of which was subject to review or control of any court. Whether, in the exercise of legislative powers, a board acts wisely or unwisely, is no concern of the courts. They cannot enter the board room and substitute their judgment for that of the board, nor interfere at all with its action unless the board is exceeding its legislative powers, or its judgment or discretion is being fraudulently or corruptly exercised. This whole subject is considered in the case of Hopping v. City of Richmond, 170 Cal. 605, 150 Pac. 977, and reference is made to this authority for further discussion of the subject.

[4] There is no fraudulent or corrupt conduct asserted against the board of supervisors in making the purchase of the hospital site. All the allegation respecting it is that the quantity of land purchased is more than is necessary for necessary hospital grounds; that the purchase of the entire tract was made to provide both necessary hospital grounds and land to be used as a county farm; and that it was the intention of the board of supervisors, and its purpose, that all that portion of the entire tract not necessary for county hospital grounds was to be used as a county farm or for other purposes. This is not an allegation of fraud or corruption in legislative action or abuse of discretion respecting the purchase. What is in effect alleged is that all the land purchased was purchased with an intention of using that portion of it that was not necessary for a hospital site for a county farm and that 60 acres was all that was necessary for a hospital site; in short, that the board purchased more land than was necessary for a hospital site with the intention of devoting the surplus to a county farm. Now, it appears from the complaint itself that as to this land purchased the board, by its resolution, declared that this purchase of the entire tract was necessary for county hospital grounds. The truth of this resolution plaintiff sought to attack by the testimony of a member of the board of supervisors which passed it, and his complaint is that he was not permitted to do so. We think, however, the court properly refused to permit the

witness to do so. The resolution passed was binding on the board and represented its official action on the subject embraced within it, and the simple secret intention of a member of the board or his extraneous expression concerning the use to which, in the future, some part of the land purchased might be devoted, will not be permitted to impeach the integrity of the official intention and purpose of the board disclosed by its records. There is nothing in the acreage of the tract purchased itself to warrant the slightest inference that it was in excess of the quantity necessary for a hospital site. As such public institutions are to be used by a county indefinitely, the board in providing for them must consider, not only the present, but the future, needs of the county, arising from the certainty of always having the sick and afflicted to care for, with the added certainty that as the population of the county increases this public duty will increase with it. No restriction is placed on the board by the statute as to the quantity of land it shall purchase or the character of the buildings it shall erect for county hospital purposes. That matter is committed entirely to the judgment and discretion of the board and when, in the exercise of such judgment and discretion, it determines that a certain quantity of land is necessary for a site, its conclusion must prevail and is not subject to review or control of the courts.

[5] As to the points made by appellant concerning the validity of certain proceedings on the part of the board of supervisors and the action of the treasurer and auditor of the county: Starting with the proposition which is, of course, true, that the publication of a proper notice of intention to purchase land for a hospital site by the board of supervisors was a jurisdictional prerequisite to the power of the board to act in the matter (Winn v. Shaw, 87 Cal. 631, 25 Pac. 968), it is contended by appellant that the public notice of intention to purchase given in this matter was defective in some essential particulars. Subdivision 6 of section 4041 of the Political Code requires such notice of intention to state, among other things, the price to be paid for the property and the name of the person from whom the purchase is to be made, and, it is claimed by appellant, that as to these matters they were not contained in the notice. While counsel makes this broad claim, it is evident on examination of the record that what he really claims is, not that these matters were entirely omitted from the notice, but only that they were defectively stated. But in this we do not agree with him. The purpose of the law in requiring these matters and others to be stated in the notice is to give the taxpayers, upon whose property the burden of taxation for the future payment of the debt entailed for the purchase of the property would fall, full information of what was intended to be done in order that they might determine whether they would or would not attend the meeting of the board when the time for the consummation of the purchase was set and protest or object to the purchase.

[6] Now, as to the points of appellant: As a matter of fact, the notice contained the names of the persons from whom the board of supervisors declared its intention to purchase as contained in the proposal to sell made by C. J. Anderson to the board in his own and on behalf of the others agreeing to the terms of that proposal earlier referred to in this opinion. It appears, however, that as to one of said tracts offered it was owned as tenants in common by Frank Parmenter and his wife, and the name of the husband was alone mentioned as the party from whom the tract was to be purchased as it was alone mentioned in the proposal to sell. Appellant insists that a failure to mention the name of the wife rendered the notice fatally defective. But this amounted only to a failure to state in the notice the name of one of the owners of this particular tract, and the section does not require a statement of the names of the owners of the property proposed to be purchased to be stated in the notice, but only the names of parties from whom it is its intention to purchase. Non constat but that the husband who had offered the common property for sale had arranged to give good title before making the offer to sell. Anyhow, he was the party who offered the property for sale and was the party properly to be mentioned from whom the board intended to purchase this particular tract. If, when it came to consummating the sale, Parmenter could not give a good title, that was another matter; but it could not affect the validity of the published notice. Considering, too, the nature of the title of the Parmenters, the mention of him as the person from whom the purchase of that tract was to be made would in any event fulfill the purpose of the statute. The notice contained a description of all the property intended to be purchased, including the tract owned by the Parmenters in common. No fraud or imposition could, under such circumstances, possibly be practiced on the taxpayers of the county by the omission of the name of one cotenant in the tenancy. It does not approach a case where there is the omission to at all mention the name of a person from whom a particular tract is to be purchased. It may be that in such a case a description of the property by governmental subdivisions or courses and distances without giving the name of the owner or person from whom its purchase was to be made would not give information to the taxpayer of the exact location of the property as readily or accurately as if in connection with the description the name of the party from whom the purchase is to be made, who is generally the owner, was mentioned in connection with the description.

Here, however, the notice subserved just this purpose. It gave a description of the property and the name of the party from whom it was to be purchased and who was in fact one of the owners. It gave the taxpayer all the information necessary for his guidance in determining what action he should take on the contemplated purchase of the Parmenter tract with the others, and hence constituted a fair and substantial compliance with the statute.

[7] The notice of intention to purchase also contained the name of R. J. Anderson as one of the parties from whom a tract, alleged to be owned by him and which was offered to the board with the other tracts, was to be purchased. It appears that R. J. Anderson was dead at the time and that his estate was unsettled. The property stood on the records as belonging to R. J. Anderson when he died and was property of his estate when it was offered by his representatives through C. J. Anderson, who offered all the tracts. The only omission there was in the notice as to this property was an omission to say that the property contemplated to be purchased was property of the estate of R. J. Anderson. No taxpayer could be misled by this omission. He had sufficient information from its being designated as property of R. J. Anderson to find out all about the particular owners of it if he thought that matter important. In this, as with respect to the Parmenters, we think there was a substantial compliance with the statute and that the omissions complained of were not in any respect fatal to the validity of the notice.

[8] It is further insisted that the notice contained no statement of the price to be paid for the property to be purchased. This is based on the fact that the term "more or less" is used in stating the aggregate acreage of the tract to be purchased. This contention is extremely critical. It is universally held that the use of the term "more or less" in notices of a statement of acreage of real property does not render the description uncertain. This being true, and the amount to be purchased being stated at 93½ acres "more or less," and the price stated at $645 per acre, mere computation on the part of the taxpayer would give him reasonable and satisfactory information as to the price to be paid for the property.

[9] Lastly, it is claimed by appellant that the conduct of the auditor and treasurer, the one in auditing, the other in paying, the several warrants on the hospital improvement fund in the county treasury, was illegal, subjecting each to liability for restoration of the money to the fund. In this regard it is insisted that sections 4074, 4075, and 4076, Political Code, which require all claims against the county to be presented to the board of supervisors for allowance and payment applied to the purchase price to be paid to the several owners of the land purchased. In the proceedings for the purchase of the land the board of supervisors had made an order directing payment of the price of the land to be made to the owners out of the hospital improvement fund as soon as deeds thereto were ready for delivery to the county, and when the deeds were delivered the auditor and treasurer paid over the purchase price thereof without the presentation of any claims to the board of supervisors or further order for their payment other than the general one above referred to. Without discussing the relevancy of the sections quoted to claims of this character, it is sufficient for present purposes to say that appellant is not in a position to raise the point he makes. No possible injury to him or to any taxpayer arose, or could arise, from the payments being made as they were. The county got the land it purchased, and it paid the owners the prices it had agreed to pay for it, and it is immaterial now whether there was a strict compliance with the statute in the method of payment or not. Any deviation from a prescribed method under the circumstances was merely an irregularity and harmless.

The judgment appealed from is affirmed.

We concur: WILBUR, J.; MELVIN, J.

---

179 Cal. 489

FEDERAL CONST. CO. v. CURD, Superintendent of Streets, et al. (S. F. 8727.)

(Supreme Court of California. Dec. 31, 1918. Rehearing Denied Jan. 30, 1919.)

CONSTITUTIONAL LAW ⊂=290(1) — MUNICIPAL CORPORATIONS ⊂=453(2)—DUE PROCESS OF LAW—ASSESSMENTS—BOARD OF TRUSTEES—INTEREST OF MEMBERS.

Interest of one or all of city board of trustees or other municipal body charged with the making or ratifying of assessments for street or other improvements arising from their ownership of property directly affected by improvement does not create such a disqualification to act as to render their action void as not constituting due process of law.

In Bank.

Application for writ of mandate by the Federal Construction Company against J. E. Curd, Superintendent of Streets of the City of Porterville, Cal., and W. L. Graham, Treasurer of said city. Writ denied.

Morrison, Dunne & Brobeck, of San Francisco, and Maurice E. Power, of Visalia (Raymond Benjamin, of San Francisco, of counsel), for petitioner.

Guy Knupp, of Porterville, C. L. Russell, Jr., of Tulare, Geo. G. Murry, of Porterville,

and Thomas Beedy & Lanagan, of San Francisco, for respondents.

RICHARDS, Judge pro tem. This is an application for a writ of mandate by which the petitioner seeks to compel J. E. Curd as superintendent of streets of the city of Porterville, Cal., to certify to W. L. Graham, as the treasurer of said city, a list of unpaid assessments upon certain street improvement work alleged to have been done therein by the petitioner, and to direct the said treasurer to issue street improvement bonds thereon, representing the amount of said unpaid assessments. The facts giving rise to this proceeding are practically undisputed, and may be stated as follows:

In the month of July, 1915, the city of Porterville, through its regularly constituted officials, initiated proceedings under the Street Improvement Act of 1911 for the improvement of certain of its streets, and in the course thereof duly entered into 14 certain contracts in writing with the petitioner or its assignors herein, whereby the latter agreed to perform certain street work, therein described, in accordance with certain plans and specifications adopted by the board of trustees of said city. The petitioner alleges, and for the purpose of considering the questions of law raised herein it may be taken to be true, that all of the work required to be done by the petitioner or its assignors under the terms of said contracts was performed and completed by it on December 15, 1915, and was then accepted by the superintendent of streets and his certificate of acceptance and approval duly issued. Thereafter, and during the month of October, 1916, the said superintendent of streets prepared and made assessments, as required by said act, covering the cost of the work performed under each of said contracts, and also prepared, in connection with such assessments, a diagram of the streets on which said work had been done, and thereupon attached to each of such assessments a warrant authorizing the petitioner, as such contractor, to demand and receive from the owners of the property, subject to such assessments, the amounts shown to be due thereon. Each of said warrants was dated on the 28th day of October, 1916. In the preparation of said assessments and warrants the said superintendent of streets made use of loose leaves, especially prepared and intended for insertion in a lock book, also prepared to receive and hold the same; and, as each of said assessments and warrants was completed by said superintendent of streets, it was fastened in said lock book, which was marked and entitled "Street Assessments of the City of Porterville." The diagrams of the streets included in said work were also similarly placed in said book, and the said warrants, assessments, and diagrams as so placed were signed by the superintendent of streets and countersigned by the president of the board of trustees of the said city of Porterville, on October 28, 1916. That thereupon, and on said 28th day of October, 1916, the said superintendent of streets recorded said assessments and warrants in his office, as required by law. Subsequent to the performance of the foregoing acts, and within 30 days thereafter, the said superintendent of streets delivered said assessments and warrants to the said petitioner, pursuant to the requirements of said street improvement act, and between the date of the said receipt thereof and the 21st day of November, 1916, the said petitioner made the demand required by said act upon each of the persons assessed for the amount of their respective assessments, and, having done so, the said petitioner redelivered to the said superintendent of streets each and all of such assessments and warrants, with its return as to such demand duly indorsed thereon, which said return was thereupon indorsed by said superintendent of streets upon the record thereof, as required by law. Thereafter, and on November 25, 1916, a number of the persons whose property had been assessed according to said assessments filed with the clerk of the board of trustees of said city their objection, in writing, thereto, setting forth as a ground of their said objections that the said contractor had not completed its said contracts in accordance with the plans and specifications thereof. Due notice was given of these objections, and the matter of the hearing thereon was fixed for the 4th day of December, 1917. Only three members of said board of trustees were present at the hearing upon said objections. It is alleged by the petitioner herein, and is not controverted, that each of the said three members of said board, so conducting and participating in said hearings and rendering their and each of their decisions upon the same, was an owner or was interested in one or other of the parcels of land upon which such assessments had been imposed and in respect to which said objections had been filed and upon which objections said hearing had been had. It was also alleged, and not controverted, that the attorney for the said protestants was at the time thereof and of the hearings thereon a law partner of the city attorney of said city, who was then directly interested in the outcome of such hearings and was thereby biased and prejudiced against the said contractor and who advised and urged the said board of trustees to sustain said objections. At the time of such hearings the petitioner herein objected to the said members of said board sitting upon the hearings thereon or deciding or determining the matter of said protests, and objected to their determination thereof, but, notwithstanding its said objection, the said board of trustees and the said members thereof proceeded to hear and to determine said objections, and to make and enter the order of said board sustaining the same. Notwithstanding

said determination and order, the petitioner herein has demanded of the superintendent of streets that he make and certify to the city treasurer a list of all of said assessments which are unpaid, and has also demanded of the said city treasurer that he thereupon make out and deliver to the petitioner bonds representing such unpaid assessments. Said officials having refused to comply with these demands, this proceeding has been instituted by said contractor, the petitioner herein.

The single question requiring determination in this case relates to the right and power of the city council, acting solely through and by the aforesaid three members thereof, to sit and act as a judicial body in the hearing and determination of the aforesaid appeals and protests of the property owners as to the proper completion of the said work of street improvement in compliance with the contract providing for the same, and as to the validity of said assessments claimed to be due and payable from them thereon. It is the contention of the petitioner herein that the three members of the city council, who assumed to sit and act upon the hearing of said appeals and protests, were disqualified to so sit and act by reason of their, and each of their, interest in property directly affected by such assessments and directly involved in and represented upon said appeals, and that the compulsion which the act imposed upon the petitioner to submit the issues raised upon said appeals and protests as to the sufficiency of its compliance with its said contracts and as to its right to have said assessments levied and collected and said warrants paid, to a tribunal thus composed of persons interested in the determination of such issues adverse to said petitioner, amounted to a denial to it of due process of law. In making this contention the petitioner herein is drawn to the extreme position of claiming that the portions of the act under review which provide for appeals by property owners to the city council for relief from the assessments sought to be imposed upon their property, upon the ground of irregularities on the part of the street superintendent in levying the same, or upon the ground that the contract has not been fully or properly performed, is unconstitutional and void for the reason that no provision is made for the hearing upon such appeals before a judicial body whose membership is not interested in the result of such appeals, and hence that such provisions should be eliminated from the body of the act, and that, being eliminated and the right of property owners to have and take such appeals being thus taken away, the petitioner would be entitled to the writ of mandate which it seeks by this proceeding. To adopt this view would be to deny to property owners any right of appeal to the city council under this act, no matter how irregular the proceedings of the street superintendent, or how incomplete or insufficient the performance of the contract, might be—a consequence quite as disastrous to the property owners in the denial of their constitutional right to due process of law as the alleged denial to the petitioner of the similar right would be. While for this reason alone we would be very reluctant to adopt a view which would lead to such a consequence, and while for the added reason that its adoption would compel the conclusion that the entire act was invalid upon the authority of Hutson v. Woodbridge Protection Dist., 79 Cal. 90, 16 Pac. 549, 21 Pac. 435 (a result which the petitioner herein would probably not relish), we would not wish to adopt it, we think that there are other and sufficient reasons why the contention of the petitioner herein cannot be sustained.

Conceding it to be true, as a rule of ethics, that no person or body of persons should sit in judgment in cases and proceedings in which they are interested parties, and conceding, also, that it has been frequently and properly held that the attempted violation of this ethical rule by persons presiding over causes triable in the ordinary courts of justice amounts to a denial of due process of law to those who are injuriously affected by such denial, yet, to this there are certain exceptions which are said to spring from the necessity of the situation. The statement in general terms of the principle underlying these exceptions is to be found thus stated in 23 Cyc. 581:

"Where disqualification if permitted to prevail destroys the only tribunal in which relief may be sought, and thus effectively bars the doors of justice, the disqualified judge is bound to hear and decide the cause."

The particular application of this principle has been most frequently made to the class of quasi judicial bodies of which the city council of Porterville is an example, such as boards of supervisors, city councils, boards of trustees, boards of equalization, commissioners of irrigation and drainage districts, and the like. While these various bodies are as a rule executive and administrative as to most of their functions, there are certain matters committed by the law of their creation to their judgment and discretion, which matters are judicial in their nature; such as the fixing of water rates, the equalizing of taxes, the determination of benefits, the correction of errors in assessments, and the like. Quite frequently the entire community to which the members of these boards or bodies belong are directly and beneficially interested in the result of the hearing and determination of such matters, and they themselves are therefore interested parties therein. Of necessity, therefore, in many of such matters, unless the members of the body designated by statute as the sole body to hear and determine the same are qualified notwithstanding their interest so to do, they never could be determined without recourse in every instance to actions in regularly constituted judicial tribunals. The state of Cal-

ifornia, in common with practically every other state in the Union, has committed itself to the more practical plan of relegating all such matters to the local boards, councils or other municipal bodies, and of providing that they shall have jurisdiction to decide them, notwithstanding the fact that some or all of the persons constituting their membership may be more or less directly interested in the result of their action. In the case of Hibben v. Smith, 191 U. S. 310, 24 Sup. Ct. 88, 48 L. Ed. 195, the question was directly presented to that tribunal in an action involving the validity of a street assessment, where the members of the board of town trustees levying the assessment were residents and taxpayers of the town, and where two of their number were owners of lots abutting upon the immediate improvement. The court said:

"The objection to the tribunal constituted by the Legislature of Indiana, which the plaintiff in error makes in this particular instance, is that it results in making a person a judge in his own case, and that hence any judgment of a tribunal thus constituted is absolutely void, and may be attacked, as it is attacked in this case, collaterally. It is said that to impose an assessment, which is the same as a judgment under such circumstances, is to take the lot owner's property without due process of law, and violates thereby the federal Constitution. We think the first objection, that all of the members of the board of trustees were residents of and taxpayers in the town, is wholly unimportant. We have not the slightest doubt of the power of a Legislature of a state, unless hampered by some special constitutional provision, to create a tribunal in a city or town, such as the common council or board of trustees, to make an assessment, and that such assessment would be valid, notwithstanding the fact that every member of the board was a taxpayer of the city or the town. It is a matter of legislative discretion as to how such a board shall be constituted, and we hazard nothing in saying that it is quite common throughout the country for the Legislatures of the states to create a tribunal for levying assessments for local improvements in a manner precisely like the case in question. It is not at all analogous, even in principle, to a judge of a court acting in a case in which he is personally interested.

"To say that no one who was a taxpayer in a city or town could act in imposing an assessment upon property therein is to say that the Legislature is wholly without power, by reason of the federal Constitution, to constitute a tribunal to make an assessment where such tribunal is composed of taxpayers in the city or town. This we do not believe. * * * Whether a judgment obtained in a case like this, where two members of a general board created by statute for the purpose of making it, had some interest in some of the property subject to the assessment, was a void or voidable judgment is a proper question for the state court to decide. A state court has the right to place its own construction upon its own judgments, and where, as in a case like this, it holds that the judgment is not void, and that it cannot be attacked collaterally, we ought to follow that determination. Newport Light Co. v. Newport, 151 U. S. 527, 539 [14 Sup. Ct. 429, 38 L. Ed. 259].

"In Lent v. Tillson, 140 U. S. 316 [11 Sup. Ct. 825, 35 L. Ed. 419], which was an assessment case, it was stated by Mr. Justice Harlan, in delivering the opinion of the court ([140 U. S.] p. 333 [11 Sup. Ct. 832, 35 L. Ed. 419]) as follows: 'Other objections have been urged by the plaintiffs which we do not deem it necessary to consider. For instance, it is said that the mayor of the city of San Francisco, one of the board of commissioners, was himself the owner of a lot on Dupont street, and, for that reason, was incompetent to act as one of the board of street commissioners. * * * In respect to all these and like objections, it is sufficient to say that they do not necessarily involve any question of a federal nature, and, so far as this court is concerned, are concluded by the decision of the Supreme Court of California."

The case of Lent v. Tillson, supra, from which the last above-quoted citation was made, was decided by this court in 72 Cal. 404, 14 Pac. 71, and that decision of this court, to which the above-quoted passage refers, has thus stood as the judicial declaration of the law of this state touching the question now before us, for the past 30 years, during which time practically every existing statute governing the subject of street improvements has been enacted. In the case of People, etc., v. Sacramento Drainage District, 155 Cal. 373, 103 Pac. 207, wherein the question arose as to whether the members of the board of drainage commissioners were disqualified to act as a tribunal to hear objections to the assessment by reason of the fact that they were landholders within the district, this court held that they were not disqualified by their interest, basing its decision to this effect upon the authority of Hibben v. Smith, supra. It would thus seem to be settled that the interest which one or all of the members of boards of supervisors, boards of trustees, city councils, or other municipal bodies charged with the making or rectifying of assessments for street or other improvements may have, arising from the fact of their ownership of property directly affected by the proposed improvement, does not create such a disqualification to sit or act in the premises as to render their action void as not constituting due process of law. This being so, and the city council having heard the appeals and protests of the property owners and having sustained the same, and the record herein failing to show that any further steps have been taken by the petitioner herein to complete the said work of street improvement or to rectify the assessments therefor in accordance with the decision and determination of the said city council, it follows necessarily that the petitioner has not presented to this court such an application as would be sufficient to require the issuance of a writ of mandate herein, and that the de-

murrer of the respondents thereto must be sustained.

Writ denied.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; WILBUR, J.; LORIGAN, J.

---

179 Cal. 479

FEDERAL CONST. CO. v. CURD, Superintendent of Streets, et al. (S. F. 8728.)

(Supreme Court of California. Dec. 31, 1918. Rehearing Denied Jan. 30, 1919.)

1. MUNICIPAL CORPORATIONS ⊂=483(3)—IMPROVEMENTS—RECORD OF ASSESSMENTS AND WARRANTS.

Under Street Improvement Act of 1911, §§ 23, 25, 26, and 37, the recordation of the assessments, warrants and diagrams must be made in the usual way in which other official documents are required to be recorded by copying them at length in a book of records to be kept for that purpose.

2. MUNICIPAL CORPORATIONS ⊂=493(2)—IMPROVEMENTS — ASSESSMENTS — WARRANTS —APPEAL TO COUNCIL.

Under Street Improvement Act of 1911, §§ 23, 25, 26, 37, the time within which property owners may appeal to city council does not begin to run, nor does contractor's lien attach until the warrants, assessments, and certificates provided in such sections have been duly recorded by being copied in a book of records kept by street superintendent for that purpose.

3. MUNICIPAL CORPORATIONS ⊂=483(3) — RECORD OF ASSESSMENTS AND WARRANTS — SUFFICIENCY—STATUTE.

Acts of superintendent of streets in relation to the recordation of assessments, warrants, and diagrams in a street improvement proceeding *held* not to constitute a complete recordation thereof, in compliance with Street Improvement Act of 1911, §§ 23, 25, 26, and 37.

In Bank.

Application for writ of mandate by the Federal Construction Company against J. E. Curd, Superintendent of Streets of the City of Porterville, and W. L. Graham, treasurer of said city. Writ denied.

Morrison, Dunne & Brobeck, of San Francisco, and Maurice E. Powell, of Visalia (Raymond Benjamin, of San Francisco, of counsel), for petitioner.

Guy Knupp, of Porterville, C. L. Russell and C. L. Russell, Jr., both of Tulare, and Thomas, Beedy & Lanagan, of San Francisco, for respondents.

RICHARDS, Judge pro tem. This is an application for a writ of mandate by which the petitioner seeks to compel J. E. Curd, as superintendent of streets of the city of Porterville, Cal., to certify to W. L. Graham, as treasurer of said city, a list of unpaid assessments upon certain street improvement work alleged to have been done therein by the petitioner, and to direct the said treasurer to issue street improvement bonds thereon, representing the amount of said unpaid assessments. The facts giving rise to this proceeding are practically undisputed, and may be stated as follows:

In the month of May, 1915, the city of Porterville, through its regularly constituted officials, initiated proceedings, under the Street Improvement Act of 1911 (St. 1911, p. 730), for the improvement of certain of its streets, and in the course thereof duly entered into 11 certain contracts in writing with the petitioner herein, whereby the latter agreed to perform certain street work therein described in accordance with certain plans and specifications adopted by the board of trustees of said city. The petitioner alleges, and for the purpose of considering the questions of law raised herein it may be taken to be true, that all of the work required to be done by the petitioner under the terms of said contracts was performed and completed by it on July 8, 1915, and was then accepted by the superintendent of streets and his certificate of acceptance and approval duly issued. Thereafter and during the month of July, 1915, the said superintendent of streets prepared and made assessments as required by said act, covering the cost of the work performed under each of said contracts, and also prepared in connection with such assessments a diagram of the streets on which said work had been done; and thereupon attached to each of such assessments a warrant authorizing the petitioner as such contractor to demand and receive from the owners of the property, subject to such assessments, the amounts shown to be due thereon. Each of said warrants was dated either on the 6th or 7th day of August, 1915. In the preparation of said assessments and warrants the said superintendent of streets made use of loose leaves specially prepared and intended for insertion in a lock book also prepared to receive and hold the same; and as each of said assessments and warrants was completed by said superintendent of streets it was fastened in said lock book, which was marked and entitled "Street Assessments of the City of Porterville." The diagrams of the streets included in said work were also similarly placed in said book, and the said warrants, assessments, and diagrams as so placed were signed by the superintendent of streets, and countersigned by the president of the board of trustees of the said city of Porterville, on either August 6 or 7, 1915. That thereupon and as to each of said assessments, warrants, and diagrams so dated, signed and countersigned on the 6th day of August, 1915, the said superintendent of

streets made on the said date the following indorsement thereon: "Recorded August 6th, 1915. Irvin H. Althouse, superintendent of Streets of City of Porterville, California;" and as to each of said assessments, warrants, and diagrams which were so dated, signed, and countersigned on August 7, 1915, the said superintendent of streets made a like indorsement, but as of the date of August 7, 1915. This was the method which had always theretofore been pursued by said superintendent of streets and his predecessors in office for the recordation of such warrants, assessments and diagrams, and no other method was adopted or act done, such as the copying in extenso of such documents in any other book or record in the recordation of the said documents in this particular case. Subsequent to the performance of the foregoing acts, and on the same day of their performance, the said superintendent of streets removed each and all of such assessments from the lock book in which the same had been placed, and delivered the same to the said contractor pursuant to the requirements of said street improvement act, and between the date of the said receipt thereof and the 10th day of August, 1915, the said contractor made the demand required by said act upon each of the persons assessed for the amount of their respective assessments; and, having done so, the said contractors, on the 10th day of August, 1915, redelivered to the said superintendent of streets each and all of such assessments and warrants with its return as to such demand duly indorsed thereon; which said return was thereupon indorsed by said superintendent of streets as recorded on said August 10, 1915, and thereupon, and on said August 10, 1915, each of said assessments and warrants was replaced by him in said lock book, where they thereafter remained. On December 27, 1915, a number of the persons whose property had been assessed according to said assessments, filed with the clerk of the board of trustees of said city their objection, in writing, thereto, setting forth as the ground of their said objections that the said contractor had not completed its said contracts in accordance with the plans and specifications thereof. Due notice was given of these objections, and the matter of the hearing thereon was fixed for the 4th day of December, 1917. Only three members of said board of trustees were present at the hearing upon said objections. It is alleged by the petitioner herein, and is not controverted, that each of the said three members of said board so conducting and participating in said hearings and rendering their and each of their decisions upon the same, was an owner or was interested in one or other of the parcels of land upon which such assessments had been imposed and in respect to which said objections had been filed and upon which objections said hearing had been had. It was also alleged, and not controverted, that the attorney for the said protestants was at the time thereof and of the hearings thereon a law partner of the city attorney of said city, who was then directly interested in the outcome of such hearings, and was thereby biased and prejudiced against the said contractor, and who advised and urged the said board of trustees to sustain said objections. At the time of such hearings the petitioner herein objected to the said members of said board sitting upon the hearings thereon or deciding or determining the matter of said protests and objected to their determination thereof, but notwithstanding its said objection the said board of trustees, and the said members thereof, proceeded to hear and to determine said objections and to make and enter the order of said board sustaining the same. Notwithstanding said determination and order the petitioner herein has demanded of the superintendent of streets that he make and certify to the city treasurer a list of all of said assessments which are unpaid, and has also demanded of the said city treasurer that he thereupon make out and deliver to the petitioner bonds representing such unpaid assessments. Said officials having refused to comply with these demands, this proceeding has been instituted by said contractor, the petitioner herein.

[1] The first legal question presented upon the face of the foregoing proceedings is the question as to whether or not there was a proper or sufficient recordation of the said assessments, warrants, and diagrams, above referred to, to satisfy the requirements of the street improvement act. The provisions of the improvement act in relation to such recordation is found in section 23 thereof, which reads, in part, as follows:

"Said warrant, [diagram] and assessment, together with the certificate, if any, of the city engineer of the quantity and character of the work done, shall be recorded in the office of said superintendent of streets. * * * When so recorded the several amounts assessed shall be a lien upon the lands, lots, or portions of lots assessed, respectively, for the period of two years from the date of said recording, unless sooner discharged; and from and after the date of said recording of any warrant, assessment and certificate, all persons shall be deemed to have notice of the contents of the record thereof."

The said street improvement act, in section 37 thereof, further provides as follows:

"The superintendent of streets shall keep a public office in some convenient place within the municipality, and such records as may be required by the provisions of this act. The records so kept and signed by him, shall have the same force and effect as other public records, and copies therefrom duly certified, may be used in evidence with the same effect as the originals. The said records shall during all office hours,

be open to the inspection of any person wishing to examine them, free of charge."

There is also contained in section 26 of said improvement act the following provision:

"The owners, whether named in the assessment or not, the contractor, or his assigns, and all other persons directly interested in any work done under this act, or in the assessment, feeling aggrieved by any act or determination of the superintendent of streets in relation thereto, or who claim that the work has not been performed according to the contract in a good and substantial manner, or having or making any objection to the correctness or legality of the assessment or other act, determination, or proceedings of the superintendent of streets, shall, within thirty days after the date of the warrant, appeal to the city council, as provided in this section, by briefly stating their objections in writing, and filing the same with the clerk of said city council."

The last above quoted provision of the said street improvement act is the one which gives point to the petitioner's contention that the acts of the said superintendent of streets, done as above stated, in relation to the recordation of the said assessments, warrants, and diagrams, constituted and completed the recordation thereof in compliance with the provisions of said act, and hence that the said appeals and protests of the property owners affected by said assessments, not having been filed within 30 days after the dates of the recordation of said warrants, were ineffectual for any purpose, and that the said board of trustees had, therefore, no jurisdiction to entertain, hear, or determine the same; and hence said appeals and protests being too late, and the said hearing and determination by said board being illegal and void, the petitioner was entitled to have the demands which it subsequently made upon the defendants herein complied with, and upon their refusal so to do is entitled to this writ. On the other hand, if it should be concluded that the said acts of the said superintendent of streets did not constitute a proper or legal recordation of said assessments, warrants, and diagrams as required by the terms of said act, these documents have never been recorded at all, and hence the demand upon the property owners for the payment of their assessments was never legally made; and hence, also, the time within which said property owners might make and file their appeals and protests has never commenced to run; and hence, of course, the petitioner is not entitled to this writ. It is conceded that the time within which property owners affected by assessments made and warrants issued under the terms of the said street improvement act may make their appeals and protests to the board of trustees of the city begins to run from the date of the due recordation of said warrants, and that from and after the date of said recording of said warrants all persons shall be deemed to have notice of the contents of the record thereof. Sections 23 and 26, supra; Cotton v. Watson, 134 Cal. 422, 66 Pac. 490. It is clear that the vital and in fact the only question involved in this case is the question as to whether the aforesaid acts of the superintendent of streets, done in relation to the recordation of the assessments, warrants, and diagrams in question, amounted to a due recordation thereof, within the proper construction of the foregoing provisions of the street improvement act of 1911.

In the consideration of this question it may be noted at the outset that while the street improvement act of 1911 does not contain any express direction as to how the superintendent of streets shall proceed to perform his duty in the matter of the recordation of the documents in question, it does contain certain clauses which impliedly point to the manner in which this duty shall be performed. Section 37 of the act above quoted requires the superintendent to keep, in a public office at some convenient place within the municipality, "such records as may be required by the provisions of this act," and that such records "shall, during all office hours, be open to the inspection of any person wishing to examine them, free of charge." The act also, in section 23 thereof, makes a distinction between the warrant and assessment and certificate and the diagram, in that as to the first three of these original documents they are to be "recorded," while the "diagram" is only required to be "filed," which would go to indicate that the mere filing of the warrant, assessment, and certificate would not, of itself, be sufficient to constitute a recordation thereof. This section of the act also provides that, "after said warrant, assessment, and certificate are recorded, the same shall be delivered to the contractor for the purpose of making the demand for the payment of the assessments in accordance with the provisions of the following section of the act. Section 25 of the act provides that the warrant so delivered to the contractor shall be returned to the superintendent of streets within thirty days after its date, with a return indorsed thereon verified by the contractor or some person in his behalf, stating the nature and character of the demand which has been made and whether any of the assessments remain in whole or in part unpaid; the section then provides that "thereupon the superintendent of streets shall record the return so made, in the margin of the record of the warrant and assessment." The section further provides that the superintendent of streets "is authorized * * * to receive the amount due upon any assessment list and warrant issued by him, and give a good and sufficient discharge therefor." Finally, the section provides that, in

case any warrant is lost, "upon proof of such loss a duplicate can be issued," etc.

These various excerpts from the sections from the street improvement act immediately relating to the record of the warrant and assessment point clearly to the conclusion that the recordation of these documents must be made in the usual way in which other official documents are required to be recorded; that is to say, by copying them at length in a book of records to be kept for such purpose. This conclusion becomes the more imperative by particular attention to the uses to which the originals of these documents are to be put after their due recordation has been accomplished. The statute, as we have seen, provides that "after said warrant, assessment and certificate are recorded the same shall be delivered to the contractor," and shall constitute his authority to make demand upon the property owners for the payment of the sums due thereon. The contractor, or his agents, may retain these originals for 30 days before making his return thereon, during all of which time they are of course, out of the possession and control of the street superintendent, who would, therefore, during that period have no record whatever in his office of their contents unless he had made the recorded copies of them after the usual manner of recording such original documents as a recorder is not to retain. During such period, also, the superintendent of streets, unless he had made such record copies of this document, would have no official data upon which to compute the amount due upon any of these outstanding warrants and assessments upon which payments were sought to be made, nor from which to make a duplicate of any warrant which might have been lost.

[2, 3] These considerations most strongly argue, in favor of the contention of the respondents herein, that until the warrant, assessment, and certificate provided for in the street improvement act have been duly recorded by being copied in a book of records to be kept by the street superintendent for such purpose, the time within which property owners may make their appeal to the city council does not begin to run, nor does the lien of the contractor attach. This contention also gains considerable support from the early case of Himmelman v. Danos, 35 Cal. 441, wherein it was held that the act of a street superintendent in copying an assessment, warrant, and diagram in a book kept in his office for that purpose, but without affixing thereto his signature and certificate of recordation, did not suffice to create a lien upon the property affected thereby.

In answer to this contention the petitioner places his reliance, first, upon section 1170 of the Civil Code, which reads as follows:

"An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the recorder's office, with the proper officer, for record."

This section of the Civil Code has direct reference only to the recordation of Transfers of property and like instruments by official recorders, and can only inferentially have a bearing upon the present controversy; but, even so, it is to be read in connection with the provisions of section 1213 of the Civil Code in order to determine its effect as affording constructive notice of the contents of the instrument. This court, in the case of Cady v. Purser, 131 Cal. 552, 63 Pac. 844, 82 Am. St. Rep. 391, had occasion to construe both of these sections of the Civil Code together, and it was there held that, in order that constructive notice of instruments required to be recorded might be given to subsequent purchasers or mortgagees, the Legislature must have intended something in addition to depositing the instrument in the recorder's office for record, and that the provisions of these sections of the Civil Code are not satisfied until the instrument has been recorded by being transcribed in a proper book. When so transcribed and certified, it operates to give constructive notice of its contents, by relation to the date of its filing for record, and thus these two sections of the Civil Code are to be harmonized. It will be seen, however, that this conclusion affords no consolation to the petitioner in the instant case. The petitioner further contends that the case of Bentley v. Hurlburt, 153 Cal. 796, 96 Pac. 890, is authority for its insistence that its lien attached, and the time for property owners to file their appeal before the city council began to run from the filing for record of the warrants and assessments in question, even though the same were not recorded by him by copying in a book, and even though the originals were removed from his office for the purpose of making the statutory demand. In that case, however, the question involved was the sufficiency of the filing for record of a plat or map of a subdivision. The statute did not require that, in the case of such maps or plats, they should be copied in a book, but merely required that the original map or plat be filed with the recorder and be by him posted in a book of maps. The court in that case held that the act of filing was sufficient as applied to that class of documents to constitute a due recordation thereof, and hence that its subsequent withdrawal for some temporary purpose did not destroy the consummated effect of its recordation by that means. The distinction between that case and the case at bar is obvious. The case of Bernard Co. v. Los Angeles, 18 Cal. App. 626, 124 Pac. 88, is also cited and relied upon by the petitioner; but that case also referred to the recordation of a diagram, and is thus distinguishable from the case at bar. The conclusion which we have therefore arrived at is that

the acts of the superintendent of streets in the instant case, in relation to the recording of the warrants and assessments in question, did not amount to a due recordation thereof so as to set in motion the time within which the respondents herein, as property owners affected by such assessments, might make their appeal to the city council. This being so, they were not too late in making such appeal, and hence the city council had jurisdiction to hear and determine the same.

It is not necessary to consider, in this decision, the question discussed at length in the briefs of counsel herein as to the propriety or validity of the action of the members of the city council in undertaking to hear and determine said appeals, since that subject is fully discussed and determined adversely to the petitioner's contention in the case of Federal Construction Co. v. Curd et al., L. A. No. 8727, 177 Pac. 469, decided this day, and to which reference is made for our conclusions thereon.

The writ is denied.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; WILBUR, J.; LORIGAN, J.

---

38 Cal. App. 654

## KREITZER v. SOUTHERN PACIFIC CO.

(Civ. 1898.)

(District Court of Appeal, Third District, California. Nov. 15, 1918. Rehearing Denied by Supreme Court Jan. 13, 1919.)

1. DEATH ⊂=58(1)—PRESUMPTION—CONTRIBUTORY NEGLIGENCE.

Where a night watchman on a railroad bridge was found dead in a sitting position beside a water barrel, *held* that it could not be presumed that he went to sleep and was struck by a passing train, in view of Code Civ. Proc. § 1963, subd. 4, as to presumption that a person takes ordinary care for his own concerns.

2. MASTER AND SERVANT ⊂=286(14)—INJURIES TO SERVANT—JURY QUESTION.

Whether a railroad company engaged in interstate commerce was negligent in failing to provide a safe place of work for a night watchman on its bridge, who was killed by a passing train, *held*, under the evidence, for the jury.

3. MASTER AND SERVANT ⊂=289(25) — INJURIES TO SERVANT—JURY QUESTION.

Whether a night watchman on a railroad bridge of an interstate carrier was guilty of gross negligence in failing to select a place which was designed as a refuge for persons on the bridge when a train was passing, and whether, when placing himself in the position selected, he failed to take ordinary precautions, *held*, under the evidence, for the jury.

4. NEGLIGENCE ⊂=136(9) — EVIDENCE — JURY QUESTION.

The rule is that negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn from the evidence.

5. MASTER AND SERVANT ⊂=265(4)—DEFENSES —BURDEN OF PROOF.

The burden of establishing the defense of assumption of risk, in an action under the Federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), is upon the master.

6. MASTER AND SERVANT ⊂=204(1)—ASSUMPTION OF RISK.

In an action for death under Federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), *held* that a servant has the right to assume that the master has used due diligence to provide suitable appliances, and he does not assume the risk of the employer's negligence in performing such duties, except where the defect is known, or is so patent as to be readily observable.

7. MASTER AND SERVANT ⊂=288(12)—ASSUMPTION OF RISK—JURY QUESTION.

Whether a night watchman on a railroad bridge trestle used in interstate commerce assumed the risk attendant upon the performance of his work for the reason that the failure of the company to provide a suitable place for him to avoid passing trains was obvious *held*, under the evidence, for the jury.

8. TRIAL ⊂=142—JURY QUESTION—SPECULATIVE VERDICT.

While a jury ought not to be permitted to speculative, in the sense of guess between causes when no reasonable explanation of injury can be found in the testimony, yet, in the absence of direct testimony, the simple suggestion of theories by defendant does not reduce the jury to mere speculation, and disqualify it from determining the cause of an injury complained of.

9. DEATH ⊂=99(4)—EXCESSIVE DAMAGES.

An award of $7,500, to be apportioned between a widow and minor children of defendant's deceased employé, engaged in interstate commerce, who had a probable earning capacity of $900 for 17.4 years, *held* not excessive, on the theory that it assumed that the deceased would devote his entire earnings to the support of his family.

Appeal from Superior Court, Stanislaus County; W. H. Langdon, Judge.

Action by Rose Kreitzer, as administratrix of the estate of Andrew Kreitzer, deceased, against the Southern Pacific Company. From a judgment for plaintiff, and an order denying new trial, defendant appeals. Affirmed.

F. H. Gould and W. C. Fitch, both of San Francisco, E. H. Zion, of Modesto, and Arthur Levinsky, of Stockton, for appellant.

Griffin, Carlson & Boone, of Modesto, for respondent.

CHIPMAN, P. J. Plaintiff's decedent was employed by the defendant, on or about January 5, 1916, as night watchman to guard or watch the bridge or trestle belonging to defendant, crossing the Tuolumne river at a point about 1 mile south of the station at the city of Modesto. He had discharged his duties as watchman for four or five days when, as is alleged in the first amended complaint, on January 11, 1916, between the hours of 6 p. m. and 12 o'clock midnight of said day, and while in the performance of his duties as such night watchman of said railroad bridge, he "was struck upon the head and body by one of the cars of a freight train which was crossing said railroad bridge" while traveling in a southerly direction, and was killed; that said railroad bridge "was and now is unsafe for any person to walk upon or travel over, due to the negligence of said defendant," because of the manner in which it is constructed, describing it; that there was and is no place on said bridge where deceased "could stand and remain at the same time that a train was crossing said bridge"; that the only places "in the nature of safety stations" were certain platforms about 25 yards apart, "upon which a person could step from said bridge proper"; that barrels filled with water were placed on these platforms, and "occupied most of the room or space upon each of said platforms"; that the spaces between said barrels and trains or cars passing over said bridge "were of such a narrow width that it was impossible for the said deceased, at the time he was so struck by said car of said freight train, or at any other time, to remain on said platform while a train was passing"; that deceased was killed by said freight train while on the second one of said platforms from the northern end of said bridge; that deceased had no notice or warning of the said approaching extra freight train; that at the time deceased was killed the defendant was engaged in interstate commerce, and deceased was employed in such commerce, and claims the benefit of the act of Congress approved April 22, 1908, and acts amendatory thereof, relating to the liability of common carriers; that in the course of his duties it became necessary, and he was so instructed by defendant, to go upon said bridge and to walk upon the top of said bridge for its entire length.

The answer is a specific denial of the averments of the complaint, and alleges that the death of deceased "was caused solely by and through a risk assumed by him in the course of his employment," and, furthermore, that his death "was caused by his own carelessness and negligence in failing to observe the approach of defendant's train while said train was upon the bridge referred to in plaintiff's complaint herein."

The cause was tried by the court with a jury, and a verdict was awarded as follows: For the plaintiff in the sum of $7,500 apportioned as follows: To the widow, age 52 years, $3,750; to the child Helen, age 16 years, $227.30; to the child Mary, age 14 years, $454.50; to the child Clara, age 7 years, $1,250.50, and to the child William, age 5 years, $1,818.20. Judgment was accordingly entered. Defendant appeals from the judgment and from the order denying its motion for a new trial.

Witness Coburn held the position of track foreman on construction work for defendant, and was foreman on the section including Modesto and the bridge or trestle where the accident occurred. He testified:

"At the time that I arranged with decedent to go to work for the railroad company I went over to his house I think, to see him. I told him I wanted to hire a man to protect the bridge, and I wanted to put a watchman on there at night; that we had found dynamite underneath it, and that I wanted to put a white man there that I could depend upon. I told him the wages would be $2 a night, and that he would have to work from 6 to 6. I told him to use no arms, in case he met with some accident down there not use any arms. He said, 'All right; I will do it.' I never saw him down there at work."

No other or further instructions were given deceased. He had worked for other railroad companies, and had previously worked for defendant company on that section, "doing ordinary track repairing, putting in new switches and changing rails, and one thing and another like that, and changing ties." He had been employed by defendant on that section for several months, in 1915, and in the course of his employment crossed this bridge two or three times a week on a hand car.

He was an active man, quick in his movements, in good health, and possessing all his faculties. He was about 5 feet 4½ inches in height and weighed about 140 pounds. He went to his work on the night of January 11, 1916, as usual, and appellant claims he was last seen alive about 7 o'clock. Witness Dodd, watchman on the county bridge which crosses the Tuolumne river about 60 feet from the railroad bridge, testified that from his house he had a clear view of the railroad bridge. He testified:

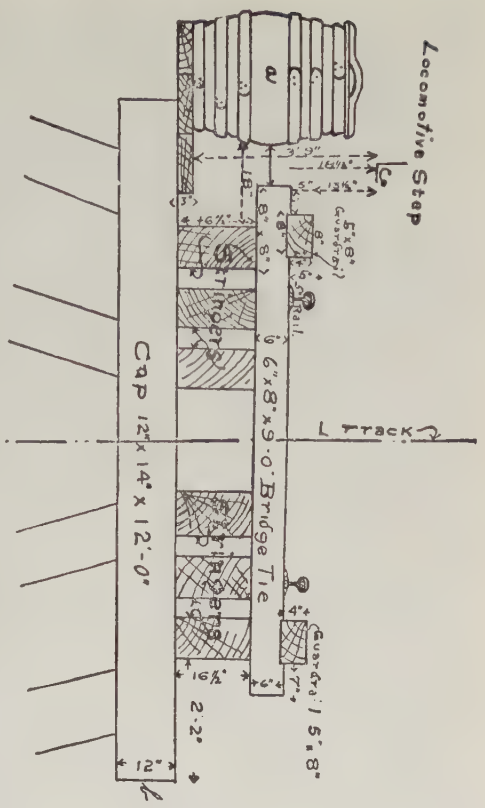
"I remember an occasion when some one purported to have found dynamite underneath the railroad bridge. After that, there was a night watch there. I saw him upon the bridge in the night. I remember the occasion when the body of Mr. Kreitzer was found. I went out to see the body on the bridge, and helped get the body out. The night before that, I saw a person with a lantern upon the bridge between 8 and 9 o'clock. My usual hour of retiring is from half past 8 to 9 o'clock, sometimes a little bit after, owing to what I have got to do. Just before I retired, I came out and looked around and went back to bed. I saw a man upon the railroad bridge with a lantern. This was the night be-

fore I saw the body. I saw the man with the lantern just before I got ready to go to bed. The man with the lantern was about 200 feet from me, going south."

It appeared that the trains passing through Modesto, south-bound, were: Passenger train 50, which arrived at 8:37 p. m. and departed at 8:41 p. m.; the next was the second section of No. 50, which arrived at 8:47 and departed at 8:49 p. m. The next train south-bound which passed the station was an extra engine, 2435, without stopping, at 9:03 p. m. The trains passing south after midnight were: One arriving at 3:30 and departing at 3:50; the next was an extra, 1656, going south, which arrived at 5:30 and departed at 5:50; the next was an extra, 1801, going south, arrived at 6:30 and departed at 7:40. It was testified that it was not unusual that extra trains passed in the night, "it is an everyday occurrence."

Witness Wood, coroner and public administrator for Stanislaus county, arrived at the scene of the accident between 7 and 8 o'clock the morning following the death of deceased. He testified:

"I saw Mr. Kreitzer's body on the railroad bridge, at the end toward Modesto, on the left-hand side or east side of the bridge, the up-river side. The body was between the end of the timber and a water barrel. It was between 200 and 300 feet from the west (north) end of the bridge, and wedged in between the end of the timbers that projected out under the track and the water barrel that was resting on the extreme end of the timber, wedged in between the end of this timber and the water barrel. It was sitting in a crouched position, his feet drawn up under him and his head was leaning to the—toward the south, toward the river; that is, toward the south. I took the body out and took it to my place of business. I found marks or bruises on the right-hand side of the head. The bruises were near the front, but on the right-hand side. There were no other marks upon the body. There was nothing on his person except a pipe and something of those things. On the ground underneath there was a great deal of blood, also a lantern and his hat. These were lying directly under him, on the ground below. A lunch pail was found. The lunch was not eaten. I think Mr. Davis, the sheriff, found it. His back was up against the barrel, his head turned toward the south. He was hit upon the right-hand side of the head. The distance between the barrel and the end of the timbers that were against his breast was about 16 or 17 inches. The tie was against his breast and the barrel against his back. He was touching both barrel and tie, so close that we had to shove the barrel off in order to remove his body from between the tie and the barrel. The barrel was not attached to the timber. It was full of water, and with some effort we succeeded in shoving it off onto the ground. * * * His face was facing the railroad ties and the rails. When I took the body out, he was dressed heavy. It was cold as the present weather, except it was foggy weather. He had on winter underwear, ordinary shirt and coat, and heavy storm coat and vest."




Witness Davis, sheriff of the county, helped to remove the body. He testified that:

The body was about 250 or 300 feet from the Modesto end of the bridge. "His head was leading to the south, and his face toward the railroad track; his back was wedged in between the barrel and the timbers, in a squatting position. We had considerable trouble getting him out."

The bridge structure consists of a steel bridge proper crossing the Tuolumne river for about 150 feet at the south end and a trestle thence northerly for about a quarter of a mile, the roadbed being about 28 feet above the river bottom land. The structure is graphically shown by a sketch attached to appellant's brief, which appears to illustrate correctly the situation at the location of the accident and the general construction of the trestle. Figure I is a cross-section of the trestle at the cap where deceased met his death, showing the barrel, "a"; the end of the cap without any barrel, "b"; the location of the lowest step of a locomotive with relation to the bridge ties, "c." The plan of construction is given by witness Coburn, foreman of defendant's construction work:

"First, piles were driven, four in number in each set. The sets were 15 feet apart, center to center. Each set was driven in crosswise of the track. Across the top of each set of piles was placed a timber 12 inches by 14 inches in diameter and 12 feet in length. On top of this

cap were placed six stringers, three under each rail. These stringers are 8 inches in thickness, 16½ inches vertical, and are about 30 feet in length and run parallel with the track. The distance from the outer end of the cap to the outer side of the outer stringer is 2 feet and 2 inches on each end. On top of these stringers are placed ties 8 inches horizontal by 6 inches vertical, and 9 feet in length, and placed 4 inches apart. On top of these ties are placed the steel rails, which are 4 feet 8½ inches apart, and midway between the rail and the outer end of the tie is the guard rail, a small timber 8 inches horizontal by 5 inches vertical, running parallel to the rail and mortised into the tie about 1 inch. Upon the end of every tenth cap, on each side of the trestle, is a small platform, and on this platform is placed a barrel filled with water for use in case of fire. Between the barrel and the end of the ties is a space of 16 or 17 inches. The platform upon which the barrel is placed is just large enough to set the barrel on. About 150 feet of the extreme southern end, where the bridge crossed the river, was made of steel and had no barrels."

The evidence was that the construction of this trestle was in accordance with the plans prevailing throughout the Southern Pacific System. The contention of plaintiff is that the defendant was negligent in failing to provide a safe place for the decedent to take refuge from passing trains. In other respects we do not understand that there is objection urged to the general construction of the bridge. So far as the public is concerned there was no obligation upon the railroad company to provide safety stations. There was, however, a duty to make such provision for its employés, and its contention is that the ends of these caps, occurring on both sides of the track every 15 feet, furnished such places of safety. Witness Burgess, supervisor of bridges and buildings for the defendant corporation, testified:

"I am familiar with the methods employed by railroad men in getting out of the way on bridges of this kind when trains are passing. They simply get down on the cap, and sit there until the train passes, steadying themselves with a hand on the guard timbers at the end of the tie. That position involves no danger for a railroad man or for any man of ordinary activity with his faculties. A man can remove himself from the surface of the bridge, such as this, and seat himself on the tie as I have suggested in not over 10 seconds, I should judge. I have done this, and that is the way that I in my practice as a railroad man adopt of removing myself from the platform of a bridge to a place of safety when trains are passing, and that is the ordinary way that railroad men in this section of the Southern Pacific take care of themselves when trains are passing on long bridges of this character. The ties are 4 inches apart, and the top of the tie is 8 inches. There is no difficulty in walking at an ordinary rate of speed over these ties. The practice of placing a barrel upon a cap is for fire protection. I never observed any man under my supervision while working on these bridges attempt to take refuge when a passing train came along on a platform on which the barrel is situated. I never attempted it."

He testified that:

The distance from the end of the tie to the end of the cap is a foot and a half. "I would not want to stand there, to stand up. I would not call that a safety station in that position; not standing up."

The distance from the top of the cap to the steps of a locomotive (see figure I) is 4 feet, showing that in a sitting position a man would be safe. The witness, Coburn testified:

"Whenever the train comes along, these caps are located about 15 feet apart, and we would scatter out and get on top of the caps that would be underneath the track like, sat on there while the train was passing over. I never had but one man that could not get down on the caps. No one ever made any objection to the method of getting down. * * * That method of escaping from passing trains has been in use ever since my knowledge, that is for 30 years, and all that time it has been a safe method for escaping trains."

He was asked whether the railroad men took refuge at any time between the barrels on the caps, and answered:

"No, sir. Neither myself or the other men employed in fixing the track would go for safety upon these places where the barrels were when the trains were passing. There is some room there, but you take chances in getting there. The space was too narrow. I know, however, that a man the size of the decedent could, if he had sat upon the cap where the barrel sat, with his legs hanging down, escape any possible injury from the car if he had kept his head in the proper place. I say that because when he gets down on the cap, he is below the top of the rail if he stoops his head down a little bit."

Speaking of this as a place of safety, he testified:

"A man could get in between on the station where the barrels were, and if he got down, he would be perfectly safe if a train went over. He would have to be a small man, understand; I don't mean a great big man. I mean a small one, and get his head down in order to get in the clear. I wouldn't like to get in there unless I had my head down."

As before shown, the decedent was a small man. Witness Burgess, on cross-examination testified that since the accident they had raised the platform even with the ties and extended it so that the barrels are now 3 feet from the end of the ties. They were formerly 11 inches from the end of the ties. He testified:

"The purpose for which they were put in was to make a place for the water barrel more accessible in the case of fire. That is the reason they were built; not for safety stations."

Witness Coburn testified:

"The barrels are about 38 inches in height, and are located on alternate sides of the track,

first on the right side and then on the left side, and are about 75 feet apart."

Witness Foulks, telegraph operator of defendant company, testified:

"There is a set of block signals at the curve leading to the bridge east of Modesto, a short distance, that should be in plain sight of the bridge. During the night there is a light; when it is safe, it is a green light, and the arm extends downward in a slanting position; that is when there is no train in the block coming from the west. When the train enters the block coming from the west, the signal arm goes up, becomes horizontal, and the green light disappears, and a red light is shown. * * * The train would ordinarily whistle five different times passing through this town from the west before it reaches the bridge. No whistle is given for the bridge."

It was testified that there is a whistling post a quarter of a mile from the bridge.

Witness Coburn testified that:

"When engines are coming from the north whistles can be heard upon the bridge when they are in the block, and the ringing of bells can be heard as they pass through the town. The headlight of an engine approaching can be seen from the northern end of the bridge for about a half a mile, very near a half a mile."

The testimony of the engineer and fireman of engine No. 2435, that passed Modesto at 9:03 p. m., was that it was on a trial trip, and traveling as an extra without cars other than the tender; that they were on the lookout in passing through Modesto and crossing the bridge; that the engine bell was ringing as they crossed the bridge; that they saw no man on the bridge, and were quite sure if they had struck deceased they would have seen it.

Witness Osborne, car foreman of defendant company, testified, as did witness Coburn, to the effect that the end of the cap was a safe place of refuge during the passing of trains, and that he could not see "that there would be any difference getting down in the nighttime than it would in the daytime, if he had a lantern." He testified that it would not be as easy for a person to get down on the cap the first time in the night as it would be in the daytime. The record states:

"Here a model of a portion of the bridge is offered in evidence, consisting of a cap, the stringer nearest to the cap in position, several ties placed on the stringer and the guard rail. The jury inspected the same, went upon the top, experimented in getting down from the top of the ties and guard rail on to the cap. The witness illustrated how he could sit upon the ends of the ties, place his feet upon the cap, and then go down upon the cap upon one knee and one foot."

It was stipulated that if the engineers and firemen of the trains passing over the bridge between 6 p. m. and midnight of January 11, 1916, were present, they would testify that they crossed the bridge in the usual manner, giving the customary signals by bells and whistles; that the trains were not operated at over 10 miles an hour and had powerful electric headlights by which objects within 250 feet were plainly visible; that they kept careful watch, and saw no man on the bridge and no light at or near any barrel, and "that neither his engine nor his cars struck or killed the deceased."

We have at considerable length endeavored to state the evidence and to show the condition existing at the time of the accident. Defendant advances the following contentions:

"First. That defendant was not negligent in failing to provide a safe place for the decedent to perform his work.

"Second. That the sole cause of the injury to the decedent, if it was caused by a passing train, was the gross negligence of decedent in failing to select places on the bridge which were designed for and were perfectly safe, and also because he did not, when placing himself in position selected, take ordinary precaution to protect himself, in which event he would have been safe.

"Third. The danger attendant upon decedent's manner in performing his work was open, obvious, and plainly apparent. He made no objections thereto and continued in the performance of his work after having had full opportunity to observe and appreciate the surrounding conditions. He therefore assumed the risk attendant upon the performance of the work which he undertook.

"Fourth. Even assuming that defendant was negligent in failing to provide a safe place to work, there is no evidence which discloses that such failure was the approximate cause or had anything to do with the death of decedent.

"Fifth. The damages awarded were excessive."

[1-4] Deceased had never before done any work for defendant at night, and this was his first service as watchman. So far as appears, his knowledge of the construction of this bridge and trestle was such only as he may have acquired in riding over it on a hand car to and from his work elsewhere two or three times a week for some months. It is not shown, nor is it claimed by defendant, that he knew anything about the provisions made for men working on the bridge to avoid passing trains, except such knowledge as he had acquired in the two or three nights he had served as watchman before he was killed. What course he pursued during these nights, if he happened to be on the bridge when a train passed, we do not know. He may have been at one end of the bridge when the two regular trains passed not long before the extra engine 2435 came along. It is reasonably clear that he met his death by being struck by some part of an engine or car while endeavoring to protect himself by taking refuge on the platform where a barrel stood on the east side of the trestle, 200 or 300 feet from the north end. The position of the wound caused by the blow which crushed his skull and the position of the body left little

doubt of the cause of his death. There were no trains before midnight except the two regulars a few minutes before 9 p. m. and the extra engine 2435 a few minutes after 9 o'clock. The next trains going south were after 3:30 a. m. His lunch was not eaten, which would indicate that the accident occurred before midnight, for it is reasonable to assume that he would have eaten it before 3:30 a. m. The testimony of the county bridge watchman justifies the inference that he saw the deceased about the time engine 2435 passed through Modesto, and not far from where he was killed. If he had been standing on the platform when the blow struck him, it would almost certainly have knocked him off, and he would have been found on the ground below. Dr. Hennemuth, who made the autopsy, testified:

"I found the right frontal bone and the right temporal bone of the skull caved in, and a fracture extending down through the base through the petrous portion of the temporal bone. I think there were two cuts on the head; that is, the scalp was cut or ripped open. There were no bruises on any other portion of the body that I remember at the present time."

If he had been standing, the blow would have struck him on his side below the shoulder. Sitting or crouching as the body was found, the step of locomotive 2435 (figure I) could have struck his head. Doubtless the blow, and the involuntary movements of the body as a result of the blow, would cause it to take the cramped position in which it was found. There were no trains after this locomotive passed until 3:30 a. m., and it is suggested by appellant that after the engine had passed there were no trains due on regular time for several hours, and deceased may have seated himself by this barrel and fallen asleep and allowed his head to drop forward and thus come in contact with some part of an engine or car. But this assumption cannot be indulged, for it involves a violation of duty, which cannot be presumed. Besides, there is a presumption "that a person takes ordinary care of his own concerns." Code Civ. Proc. subd. 4, § 1963; Crabbe v. Mammoth Channel G. M. Co., 168 Cal. 501, 506, 143 Pac. 714. It is conceded that the floor of the bridge is a place of danger when trains are passing over it, and that the only place of escape is either on the end of the caps or at the platforms where barrels are situated. The evidence was that it is the custom of men working on the floor of the bridge in the daytime to take refuge on the caps when trains are passing. No such custom is shown as to nighttime, for repair work is not then done. Witness Coburn, who testified to this custom, stated that he had one man on a crew who could not get down on a cap. Standing on the cap was considered unsafe. While the evidence was that the platforms built for barrels may not have been built with special reference to furnishing a means of escape from passing trains, they had that appearance, and could be so used, and to one going on the bridge as watchman, not familiar with the means of escape from passing trains, and not knowing the exact space between the barrel and the projecting steps or parts of cars, would naturally, we think, in the nighttime, resort to one of these platforms rather than to one of the caps of whose relation to the engine or cars he had no more knowledge and which are not so readily accessible.

Deceased was told to watch the bridge, but was not instructed how to do it. It is claimed that he could have performed his duty by walking on the county bridge, which is parallel to the company's bridge and 60 or 100 feet distant from it; or he could have walked underneath the bridge, thus avoiding any danger from passing trains. It seems to us that when told to watch the bridge deceased would naturally assume that he was to patrol it, and to do this efficiently he must go upon it. If, as is claimed, ample provision was made to escape passing trains, it was not a place of danger. If there was danger from lack of such provision or from provision likely not to be comprehended by deceased, he should have been warned of the danger and instructed how to avoid it. The suggestion that he should not have gone on to the floor of the bridge implies danger and lack of provision to escape it. Appellant cannot consistently urge that deceased ought not to have gone over the bridge and at the same time urge that it was entirely safe, for, if the bridge was a safe place, there is no reason why the deceased should have avoided going on to it in the discharge of his duty.

It is not to be overlooked that after this accident the defendant raised the platforms for the barrels even with the ties, and extended them so that the space between the barrels and the ends of the ties is 3 feet, whereas formerly this space was but 18 inches. The present platforms are quickly accessible, and afford a perfectly safe place of refuge. The change may not establish the fact that the former platforms were unsafe, but it shows very clearly that at small cost a safe place has been provided, and might have been provided before the accident occurred, and would have avoided it. It is also to be considered that a working model of a section of the bridge was introduced, and the jurymen were allowed to make an experiment of getting down to the caps from the ties, and the operation as railroad men used the caps for that purpose was illustrated by a witness.

Whether or not defendant was negligent in failing to provide a safe place for the decedent to work; whether decedent was guilty of gross negligence in failing to select a place which was designed for safety and was safe; whether, when placing himself in the position

selected, he failed to take ordinary precautions to protect himself—were questions which, under the evidence, could not be taken from the jury and decided by the court as matter of law, but were proper questions for the jury. In Herbert v. Southern Pacific Co., 121 Cal. 227, 229, 53 Pac. 651, the court said:

"The rule is, that negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn from the evidence" (citing cases).

[5-8] Appellant contends that deceased assumed the risk attendant upon the performance of the work which he undertook, for the reason that his manner in performing the work "was open, obvious, and plainly apparent"; that "he made no objections thereto, and continued in the performance of his work after having had full opportunity to observe and appreciate the surrounding conditions." The burden of establishing the defense of assumption of risk is upon the defendant. Kanawha & Michigan Ry. Co., v. Kerse, 239 U. S. 576, 36 Sup. Ct. 174, 60 L. Ed. 448. "The question of assumption of risk is quite apart from that of contributory negligence. The servant has the right to assume that the master has used due diligence to provide suitable appliances in the operation of his business, and he does not assume the risk of the employer's negligence in performing such duties. * * * This rule is subject to the exception that where a defect is known to the employé, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of knowledge and without objection, without assuming the hazard incident to such a situation. Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 67, 124 Sup. Ct. 24, 25 (48 L. Ed. 96). Appellant relies upon the exception to the rule. The evidence does not compel the inference that deceased had knowledge of the danger attending resort to the platform as a place of safety where he was killed, or that the risk was so patent as to be readily observed by him. On the contrary defendant's witnesses testified that if he was sitting down, as in fact he was when found, and had "kept his head down a little," there would have been no danger. There was no evidence that he knew there was not sufficient space between the barrel and the steps of a passing locomotive or parts of the cars, to make the place one of safety. He may not have had occasion to use a platform when trains were passing on any previous night, or he may have used it and not been hit. He cannot be presumed to have known the exact limit of safety in occupying a platform; knowledge of the exact width of the engines or cars or the distance they extended beyond the rails cannot be imputed to him. He resorted to what the jury believed he had a right to assume was a place of refuge. The presumption is that he took a position on the platform that offered security from injury. In Crabbe v. Mammoth Channel G. M. Co., supra, 168 Cal. at page 506, 143 Pac. 716, the court said:

"Where death is occasioned under circumstances such as this, without eyewitnesses, the law comes to the aid of the plaintiff who is pressing a suit for damages for the death, and that law is found in the presumption of the Code of Civil Procedure, namely, that a person takes ordinary care of his own concerns (citing cases). This is a controvertible presumption, it is true, but until controverted it is evidence in accordance with which the jury is bound to decide."

See Boyle v. Coast Imp. Co., 27 Cal. App. 714, 722, 723, 151 Pac. 25. In the case of Texas & Pacific Ry. Co. v. Swearingen, 196 U. S. 51, 25 Sup. Ct. 164, 49 L. Ed. 382, track No. 1 ran over a scale in the yard at El Paso. Two feet beyond the scale box was track No. 2, parallel with No. 1, and beyond this two other tracks, Nos. 3 and 4. The space between a ladder on the side of a freight car when running on track 2 and the scale box was shown to be 19½ inches. The scale was in plain view, and plaintiff knew of its location, but did not know of its dangerous proximity to track 2. In considering the contention that plaintiff assumed the risk the court said:

"The Court of Appeals was of opinion, and rightly we think, that the dangerous contiguity of the scale box to track No. 2, and the extra hazard to switchmen resulting therefrom, was not so open and obvious on other than a close inspection, as to justify taking from the jury the determination of the question whether there had been an assumption of the risk. The plaintiff was entitled to assume that the defendant company had used due care to provide a reasonably safe place for the doing by him of the work for which he had been employed; and, as the fact that the defendant company might not have performed such duty in respect to the scale box in question was not so patent as to be readily observable, the court could not declare, in view of the testimony of the plaintiff as to his actual want of knowledge of the danger, that he had assumed the hazard incident to the actual situation. Choctaw, O. & G. R. R. Co. v. McDade, 191 U. S. 64, 68 (48 L. Ed. 96, 100, 24 Sup. Ct. 24)."

An objection was made to an instruction given by the trial court that plaintiff knew the location of the track scale box and the track 2 on which he was riding in reference to the scale box; that the location was open and obvious to plaintiff's view, and as an experienced brakeman he was charged with notice that riding on the cars as he did was dangerous, and that he assumed the risk, and

the court should have so charged the jury. In commenting upon this contention the Supreme Court said:

"This assignment but reiterates contentions made in connection with the assignment based on the alleged error in overruling the motion for judgment. As we have already decided that knowledge of the increased hazard resulting from the dangerous proximity of the scale box to the north rail of track No. 2 could not be imputed to the plaintiff because he was aware of the existence and general location of the scale box, it was for the jury to determine, from a consideration of all the facts and circumstances in evidence, whether plaintiff had actual knowledge of the danger."

In the case of Choctaw v. McDade, supra, the court said:

"Upon this question the true test is not in the exercise of care to discover dangers, but whether the defect is known or plainly observable by the employé."

As to appellant's fourth point, we think the evidence was sufficient to justify the submission of the question to the jury whether the alleged negligence of defendant was the proximate cause of decedent's death. We have stated very fully the facts and circumstances attending the death of decedent and need not repeat them. "Doubtless," as we said in Wabash Screen Door Co. v. Black, 126 Fed. 721, 61 C. C. A. 639, "a jury ought not to be permitted to speculate, in the sense of guess, between causes, when no reasonable explanation of the injury can be found in the testimony. * * * But, in the absence of direct testimony, the simple suggestion of theories by the defense does not reduce the jury to mere speculation, and disqualify it from determining the cause of the injury complained of." We feel quite satisfied that there was sufficient evidence to warrant the submission of the question to the jury.

[9] It is claimed that the verdict was excessive for the reason, as given in appellant's brief:

"The uncontradicted testimony showed deceased received $75 per month. No allowance at all was made for any cost of living, clothing, or shelter of the deceased."

The life expectancy of deceased was 17.4 years. He had a probable earning capacity of $900 per year for 17.4 years, or $15,336. The plaintiff was awarded $7,500 to be apportioned between herself and her minor children as above shown. We may assume that the jury took into account the items mentioned by appellant, since they reduced decedent's gross earning capacity nearly one-half.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

38 Cal. App. 763

## HARTIGAN v. PACIFIC GAS & ELECTRIC CO. (Civ. 2683.)

(District Court of Appeal, First District, Division 1, California. Nov. 26, 1918.)

1. MANDAMUS ⟸154(4) — PLEADING—RIGHT OF PETITIONER—COMPLIANCE WITH RULES.

Property owner's petition for writ of mandate requiring gas company to furnish service is defective, in absence of allegation that petitioner has complied with rules and regulations formulated by Railroad Commission under Public Utilities Act.

2. MANDAMUS ⟸154(10)—ORIGINAL APPLICATIONS—LEAVE TO AMEND—WHEN DENIED.

Where counsel for petitioner for writ of mandate admitted client's noncompliance with rules of Public Service Commission, compliance being prerequisite to issuance of writ, leave will not be granted to amend the petition, so as to allege compliance.

3. MANDAMUS ⟸9—RIGHT TO REMEDY—PREVIOUS APPLICATION IN LOWER COURT.

Where writ of mandate was applied for in the superior court, and demurrer was sustained to the petition, whereupon petitioner dismissed the proceeding and applied in the appellate court for the same writ, the appellate court will not entertain jurisdiction.

Petition by William Hartigan for writ of mandate against the Pacific Gas & Electric Company. Demurrer sustained, and writ dismissed.

George D. Collins, Jr., of San Francisco, for petitioner.

Leo H. Susman, of San Francisco, for respondent.

PER CURIAM. Petition for writ of mandate, commanding the respondent to furnish to the petitioner its service of gas and electricity.

[1, 2] The court is of the opinion that the petition for the writ is deficient in its failure to state that the petitioner had complied with the rules and regulations formulated by the Railroad Commission under the Public Utilities Act of this state (St. 1911 [Ex. Sess.] p. 18); the commission being given statutory control of the subject-matter involved in this particular proceeding. For that reason the demurrer to the petition will be sustained, and leave to amend will not be granted, in view of the admission of counsel for the petitioner that the petitioner has not complied with such rules and regulations. It would be idle to grant leave to amend, because, the fact not existing, the petition could not be amended so as to truthfully allege it.

[3] Aside from this, it has been disclosed upon the hearing of the application that this writ was applied for in the first instance to the superior court of the city and

county of San Francisco, and that, upon an issue of law being joined in that proceeding by the interposition of a demurrer to the petition, the court sustained the demurrer without leave to amend, upon which, and before the entry of judgment, the petitioner dismissed the proceeding in that court, so that he might apply here for a similar writ to enforce the same alleged right. Under those circumstances this court will not entertain the application.

For the reasons first given the demurrer is sustained, without leave to amend, and for the reason last given the writ is dismissed.

---

(38 Cal. App. 714)

## PEOPLE v. VOTAW. (Cr. 628.)

(District Court of Appeal, Second District, California. Nov. 21, 1918. Hearing Denied by Supreme Court Jan. 20, 1919.)

1. CRIMINAL LAW ⟸1071—APPEAL—APPLICATION.

Points that facts stated in information do not constitute a public offense, and that judgment of conviction is uncertain and void, are referable solely to judgment roll, and may be raised at any stage of proceedings, although not included in the statement of points and grounds of appeal filed in the lower court as required by Pen. Code, § 1247.

2. CRIMINAL LAW ⟸1071—APPLICATION FOR APPEAL — CONSIDERATION OF ADDITIONAL POINTS.

Where the people cannot be prejudiced by consideration of additional points raised by appellant, but not stated in points and grounds of appeal filed in trial court under Pen. Code, § 1247, statement filed being sufficient to give jurisdiction of appeal, Appellate Court will not decline to consider such additional points.

3. SEDUCTION ⟸37—INFORMATION—STATUTE.

Information *held* to charge crime of seduction under promise of marriage, denounced by Pen. Code, § 268, particularly in the absence of objection except on appeal.

4. SEDUCTION ⟸45 — SUFFICIENCY OF EVIDENCE.

In prosecution for seduction under promise of marriage, denounced by Pen. Code, § 268, evidence *held* sufficient to justify conviction.

5. SEDUCTION ⟸46 — CORROBORATION OF PROSECUTRIX.

Corroboration of prosecutrix is not required by law of California to support conviction of seduction under promise of marriage.

6. SEDUCTION ⟸50(1)—INSTRUCTION.

In prosecution for seduction, instruction *held* not erroneous as misleading in making it possible for jury to find defendant guilty if act was result merely of meretricious bargain.

7. CRIMINAL LAW ⟸1137(3) — APPEAL — INVITED ERROR—INSTRUCTION.

Appellant from conviction of seduction cannot complain of instruction on ground it made it possible for jury to find him guilty, though act was result of meretricious bargain, where definition of offense in instruction was substantially identical with that embodied in one requested by appellant and given.

8. CRIMINAL LAW ⟸757(7)—INSTRUCTION — INVASION OF PROVINCE OF JURY.

Instruction, that witness false in one part of his or her testimony must be distrusted in others, *held* not erroneous as invading province of jury.

9. CRIMINAL LAW ⟸829(1)—INSTRUCTIONS—REPETITION.

In prosecution for seduction, action of trial court in striking out parts of instructions given at defendant's request *held* not erroneous, where parts stricken, so far as correct, were substantially embodied in other instructions given.

10. CRIMINAL LAW ⟸1206(3) — JUDGMENT WITH INDETERMINATE SENTENCE—OFFENSE BEFORE LAW.

Judgment of conviction for seduction was not void because providing for indeterminate sentence, though offense was committed at time before taking effect of indeterminate sentence law.

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Vernon J. Votaw was convicted of seduction, and from the judgment and an order denying his motion for new trial he appeals. Case remanded to the superior court, with instructions that such steps be taken as may be necessary to bring the defendant before it and to pronounce judgment upon him under the law as it stood at the time the crime was committed.

Owens & Wingert, of Los Angeles, Ralph F. Graham, of Whittier, and Frank F. Oster, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn, Deputy Atty. Gen., for the People.

MYERS, Judge pro tem. This is an appeal from a judgment of conviction of the crime of seduction under promise of marriage, as denounced by section 268 of the Penal Code, and from an order denying defendant's motion for a new trial.

[1, 2] The defendant urges upon this appeal three points which were not included in the statement of points and grounds of appeal filed by him in the court below under the provisions of section 1247 of the Penal Code. They are as follows: (1) The facts stated in the information do not constitute a public offense. (2) The district attorney was guilty of misconduct during the trial prejudicial to the defendant. (3) The judgment is uncertain and void. The statement filed by the defendant in the court below was a sufficient compliance with the requirements of section 1247 to give this court jurisdiction to consider the appeal. Of these additional points, the first

and third are referable solely to the judgment roll and are points which may be raised at any stage of the proceedings; the second is, in our opinion, inconsequential. Inasmuch as we cannot see that the respondent can be in any way prejudiced by our consideration of these additional points at this time, we shall not decline to consider them.

[3] The defendant earnestly contends that the facts stated in the information are insufficient to constitute a public offense. The information is as follows:

"The said Vernon J. Votaw is accused by the district attorney of and for the county of Los Angeles, state of California, by this information, of the crime of seduction under promise of marriage, a felony, committed as follows: That the said Vernon J. Votaw on or about the 19th day of May, 1917, at and in the county of Los Angeles, state of California, did willfully, unlawfully and feloniously have and accomplish an act of sexual intercourse with one Laura S. Newton, who was then and there an unmarried female of previous chaste character, said act of sexual intercourse being accomplished by him, the said Vernon J. Votaw, under and through promise of marriage then and there made by him, the said Vernon J. Votaw, to her, the said Laura S. Newton, contrary to the form, force and effect of the statute in such cases made and provided, and against the peace and dignity of the people of the state of California."

The offense in question is defined by section 268 as follows:

"Every person who, under promise of marriage, seduces and has sexual intercourse with an unmarried female of previous chaste character, is punishable," etc.

Defendant calls our attention to the words "seduces and has sexual intercourse," and contends that under this section something more is required than merely having sexual intercourse under promise of marriage. It is pointed out that a mere bargain between a man and a woman, whereby the woman barters her virtue in exchange for the man's promise of marriage, would not constitute seduction. Defendant contends that the information in this case charges nothing more than such a bargain; that in order to constitute a public offense it should charge, in addition, such facts as would amount to a seduction. Respondent replies, in effect, that seduction is the leading away of a chaste woman from the path of virtue, accomplished by any one of several different means, as, for example, by flattery, or false promises, or artifice, or urgent importunity, or undue influence, or the like; and that the information in this case charges in ordinary and concise language a seduction accomplished by the particular means of a promise of marriage.

The Supreme Court of this state, in a civil case (Marshall v. Taylor, 98 Cal. 55, 60, 32 Pac. 867, 869 [35 Am. St. Rep. 144]), has approved the following definition:

"The word 'seduction,' when applied to the conduct of a man toward a female, means the use of some influence, *promise*, art, or means on his part, by which he induces the woman to surrender her chastity and her virtue to his embraces. There must be something more than a mere reluctance on the part of the woman to commit the act, and her consent must be obtained by flattery, false *promises*, artifice, urgent importunity, based on professions of attachment, or the like, for the woman, and that relying solely on said *promises* or professions of flattery or artifice or importunity, she surrendered her person and chastity to her alleged seducer." (Italics ours.)

In People v. Krusick, 93 Cal. 74, 77, 28 Pac. 794, a prosecution under this section, the court said:

"In order to convict the defendant of the crime defined in this section, it is necessary for the state to prove that the person seduced was an 'unmarried female of previous chaste character,' and that she consented to sexual intercourse with the defendant upon the sole consideration of his promise to marry her."

In People v. Wallace, 109 Cal. 611, 612, 42 Pac. 159, the court said:

"The charge was seduction under promise of marriage, and, of course, the gist of the offense is the *accomplishment of the act by means of such promise* as the inducing cause of the consent of the one seduced." (Italics ours.)

In People v. Kehoe, 123 Cal. 224, 227, 55 Pac. 911 (69 Am. St. Rep. 52) the court said:

"The law is designed to protect female chastity. * * * If a previously chaste woman submits herself to the embraces of a man under promise of marriage from him, upon which she in fact relies, the conviction, generally speaking, may not be avoided by proof that the promise was not legal and binding."

In People v. Jensen, 15 Cal. App. 220, 222, 223, 114 Pac. 585, 586, the court states the facts of that case from the testimony of the prosecutrix as follows:

"That some time previously to the time at which she first became immorally intimate with the defendant, the latter and she became engaged to be married; that subsequently, for some reason, said engagement was broken; that during the period of said engagement the defendant did not have sexual relations with her; that, thereafter, she resumed keeping company with the defendant, and it was then that he began coaxing her to yield to his lust and submit to his embraces. She testified that she did not submit to his entreaties in this regard until he had promised her that *if she would do so* he would marry her, and that, finally, relying upon said promise, she consented to and did have sexual connection with him. * * * The direct testimony of the prosecutrix, as we must view it, warranted the verdict, if the jury believed it, as evidently they did." (Italics ours.)

Considering the information in this case in the light of these definitions, we do not think it can be said that it would fail to

convey to a defendant of ordinary intelligence the information that he was charged with the crime of seduction under promise of marriage as denounced by this section of the Code. It may be that it would have been vulnerable to a demurrer for uncertainty, if such demurrer had been interposed; but no question was raised as to the sufficiency of the information, either by demurrer or objection or motion, until the case had reached this court. Of course, if the information is, as defendant now contends, insufficient to state a public offense, that objection was not waived by defendant's failure to demur or to object to the introduction of the evidence or to move in arrest of judgment; but the fact that no such objection was made is strongly persuasive to the conclusion that the defendant was not in any way misled to his prejudice by what he now conceives to be a defect in the information. We are of the opinion that these circumstances and considerations bring this case, in this respect, within the rule followed in People v. Brown, 173 Pac. 621, and People v. Griesheimer (Sup.) 167 Pac. 521, 522.

[4, 5] Defendant contends that the evidence was insufficient to justify the verdict. It appears from the testimony of the prosecuting witness: That she and the defendant, who were fellow students in college, became engaged to be married as the culmination of a courtship which extended over a period of about two years. That about three weeks thereafter "he came to call on me in the evening and Perrys retired about 9 o'clock, and after they had retired he told me that he thought that I was the same as his wife and he was the same as my husband, and that it would be all right for us to have sexual intercourse. And I said, well, I did not know as it was exactly the same as his wife, because if anything should happen to me I would be ——— and he said, well there would not be anything happen, and we would take precautions and there would not be anything happen, and I consented." She further testified that she would not have consented if the promise of marriage had not been made. There was no question as to her previous chaste character, and it was testified by many witnesses that the defendant was the only man with whom she "kept company." The defendant did not deny the acts of intercourse, but did deny that there was ever any promise of marriage between them. The evidence of the prosecutrix was, if true, sufficient to present a perfect case of seduction under promise of marriage; not only a perfect case, but an exceedingly flagrant one. The jury, after a fair trial, found it to be true, and the court approved that finding by denying the defendant's motion for a new trial. Some point is made of the alleged circumstance that there is no corroboration of the testimony of the prosecutrix as to the promise of marriage. Defendant's counsel concede that no such corroboration is required by the law of California. It may be said in passing, however, that such corroboration does appear inferentially from many of the facts and circumstances in the record, and particularly from the letters in evidence which passed between the two.

[6, 7] Defendant complains of the giving by the court of instruction numbered H, as follows:

"If the jury believes from the evidence beyond a reasonable doubt that Laura S. Newton and the defendant, Votaw, had and accomplished an act of sexual intercourse as charged in the information, and that at the time of such act or prior thereto the defendant had promised to marry said Laura S. Newton, and that she was then an unmarried female of previous chaste character, and that but for such promise of marriage said Laura S. Newton would not have consented to said act of sexual intercourse, then you should find the defendant guilty as charged, notwithstanding the fact that other promises and representations were made as to the means and method by which such act should be accomplished."

The objection to this instruction is substantially the same as the objections to the information, namely, that it leaves out of consideration the question of seduction and makes it possible for the jury to find the defendant guilty, even though the intercourse was the result merely of a meretricious bargain between the parties. What we have said with respect to the sufficiency of the information applies here. It may be added that, even if it be conceded that the instruction was faulty in this respect, it could not have misled the jury in this case to the defendant's prejudice, because there was not a scintilla of evidence tending to show any such meretricious bargain. Furthermore, the definition of the offense contained in this instruction is substantially identical with that embodied in instruction numbered 6, which was given by the court in this case at the request of the defendant.

[8, 9] The court also instructed the jury that "a witness false in one part of his or her testimony must be distrusted in others." Defendant contends that this instruction invaded the province of the jury. This can scarcely be regarded as an open question in this state at this time. Complaint is also made of the modification of certain instructions given by the court at the request of the defendant, by striking out certain portions therefrom. An examination of these instructions discloses that the parts stricken out, in so far as they were correct statements of the law, are substantially embodied in other instructions given by the court.

[10] Defendant contends that the judgment in this case is void because it provides for an indeterminate sentence and the offense was committed at a time prior to the taking

effect of the indeterminate sentence law. This error does not render the judgment void. Ex parte Lee (Sup.) 171 Pac. 958; People v. Lee, 172 Pac. 158, 162; People v. Booth, 174 Pac. 685.

Following the practice adopted in People v. Hill, 172 Pac. 1114, the case is remanded to the superior court, with instructions that such steps be taken as may be necessary to bring the defendant before it and to pronounce judgment upon the defendant under the law as it stood at the time his crime was committed.

We concur: CONREY, P. J.; JAMES, J.

---

38 Cal. App. 751

## KIMBALL v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 2637.)

(District Court of Appeal, First District, Division 1, California. Nov. 25, 1918. Rehearing Denied Dec. 23, 1918.)

1. MINES AND MINERALS ⟸34—CLAIMS — TRANSFER — RIGHTS UNDER GRUBSTAKE AGREEMENT.

Under Civ. Code, §§ 856, 2243, persons who purchased mining claim in good faith and for valuable consideration are not responsible to plaintiff, who had rights in such claim under grubstake agreement.

2. EVIDENCE ⟸80(1)—PRESUMPTION — LAWS OF TERRITORY.

In absence of proof to contrary, it is presumed that laws of Alaska are same as those of California.

3. WITNESSES ⟸21 — REFUSAL TO ANSWER IMMATERIAL QUESTIONS—CONTEMPT.

Under Code Civ. Proc. § 2065, and section 1209, subsecs. 5, 10, witness in case involving mine was not guilty of contempt when he refused to answer immaterial questions relating to title of third person, a subject not in issue.

4. WITNESSES ⟸21—REFUSAL TO ANSWER QUESTION.

Under Code Civ. Proc. § 2065, and section 1209, subsecs. 5, 10, witness in action involving mine was guilty of contempt of court for refusing to answer question as to how much gold he had seen defendant and his employés clean up, which was pertinent to issue.

Application for writ of review by Charles E. Kimball against the Superior Court of the State of California in and for the City and County of San Francisco and others to annul a judgment of contempt. Judgment affirmed in part; otherwise annulled.

Clarence G. Atwood, of San Francisco, for petitioner.

Wilson T. Hume, of Portland, Or., for respondents.

STURTEVANT, Judge pro tem. This is an application for a writ of review brought by the petitioner to have a judgment of contempt annulled. The alleged contempt arose in certain proceedings had in the case of Heim v. Wilson. In the amended complaint, in that case, on which the parties went to trial, it was alleged that Wilson held title for the plaintiff, Heim, of and to certain properties acquired by the defendant Wilson, under and by virtue of a grubstake agreement theretofore entered into by and between the plaintiff, Heim, and the defendant, Wilson. In the said amended complaint, Charles E. Kimball, this petitioner, John S. Kimball, and the Wilson-Kimball Mining Company (a corporation), were not made parties or, if they were, judgment was entered in their favor. A part of the property involved was a mine in Alaska. The trial court found for the plaintiff as to the existence of the trust and entered an interlocutory decree, in which it ordered that an accounting be had. The findings are silent as to what is the law of Alaska on the subject of trusts or on any other subject. There is no finding as to the title, if any, of J. S. Kimball (deceased), of Charles E. Kimball (this petitioner), or of the Wilson-Kimball Mining Company (a corporation), or whether either "purchased it in good faith, and for a valuable consideration." Civ. Code, § 2243.

[1-4] In short, as the case was made in the trial court, it presented the simple issue as to what Wilson had obtained and acquired under the grubstake—nothing more. Wilson's vendees, who purchased in good faith and for a valuable consideration, are not responsible to the plaintiff, Heim. Civ. Code, §§ 856, 2243; Estate of Lyon, 163 Cal. 803, 805, 806, 127 Pac. 75; Kowalsky v. Kimberlin, 173 Cal. 506, 160 Pac. 673. In the absence of proof to the contrary, it is presumed that the laws of Alaska are the same as in California. Navajo County Bank v. Dolson, 163 Cal. 485, 126 Pac. 153, 41 L. R. A. (N. S.) 787; Hobbs v. Tom Reed Mining Company, 164 Cal. 497, 129 Pac. 781, 43 L. R. A. (N. S.) 1112; Fox v. Mick, 20 Cal. App. 599, 602, 129 Pac. 972. The witness was adjudged guilty of contempt for refusing to answer questions 1, 2, 3, 15, 18, 28, 32, 33, 34, and 35. All of those questions, except No. 18, related to the title of J. S. Kimball, a subject that was not an issue in the case. Such questions were therefore immaterial, and the petitioner was not guilty of contempt when he refused to answer immaterial questions. Code Civ. Proc. § 2065, and section 1209, subs. 5 and 10; Ex parte Zeehandelaar, 71 Cal. 238, 240, 12 Pac. 259; Rogers v. Court, 145 Cal. 88, 91, 78 Pac. 344. Question 18 was an inquiry as to how much gold the witness had seen J. L. Wilson and his

employés clean up. That question was directly pertinent to the issue on trial and should have been answered. For refusing to answer question No. 18, the judgment of contempt should be affirmed; but the judgment of contempt should be annulled as to all of the other questions. In re Rogers, 129 Cal. 468, 470, 62 Pac. 47.

It is so ordered.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

---

(38 Cal. App. 758)

CROSARO et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 2566.)

(District Court of Appeal, First District, Division 1, California. Nov. 25, 1918.)

MASTER AND SERVANT ⟸417(7)—WORKMEN'S COMPENSATION ACT—REVIEW.

Where Industrial Accident Commission had power to hold hearing, to take evidence, and to make findings thereon, its findings, though erroneous, are binding on the Court of Appeal, under St. 1913, p. 318, § 84; court's only power being in case where commission exceeds its authority.

Proceedings under the Workmen's Compensation Act by Angelo Crosaro and another for compensation for death of Guiseppe Crosaro. Order of Industrial Accident Commission refusing petitioners any allowance, and petitioners apply for writ of review to have order annulled. Affirmed.

I. F. Chapman, of San Francisco, for petitioners.

Chris. M. Bradley and Barry J. Colding, both of San Francisco (Theodore Hale, of San Francisco, of counsel), for respondents.

STURTEVANT, Judge pro tem. This is an application by the petitioners for a writ of review to have annulled an order of the Industrial Accident Commission refusing the petitioners any allowance as dependents under the Workmen's Compensation Act. The commission had regular hearings and made a full set of findings. From the latter it appears that the petitioners are, respectively, the surviving father and mother of Guiseppe Crosaro, who was killed in an accident in the early part of 1918; that Guiseppe was 23 years of age at the time of his death and had never been married. There is an express finding that neither of the petitioners was, at the time of the death of Guiseppe, "wholly nor partially dependent upon the employé for support." In their application the petitioners aver that said last-mentioned finding is not supported by the evidence, and they ask that the order of the commission refusing them an allowance as dependents be annulled.

We think the prayer of the petitioners cannot be granted. The commission took evidence on the subject of dependency, and the evidence shows that the petitioners could have lived, and did live, on the earnings of the father; and, as the commission had the power to hold the hearing, to take evidence, and to make findings thereon, such findings are, under these facts, binding on this court. True, the petitioners allege that "the findings are not supported by the evidence," but their real contention in this behalf is that the commission erred in its conclusions based on the evidence. Not intimating that the commission erred, yet if it did no court has power to correct mere errors of the commission. Stats. 1913, p. 279, § 84. It is only excess of power that can be examined into by the courts. As an abstract proposition, power to hear and determine is power to determine it wrong as well as right. McFarland v. McGowen, 98 Cal. 331, 33 Pac. 113.

The order of the commission is affirmed.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

---

(38 Cal. App. 706)

PRETTY v. WARDEN et al. (Civ. 2584.)

(District Court of Appeal, Second District, California. Nov. 21, 1918.)

1. TAXATION ⟸707—SALES—NOTICE OF APPLICATION FOR DEED—SERVICE—AFFIDAVITS.

Under St. 1909, p. 1072, § 24, providing for notice of a tax sale, purchaser's intention to apply for a deed, and for an affidavit of service, an affidavit of service on the occupant, "an agent of the owner," was insufficient as showing no personal service on the owner or of due diligence to accomplish such service.

2. TAXATION ⟸701—TAX SALE—NATURE—COMPLIANCE WITH STATUTE.

Proceedings calculated to deprive an owner of his property under the taxing power are in invitum, and the requirements of the statute as to notice of application for tax deed must be strictly complied with.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Suit by Elizabeth A. Pretty against Julia P. Warden and another to quiet title. From a decree for plaintiff, defendants appeal. Affirmed.

J. Irving McKenna and Catherine A. McKenna, both of Los Angeles, for appellants.

James M. O'Brien and Luther P. Spalding, both of Los Angeles, for respondent.

MYERS, Judge pro tem. Defendants appeal from a judgment against them quieting plaintiff's title to certain property in the city of Los Angeles as against the claim of

defendants under a deed issued by the board of public works of said city to defendant Julia P. Warden after a failure of the plaintiff to redeem from the lien of a delinquent assessment previously levied against said property for public park purposes.

[1] Appellants concede that the title is in the plaintiff, except as it may have been divested by the deed above mentioned and which was issued pursuant to proceedings had under the Park and Playground Act of 1909 (Stats. 1909, p. 1066). Section 24 of this act provides that the purchaser must, at least 30 days before he applies for a deed, serve upon the owner of the property, and upon the occupant thereof, if occupied, a written notice of his intention to apply for a deed, and must also file with the board of public works an affidavit or affidavits showing that such notice has been given as required; or, if the notice was not served upon the owner personally, that due diligence was used to find said owner. The affidavit of service here in question, so far as it is here material, is to the effect that affiant, as agent for the purchaser, served such notice "by delivering a true copy of the attached notice to redeem to Mrs. Charles Greenburg, the occupant of said property and the agent of the owner of said property." It is manifest that here was no showing of personal service upon the owner, or of due or any diligence to accomplish such service.

Appellants argue that the evidence establishes the fact that Mrs. Greenburg, the occupant of the property, was also the duly authorized agent of the owner of the property, and that therefore the service of notice upon such duly authorized agent was a substantial compliance with the requirements of the statute, or was at the least sufficient evidence of due diligence in the effort to serve such owner. This appeal is taken under the so-called alternative method; typewritten transcripts being filed. The appellants have wholly failed to print in their brief any of the testimony to which they refer, in violation of the express mandate of section 953c of the Code of Civil Procedure. This court cannot be expected to search through typewritten transcripts for evidence which the litigants have neglected to present, in the manner prescribed by law, for its consideration. California Savings & Commercial Bank v. Canne, 34 Cal. App. 768, 169 Pac. 395, and cases there cited. However, appellants do print in their brief what they assert to be the substance of the testimony on these points, and from their statement of this testimony it clearly appears that Mrs. Greenburg, on whom the notice in question was served, was not the agent of the owner of the property and sustained no relationship toward said owner other than that of landlord and tenant. It is therefore unnecessary to consider here the question whether or not service upon the duly authorized agent of the owner would be a sufficient compliance with the requirements of said statute.

[2] It is elementary that proceedings calculated to deprive an owner of his property under the taxing power are in invitum, and that all the requirements of the statute respecting the same must be strictly complied with. Here the appellants wholly failed to comply with the express requirement of the statute for service of notice upon the owner of the property, and failed to use due diligence or any diligence in the effort so to do. There is no merit in this appeal.

An examination of the record here, as presented by appellant, constrains us to the conclusion that this is a frivolous appeal taken solely for the purpose of delay. It has resulted in unjustly clouding the title to plaintiff's property for a period of 3½ years.

The judgment appealed from is affirmed, with an award of $50 damages to the respondent.

We concur: CONREY, P. J.; JAMES, J.

---

38 Cal. App. 760

## CELLA v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 2570.)

(District Court of Appeal, First District, Division 1, California. Nov. 25, 1918.)

MASTER AND SERVANT ⊂⊃393½—WORKMEN'S COMPENSATION—MEDICAL CARE—RIGHT TO AWARD.

Where workman, directed by master to one hospital, went to another and was refused care, he was not entitled to an award for medical services under St. 1913, p. 290, § 19, subd. (b).

Application by Rafaelo Cella, sometimes known as R. Lee for writ of review to annul an order of the Industrial Accident Commission, denying an award in petitioner's behalf in his proceeding for workmen's compensation opposed by the Producers' Hay Company, employer, and the Ætna Life Insurance Company, insurer. Order of the Commission affirmed.

I. F. Chapman, of San Francisco, for petitioner.

Chris M. Bradley and E. L. Stockwell, both of San Francisco, for respondents.

STURTEVANT, Judge pro tem. This is an application for a writ of review for the purpose of having annulled an order made by respondents refusing to make an award in behalf of the petitioner covering hospital charges.

---

⊂⊃For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

About November 9, 1917, Rafaelo Cella was injured while in the employment of Producers' Hay Company (which is hereinafter referred to as the company). On the 16th he was told by the company's physician to go to the St. Francis Hospital. The petitioner did not do so, but went to St. Joseph's Hospital, and now claims that he did so through ignorance. In this behalf he alleges that he is an Italian, and can neither read, write, nor speak English. However, the fact was clearly established that the petitioner was directed to go to the St. Francis Hospital and the address was given in writing. These facts do not show any neglect or refusal on the part of the company to furnish the petitioner hospital service. Yet it is clear that the commission could not make an award to petitioner for such services except it be first shown that the company had neglected or refused to furnish such service. Stat. 1913, p. 279, § 19, subd. (b). The respondent commission did not exceed its jurisdiction in refusing the petitioner an award. Its order is therefore affirmed.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

---

38 Cal. App. 745

SHERWOOD v. WOOD et al. (Civ. 2594.)

(District Court of Appeal, Second District, California. Nov. 23, 1918.)

1. WATERS AND WATER COURSES ⊜152(12)—APPROPRIATION—CONFLICTING CLAIMS—REVIEW.

In an action to determine conflicting claims to the waters of a stream as between appropriators under Civ. Code, § 1416, whether under conflicting evidence the different acts of appropriation were sufficient in character and were consummated within a reasonable time was for the trial court.

2. WATERS AND WATER COURSES ⊜131—APPROPRIATION — HOLDER OF POSSESSORY RIGHTS.

The waters of a stream may be appropriated for use upon lands held under a possessory right only.

3. WATERS AND WATER COURSES ⊜140—APPROPRIATION — PRIORITY AS BETWEEN APPROPRIATORS.

One who obtains the right to occupy public lands riparian to a stream the waters of which have at a prior time been appropriated by another takes such right subject to those of the prior appropriator.

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action by Charles E. Sherwood against I. A. Wood and another. From a judgment for plaintiff and denial of a new trial, defendants appeal. Affirmed.

Trippet, Chapman & Biby and Ward Chapman, all of Los Angeles, for appellants.

S. E. Vermilyea and S. L. Carpenter, both of Los Angeles, for respondent.

JAMES, J. This action was brought for the purpose of determining conflicting claims to the waters of a stream called Birch or Summit creek, which has its course in the Sierra Nevada Mountains in the county of Inyo. The court determined that, as between the parties plaintiff and defendants, both being appropriators, the right of the plaintiff was the better, and entered judgment accordingly. Defendants appeal from the judgment and from an order denying their motion for a new trial.

Plaintiff and defendants both claimed to be entitled to use the waters of the creek for agricultural purposes upon lands occupied by them, with this difference: That the lands of the plaintiff did not lie upon or along the stream, but were situated several miles distant therefrom. In order to obtain water from the creek, the plaintiff was obliged to construct a ditch and conduct the water over and across the intervening elevations of land. Under the plan adopted by the plaintiff, the water, after passing through such a ditch, would fall into the bed of a dry creek, which water course extended to the plaintiff's land. The lands of the defendants did lie upon Birch creek below the point of diversion selected by the plaintiff. In June, 1910, the plaintiff obtained from the appropriate federal department a permit to use 150 acres of land, the permit providing that the purpose was to allow the plaintiff to clearly establish the fact that the land was chiefly valuable for agricultural purposes, preliminarily to the land being listed as open to entry. Prior to that time plaintiff had gone upon the land and had secured a federal permit to enable him to construct a water ditch to the property, commencing at a point on Summit creek, hereinbefore mentioned. On the 17th of May, 1909, plaintiff had posted and filed notice of water appropriation on Summit creek, claiming all of the water flowing in the stream, to the extent of 200 inches measured under 4-inch pressure. The form of notice and posting were all in full compliance with the terms of section 1415, Civil Code. Plaintiff testified that he began the work of constructing the ditch in January, 1910, and completed the ditch and turned the water into it prior to April of the same year; that at that time the water ran through the ditch into the dry wash mentioned and through the dry wash to the land occupied by the plaintiff; that he used the water there in the year 1911, made a small garden, planted seeds of plum and peach trees and some vegetables, which he irrigated with the water; that the water continued to run until the lat-

ter part of May or the first of June at that time; and that, in addition to the crops mentioned, alfalfa and potatoes were planted. None of these crops matured, however, as the water was turned off at the instance of the defendants, who refused to allow the plaintiff to further divert it and claimed that they had appropriated all the waters of the stream to their use. It seems that the defendants made application for leave to use approximately 135 acres of land to the forestry department of the United States in May, 1911, and that they received a special-use permit dated July 17, 1911. This permit was of similar kind to that theretofore granted to the plaintiff covering the lands sought to be used by him for agricultural purposes. On the 22d of May, 1911, the defendants posted and recorded notice of water appropriation on Summit creek, under which appropriation they asserted the right to take the full flow of the stream. It was at this time that they asserted the claimed right as against the plaintiff and refused to allow the plaintiff to take any of the water of Summit creek through the ditch theretofore constructed by him. It appears further that homestead filing was made by defendants in November, 1912, on the land occupied by them. It does not appear that any such filing was made by the plaintiff; neither does it appear that his possessory right to the land so occupied by him had been disturbed. It is by this time apparent that the controversy was mainly one as between different appropriators of water, one appropriation being of date prior to the other; and that, so far as the posting and recording of notice is concerned, the plaintiff was first in point of time. If the simple question suggested depended alone upon a showing of relative dates when the claims of the adversaries were made, this discussion could be here brought to an end, for section 1414, Civil Code, provides that, "as between appropriators, the one first in time is the first in right"—the section being expressive of the old maxim, "Qui prior est in tempore potior est in jure." The further claim is made, however, that the plaintiff never did complete the acts necessary to a valid appropriation by putting the water to the intended use. It is insisted that the ditch constructed by the plaintiff was not of such a character as would or could carry the water for the distance described; that it was constructed through rocks and gravel, and the water flowing therein would and did escape from the ditch from the sides thereof and was absorbed by the gravelly bed of the ditch; that plaintiff was neglectful in making repairs to the ditch, allowed the water to escape, and did not use diligent efforts to subject it to the use designed; and that such neglect worked an abandonment of the right. The plaintiff's testimony was that from the time of the construction of the ditch in 1910, which brought the water to his land, he made no particular use of the same until early in 1911, when he planted some crops and irrigated them with the water; that he had the water running on his land in January, 1911; and that he was making use of it for irrigating purposes at the time the appropriation was attempted to be made by the defendants, who thereafter prevented any water from coming into the ditch at plaintiff's intake.

[1] The effect of the court's finding was that the plaintiff had perfected his appropriation, and we think that it must be said that there was evidence to sustain the finding; and that it was for the trial judge to determine as to whether the different acts of appropriation were sufficient in character and were consummated within a reasonable time. Quoting from Senior v. Anderson, 115 Cal. 503, 47 Pac. 456:

"We do not hold that the Hines appropriation is limited by the quantity of water he could put to a useful purpose upon his land the first or second year, but to such quantity as he could put to a useful purpose upon his land within a reasonable time by the use of reasonable diligence. 'To entitle the defendant, however, to the benefit of such an appropriation, he should, within a reasonable time, apply the water to such beneficial use. As fast as he could reasonably put his homestead into cultivation, he is entitled to divert and use the water for that purpose.'"

The evidence did show that the work of constructing the ditch was commenced and completed within the limits imposed by section 1416, Civil Code. It is true that there was evidence tending to show that the plaintiff allowed his ditch to fall into disrepair and also evidence tending to show that the ditch was not reasonably adapted to convey the water for the great distance required; but, in view of the conflict existing upon these points, the facts must be resolved in support of the findings of the court.

[2, 3] Defendants make the further claim that the court failed to find upon issues presented by their answer, which raised the question of their riparian rights in the waters of the stream. Respondent replies that no such rights were sufficiently pleaded and that no findings were necessary to determine any such issue, citing Riverside Water Co. v. Gage, 89 Cal. 410, 26 Pac. 889, and San Luis Water Co. v. Estrada, 117 Cal. 168–182, 48 Pac. 1075. While we have examined the text of the opinions in those cases and while they tend strongly to support the contention of respondent, we think that more facts were pleaded by the defendants than were found in the cases cited, as tending to show that the lands of defendants were riparian to Summit creek, and that all of the water of that creek was necessary for use thereon for agricultural purposes. However, we fail to see how any prejudice could result to defend-

ants by reason of the failure of the court to make a finding upon that issue. Even had the court determined in favor of the defendants that their lands were riparian to Summit creek and that all of the waters of that creek were reasonably necessary to the proper irrigation thereof, such finding would not have compelled a judgment in their favor, for reasons which we will state: The defendants, at the time they made their attempted appropriation of the waters of Summit creek, held possessory rights only in the lands upon which the waters were to be used. That the appropriation of water may be made for use upon such lands so held, there is no question. However, one who obtains the right to occupy public lands riparian to a stream the waters of which have, at a prior time, been appropriated by another, takes such right subject to those of the prior appropriator. This proposition has been established from the beginning of the cases. Irwin v. Phillips et al., 5 Cal. 140–147, 63 Am. Dec. 113; Crandall v. Woods, 8 Cal. 136; Osgood v. El Dorado Water, etc., Min. Co., 56 Cal. 571; Lux v. Haggin, 69 Cal. 355, 4 Pac. 919, 10 Pac. 674; Hargrave v. Cook, 108 Cal. 72–78, 41 Pac. 18, 30 L. R. A. 390; Senior v. Anderson, supra.

There was evidence tending to show that the amount of water claimed under the appropriation made by plaintiff was reasonably necessary for the purposes to which it was sought to be applied.

The judgment and order are affirmed.

We concur: CONREY, P. J.; MYERS, Judge pro tem.

---

(38 Cal. App. 776)

MILLS v. LAING et al. (Civ. 2549.)

(District Court of Appeal, First District, Division 1, California. Nov. 26, 1918. Rehearing Denied by Supreme Court Jan. 23, 1919.)

1. JUDICIAL SALES ⟸54—PURCHASER—EFFECT OF REVERSAL OF JUDGMENT.

The title of a stranger, purchasing lands at a judicial sale under a judgment which is erroneous, but not void, will not be defeated or impaired by a subsequent reversal of the judgment, under Code Civ. Proc. § 957; but, where a party to the decree purchases, he and his grantees acquire a defeasible title only, under section 347.

2. ADVERSE POSSESSION ⟸58—ESSENTIALS—HOSTILE CLAIM.

The essence of adverse possession is that the holder claims the right to his possession, not under, but in opposition to, the title to which his possession is alleged to be adverse.

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by Laura J. E. Mills against Charles D. Laing and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Arthur H. Barendt, of San Francisco (Geo. H. Pippy, of San Francisco, of counsel), for appellants.

F. H. Dam, of San Francisco, for respondent.

LENNON, P. J. This is an action in ejectment to recover the property described in the complaint, which was acquired by one of the defendants from the plaintiff under a decree of sale in an action for specific performance, and was occupied by her for more than five years before this action was commenced. The facts constituting the basis of the case are briefly as follows:

In January, 1903, Laura J. E. Mills, the plaintiff, was the owner and holder of the property here involved. Thereafter Charles Wesley Reed entered into a contract for its purchase, but, being unable to pay Mary A. Fritz the balance of certain money which he had borrowed from her, he assigned his contract of purchase and the cause of action based thereon to her as security therefor. Mrs. Fritz was subsequently substituted as plaintiff in that action in the place of Reed, and on the 29th day of May obtained judgment against Mrs. Mills, providing in part for a sale of the property. On July 14, 1908, the clerk of the court, pursuant to the judgment, executed a deed in the name of Mrs. Mills, conveying the property to Mrs. Fritz. The next day the deed was recorded. Thereafter, and on the 30th day of September, 1908, Mrs. Fritz sold the property to Isabella Laing, the only defendant in interest here, under a contract by which payment was to be made in installments. Mrs. Laing went into possession of the premises on the 3d day of October, 1908, and with her husband occupied them continuously down to the date of trial, and was in possession at the time of the commencement of this action, December 4, 1915, having theretofore, to wit, in September, 1915, made the last payment under her contract of purchase. However, after the judicial sale of July, 1908, and after Mrs. Laing had gone into possession of the premises under her contract, to wit, on the 1st day of December, 1908, Mrs. Mills appealed from that judgment, without filing any bond staying execution. December 3, 1909, the judgment was reversed. Fritz v. Mills, 12 Cal. App. 113, 106 Pac. 725. Upon a second trial of the action, judgment went for Mrs. Mills, denied the plaintiff therein specific performance, and this judgment was, so far as we are here concerned, declared final in effect by the Supreme Court on June 21, 1915. 170 Cal. 449, 150 Pac. 375. During this litigation Mrs. Mills paid no taxes on the property; they, by the terms of the con-

tract of purchase between Mrs. Laing and Mrs. Fritz, being paid by the latter.

[1] One of the questions in the case requiring consideration is: What effect did the reversal of the judgment in favor of Mrs. Fritz have upon the conveyance by her to Mrs. Laing? It is settled law that the title of a stranger, purchasing lands at a judicial sale under a judgment which is erroneous, but not void, will not be defeated or impaired by a subsequent reversal of the judgment. If a judgment is so far valid that it is necessary for the party against whom it is given to resort to an appeal to avoid its effect, he must, in order to prevent execution, stay proceedings by giving a sufficient undertaking on appeal. If he omit to do this, strangers to the suit may purchase at the sale, and in that event their title is valid, whether the judgment is affirmed or reversed. It is said that this is so for the reason that public policy requires that all persons should have confidence in the title to be derived from such sale; otherwise, few would take the risk of purchasing, and the property would almost invariably be sold at a grossly inadequate price. Upon the reversal of the judgment after such sale to a stranger, the defendant must seek redress from the plaintiff. Freeman on Executions (3d Ed.) §§ 345, 346; Code Civ. Proc. § 957. But where a party to the decree purchases he acquires a defeasible title only, which fails upon a subsequent reversal of the judgment. Id. § 347. And we think, under the weight of authority, that the grantee of one who purchases under an erroneous decree in his own favor necessarily receives the title subject to the condition under which it was held by his vendor. Id. § 347; 2 Dembitz on Land Titles, § 164; Reynolds v. Harris, 14 Cal. 667, 681, 76 Am. Dec. 459; Di Nola v. Allison, 143 Cal. 106, 112, 76 Pac. 976, 65 L. R. A. 419, 101 Am. St. Rep. 84.

In the case of Marks v. Cowles, 61 Ala. 299, the facts were identical in principle with those of this case. The purchasing plaintiff sold the land to a third person, a stranger to the action. After the conveyance the judgment under which the property was sold was reversed. The court held that the defendant was entitled to restitution of the land upon the ground that the purchaser from the plaintiff was chargeable with notice of the defeasible character of the title of his grantor, saying:

"The judgment or decree must be shown necessarily as an indispensable element of the title of the party, on the face of the title papers. And when it is shown, the defeasible quality of the title appears, of which the vendee is bound to take notice. * * * The right of a party, aggrieved by an erroneous judgment, to a restoration to the condition in which he was when it was rendered—the prohibition against the use of such judgment by his adversary, so as to derive advantages he cannot restore, would be of little avail, if through the mechanism of an alienation to a party bound to know that the right and prohibition exists, it could be defeated."

[2] The only other question in the case worthy of detailed consideration is as to whether or not it can be said under the facts of the case that Mrs. Laing acquired title to the property by prescription. It will be noted that she went into possession of the premises in the month of October, 1908, and remained therein for more than five years, to wit, about seven years, at the time this action was commenced. We will not attempt to answer all of the points made by defendant on this phase of the case. We think it sufficient to say that the evidence in this case sustains the view that Mrs. Laing did not establish title by prescription in failing to show that she held the property in hostility to the title of the true owner, and under a claim of right. If the possession is consistent with or in subordination to the title of the real owner, it is not adverse. Any evidence of the recognition of the title of another is always admissible to show the real character of the possession. Unger v. Mooney, 63 Cal. 593, 49 Am. Rep. 100; 1 Am. & Eng. Ency. of Law, 796; 2 Corpus Jur. 131, §§ 224, 225. It is said in McCracken v. San Francisco, 16 Cal. 636:

"To render possession adverse, so as to set the statute of limitations in motion, it must be accompanied with a claim of title; and this claim, when founded 'upon a written instrument as being a conveyance of the premises,' must be asserted by the occupant in good faith, in the belief that he has good right to the premises, and with the intention to hold them against all the world. The claim must be absolute—not dependent upon any contingencies—and must be 'exclusive of any other right'; and to render the adverse possession thus commenced effectual as a bar to a recovery by the true owner, the possession must be continued without interruption, under such claim, for five years."

The essence of adverse possession is that the holder claims the right to his possession not under but in opposition to the title to which his possession is alleged to be adverse. Farish v. Coon, 40 Cal. 33, 57.

As we have seen, Mrs. Laing was bound to know, and in fact did know, the condition of the record upon which the title of Mrs. Fritz rested. The contract of purchase provided in part for a return of the money paid on account of the purchase price in the event that Mrs. Fritz was unable to tender Mrs. Laing a perfect title. After the reversal of the judgment in favor of Mrs. Fritz on the first appeal, and on April 30, 1910, Mrs. Laing evidently became apprehensive concerning the condition of Mrs. Fritz's title, and as a result a second contract was entered into between them, which provided, among other things, as follows:

"In case the seller is not able to tender the purchaser a perfect title, * * * or if the purchaser should be at any time ousted from the possession of said premises, then in any of said events, at the option and upon the demand of the purchaser, the seller shall return all of the moneys which the purchaser shall have paid to the seller, less $45 a month rent for the said premises for the time they have been occupied by the purchaser, plus the interest hereinafter stated."

The new agreement further provided:

"The seller further agrees * * * in all respects to save purchaser harmless in all matters relating to said title and to his occupation of said premises."

Shortly after the decision of the Supreme Court on the second appeal, affirming the judgment of the trial court denying Mrs. Fritz a specific performance of the contract in her action against Mrs. Mills, and on September 4, 1915, Mrs. Laing wrote to Mrs. Fritz, calling attention to this decision, and, construing it, said:

It "means, as I understand it, that the property belongs to Laura J. E. Mills, and that you have not, and never have had, any title to convey to me."

In November, 1915, Mrs. Laing again wrote to Mrs. Fritz, and, after quoting certain provisions of the contract of purchase, demanded the return of the money she had paid on account of the purchase, less a certain sum per month during the period she had occupied the premises, whereupon, she said, "I will, of course, * * * immediately vacate the premises." Approximately a month after this action was commenced Mrs. Fritz and Mrs. Laing entered into a supplemental agreement, reaffirming certain provisions of the contract of April, 1910, and providing further that Mrs. Fritz would assume and pay all attorney's fees, costs, damages, and expenses which might be incurred by or imposed upon Mrs. Laing by reason of the litigation over the property. Mrs. Laing in part testified:

"Q. You expected to get a deed when you had the property paid for, and did not expect to become the owner in any other way than through a deed from Mrs. Fritz; isn't that correct? A. Yes, sir."

She also testified that her attorney in this case was employed by Mrs. Fritz.

In view of what has just been said, we are convinced that it cannot be held that Mrs. Laing held possession of the property in hostility to the title of Mrs. Mills. Mrs. Laing did not enter into possession of this property and hold it under a claim of title exclusive of any other right. It is true that the two contracts made by Mrs. Fritz and Mrs. Laing, two and eight years after the contract of purchase, might have been entered into under such circumstances as would warrant the conclusion that they were contracts of indemnity only. But it must be remembered that Mrs. Laing was bound to know, and did know, the doubtful condition of the title when she entered into the contract of purchase. In her letter of November, 1915, she quoted certain provisions of that contract, according to which, under the decision of the Supreme Court, she seemed to believe that she ought to vacate the premises, and that upon doing so she was entitled to the return of the payments made by her, less a certain monthly sum covering the period of her occupation, to be considered as rental of the premises. Much of what was done by Mrs. Laing was done to protect the interests of Mrs. Fritz. All through the transaction Mrs. Laing appears to base her claim to the property upon the title of Mrs. Fritz, and to hold the possession thereof in submission to the title of Mrs. Mills.

The judgment is affirmed.

We concur: STURTEVANT, Judge pro tem.; BEASLY, Judge pro tem.

---

38 Cal. App. 687

FURMAN v. BREWER et al. (Civ. 1864.)

(District Court of Appeal, Third District, California. Nov. 19, 1918.)

1. HOMESTEAD ⟸81 — HOMESTEAD DECLARATION.

A trustee, having not only actual possession of land which was subject to a trust but a beneficial interest therein, is entitled to protect not only that interest but any other interest which she may have in the land as against creditors, by impressing the entire parcel with a homestead declaration.

2. EXECUTORS AND ADMINISTRATORS ⟸315(6) —DECREE OF DISTRIBUTION—EFFECT.

A decree of distribution determining the rights of the beneficiaries under a will from which no appeal was ever taken is conclusive as to the provisions of the will.

3. JOINT TENANCY ⟸1 — NATURE OF ESTATE.

The properties of a joint estate are derived from its unity, which is fourfold, unity of interest, unity of title, unity of time, and unity of possession, in other words, joint tenants have one and the same interest.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Joint Tenancy.]

4. TENANCY IN COMMON ⟸1—NATURE OF.

Tenants in common are those who hold by unity of possession.

5. HOMESTEAD ⟸84 — TENANCY IN COMMON ⟸1 — NATURE OF INTEREST — HOMESTEAD DECLARATION.

A widow who with her deceased husband had been the owner of community estate *held*

not a tenant in common with children of the marriage, who were entitled to interests in the land under the will of the husband, and hence the widow's homestead declaration while she was in possession of the land was valid.

6. HOMESTEAD ⟹154—RELEASE AS TO TRUST PROPERTY—EFFECT.

Where the trustee, who was not only in possession of the land but also had a beneficial interest and title to a part of it, filed a homestead declaration on the property, the homestead declaration was not destroyed because of the release of the homestead as to the land subject to the trust.

7. WILLS ⟹792(4) — ACTS CONSTITUTING ELECTION—ACTING AS EXECUTOR.

The husband of a decedent who had filed a homestead declaration on land is not estopped from maintaining an action to quiet title to the property because he qualified as executor of the will of his deceased wife by which instrument the property was devised to others, etc.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action to quiet title by Francis Marion Furman against Henry S. Brewer and another. From a judgment for plaintiff, the first-named defendant appeals. Affirmed.

Cosper & Watkinson, of Hanford, for appellant.

Francis Cunningham, of Hanford, for respondent.

HART, J. The action was brought to quiet the title of plaintiff to the south half of the northwest quarter of a certain section of land in the county of Kings. Judgment was in his favor, and the appeal is by the defendant, Henry S. Brewer, from said judgment.

In August, 1889, Samuel G. Brewer was the owner of the entire northwest quarter section, the south half of which is in controversy here, said quarter section being the community property of Samuel G. Brewer and his wife, Phoebe Brewer. Samuel G. Brewer died on August 29, 1889, leaving a will of which his wife and Samuel A. Brewer, a son, were appointed executors. The fourth clause of said will reads as follows:

"I give and devise all the rest, residue and remainder of my estate, real and personal, of every name and nature whatsoever, owned by me at the time of my death, to my wife, Phoebe Brewer, and my son, Samuel A. Brewer, to be by them held in trust for my sons, Daniel G. Brewer, Samuel A. Brewer, Charles Brewer and Henry Brewer, for the maintenance of my wife, Phoebe Brewer, and our children who may then be less than twenty-one years of age and unmarried, until all of said children shall have attained unto the age of twenty-one years; and I hereby direct and order that when the youngest living child hereinbefore named shall have reached the age of twenty-one years, that my said estate so devised and bequeathed in trust to my wife, Phoebe Brewer, and to my son, Samuel A. Brewer, shall be sold by them or by their successors in trust, and that the proceeds of such sale be divided share and share alike among my sons, Daniel G. Brewer, Samuel A. Brewer, Charles Brewer, and Henry Brewer."

Said will was probated and a decree of distribution was entered, on May 6, 1892, containing this clause:

"To the said Phoebe Brewer, the surviving wife of said deceased, the one-half of the residue of said estate absolutely and the other half of the residue of said estate to Phoebe Brewer until the youngest child of said deceased becomes twenty-one years old according to the terms of the last will and testament of said deceased."

Then follows a description of certain personal property and the northwest quarter of said section of land.

In November, 1897, Phoebe Brewer became the wife of Francis Marion Furman, the plaintiff herein, and, on the 23d of December, 1898, she filed a declaration of homestead upon the said quarter section.

Certain deeds were introduced in evidence, and certain others were referred to by counsel for the respective parties, showing that, in 1905, Phoebe Furman became the sole owner of the south half of said quarter section, the land in dispute.

Phoebe Furman died on October 19, 1905, leaving a will in which she bequeathed to her husband the land in question "to have and to hold for his natural life," and upon his death half thereof to go to her daughter, Ada Harper, and half to her son, Henry S. Brewer, the defendants herein.

[1-6] The principal question presented for decision is as to the validity or invalidity of the homestead declared by Phoebe Furman (formerly Brewer) upon the property in dispute after her marriage to the plaintiff, the homestead being for their joint benefit. The importance of the controversy thus brought to us lies in the fact that Phoebe Furman, upon her death, left a will whereby she gave to her surviving husband, the plaintiff, a life estate in the property in dispute, with a remainder over to two of her children by her former marriage, one of whom is the appellant here, and that the court found and adjudged, obviously by virtue of section 1474 of the Code of Civil Procedure, that the plaintiff is the owner in fee of said property.

The contention of the appellant is that, inasmuch as at the time of the filing of the declaration of homestead the property was held by her and her children as joint tenants or tenants in common, the homestead is invalid. On this proposition, the respondent contends that the declaration of homestead

was filed under the statute of 1868 relating to homesteads (Stats. 1867–68, p. 116), the first section of which reads:

"Whenever any party entitled to a homestead under the laws of this state shall be in exclusive occupation of any parcel or tract of land, having the same inclosed, and shall select and record and reside upon the same as a homestead, such party so selecting and claiming shall be entitled to such homestead, and to all rights and exemptions provided by the general law relating to homesteads, to the extent of such claimant's interest in such homestead property, although such land be held in joint tenancy, or tenancy in common, or such claimant own only an undivided interest therein."

It is argued by the respondent that the above section has never been repealed by subsequent legislation relating to homesteads, and that therefore the declaration of homestead is valid, even if it be true that Phoebe Brewer and her children, the beneficiaries named in the trust clause of the will of the deceased and also referred to in the decree of distribution in the estate of said deceased, are cotenants of the real property upon which the homestead declaration was filed. On the other hand, the appellant contends that the statute of 1868 has been repealed by the subsequent legislation upon the subject of homesteads. See section 1237 et seq., Civ. Code.

The present law relating to homestead, in all substantial particulars, is as it was enacted by the Legislature of 1873–74. Stats. 1873–74, p. 228 et seq. There is no express provision in the present law repealing the act of 1868, and therefore, if the act of 1868 has been repealed, the repeal has been effected by implication arising either from an irreconcilable inconsistency between the law as it now stands, as found in the sections of the Civil Code above named, and the act of 1868, or from an indication irresistibly deducible from the general tenor of said law that the Legislature intended that it should supersede as a scheme for allowing homesteads that which was established by the Legislature of 1868. This precise question has never, so far as we are at present advised, been passed upon by the higher courts, and it is probable that the proposition has never been put squarely up to those courts. There are comparatively recent decisions, however, which distinctly hold "that a homestead cannot be created upon land held in cotenancy, or tenancy in common, in favor of one of the cotenants." Rosenthal v. Merced Bank, 110 Cal. 198, 202, 42 Pac. 640; In re Carriger's Estate, 107 Cal. 618, 40 Pac. 1032; Schoonover v. Birnbaum, 148 Cal. 548, 549, 83 Pac. 999. The last-named case comes nearer than any other to which our attention has been called to holding that the effect of the enactment of the sections of the Civil Code relating to homesteads and above referred to was to repeal the act of 1868, for it is therein said:

"The decisions under the present and former laws holding that a homestead cannot be created out of lands held in cotenancy, violate no well-established rule of law. They merely construe statutory provisions conferring upon householders rights of exemption not otherwise enjoyed. Five sessions of the Legislature have been held since the last decisions were promulgated. If the legislative department had not been satisfied with the judicial interpretation as to the extent of the right conferred, there has been ample opportunity to amend the statute so as to give in unmistakable language the right withheld by the decisions. In view of these circumstances, and without expressing any opinion concerning the soundness or unsoundness of the decisions in question, we are of the opinion that they should be adhered to, leaving it to the Legislature to extend the right of the homestead to cotenants if it shall see fit."

In Swan v. Walden, 156 Cal. 195, 103 Pac. 931, 134 Am. St. Rep. 118, 20 Ann. Cas. 194, the grants of three several lots were to Edward Walden and his wife, Luella Walden, in joint tenancy. The wife filed a declaration on all of two lots, which were conveyed to the parties by a single deed or grant. The court held that the homestead was valid, inasmuch as the whole land held by the husband and wife in joint tenancy was impressed with the homestead characteristic, which she could do as to her own interest, which was her separate property, and which she could do as to her husband's interest, "since she has the power to declare a homestead upon the husband's separate property." The Walden Case is differentiated from the Schoonover and other preceding cases, in which the right of a cotenant to impress real property held in cotenancy with the homestead characteristic is denied, in the fact that in the latter cases, unlike the Walden Case, the cotenants were not husband and wife, the cotenancy being between the husband or his wife and third persons, and consequently the holding of the wife or husband not capable, from the very nature of the tenancy, of being delimited or its limits definitely marked out and fixed. The Schoonover Case and the cases followed by it are also to be distinguished from the case where the husband owns an undivided interest in land, as a tenant in common with others, and is living on the entire tract with his family, for in that case it has been held that the wife may claim a homestead on it to the extent of the husband's undivided interest, and to the extent in value of $5,000. Higgins v. Higgins, 46 Cal. 260.

The present case comes within the rule of the Schoonover and other cases which it follows, and not within the rule established by the case of Swan v. Walden; for here, as the evidence shows, the homestead claimant, when filing the homestead, lived on and had actual possession of the entire tract of land,

including her undivided one-half thereof as well as the undivided one-half which she held in trust. It also differs from all the cases above named because, as shown, Phoebe Brewer had a beneficial interest in the trust estate.

But it is not necessary for us to decide whether the enactment of the existing Code sections resulted in the repeal of the homestead statute of 1868, or whether the decisions so hold, since we are unable to perceive how it can be worked out that Phoebe Brewer and her children, named as beneficiaries in the trust clause of the will of the deceased and which clause is by reference made a part of the decree of distribution of the latter's estate, hold the property in cotenancy.

It may first be observed that, since the evidence discloses that all the estate of Samuel G. Brewer, deceased, was community property—that is, acquired during the coverture of Samuel G. and Phoebe Brewer (later Furman)—it was, of course, not within the legal competency of Samuel G. to dispose of her community interest by testament. This, though, as we construe his will, he neither intended nor attempted to do; but in disposing of that portion of the estate which he had the right to make testamentary disposal of, he made Phoebe Brewer, with their children named in the trust clause of the will, a beneficiary thereof; that is to say, he provided therein that the interest so disposed of should be for her maintenance until the youngest living of their children named as beneficiaries under the trust clause of the will should attain the age of 21 years. Her trusteeship was therefore coupled with an interest. That, as trustee, she should have exclusive actual possession of the land which constituted the corpus of the trust, we doubt not was the intention of the testator. Indeed, as above shown, the evidence shows that she did have actual possession of and occupied the real property during the period of the existence of the trust, which, it seems to be admitted, though not clearly shown by the record, terminated in November, 1905, the youngest of the children having then attained the age of 21 years. Thus it appears her right to the possession of the property during the existence of the trust was never challenged or questioned. At any rate, having not only the actual possession of the trust property, but a beneficial interest therein—that of maintenance—she was entitled to protect not only that interest, but any other interest she had in the land as against creditors by impressing the entire tract with a homestead characteristic, unless, as is the contention, she and the other beneficiaries of the trust held the property as cotenants, to which question we will now give our attention and as to which we have this to say: That at no time was the property held in cotenancy unless it can properly be said that Samuel A. Brewer, named in and appointed by the will of the deceased as cotrustee of Phoebe Brewer, and the last named by virtue of their joint trusteeship, became cotenants of the trust estate. But, assuming, without deciding or conceding, that Samuel A. Brewer and Phoebe Brewer, as cotrustees, held the joint property in cotenancy under the will of the deceased, it nevertheless transpires that by the decree of distribution entered in the estate of the deceased six years before the filing of the declaration of homestead in question, and from which decree no appeal was ever taken, Phoebe Brewer was given the entire estate of the deceased in severalty —an undivided one-half absolutely and an undivided one-half to her in trust, to be disposed of by her according to the terms of the trust clause of the will of the deceased. The decree of distribution is conclusive as to the provisions of the will and the intention of the testator, and therefore under the decree Samuel A. Brewer ceased to be a trustee of the trust estate, and it follows, of course, that if ever he was a cotenant of Phoebe Brewer of the property, he was not such at the time of the filing by her of the declaration of homestead thereon.

Nor were the children of the deceased, named as beneficiaries, etc., either joint tenants or tenants in common with Phoebe Brewer of the property. "The properties of a joint estate are derived from its unity, which is fourfold; the unity of interest, the unity of title, the unity of time and the unity of possession; or, in other words, joint tenants have one and the same interest accruing by one and the same conveyance, commencing at one, and the same time, and held by one and the same individual possession." 2 Black. Comm. 181. Tenants in common are those who hold by unity of possession.

There is absolutely no semblance of a joint tenancy in the estate created by the testator in the property or in the whole or any part of the property. Nor was there a tenancy in common thereby created. The estate created by the will is wanting in at least two of the unities essential to constitute it a joint estate, viz. the unity of interest and the unity of possession, and the absence of the latter unity leaves it without the distinguishing characteristic of a tenancy in common. As seen, the testament or the trust clause thereof expressly provides that, when the youngest of the living children named as beneficiaries shall have attained the age of 21 years, the trust property shall be sold and the proceeds of the sale divided share and share alike between said children. Thus it will be noted that there is no provision that said children should at any time have possession of the property. Of course, they had a vested or present interest in the estate, but the actual enjoyment of such interest was postponed to a future time, not by possession of the cor-

pus of the trust itself, but by receiving their respective shares of the proceeds realized upon the sale of the property as provided by the will and in the decree of distribution. As a matter of fact, the said children were nearer legatees than devisees, although up to the happening of the contingency upon which the trust property was to be sold the corpus of the trust would strictly be treated as land rather than as personalty. But, however that may be, it is very clear that it was not intended by the deceased that the said children should have actual possession of the trust property at any time, but that such possession should be enjoyed exclusively by Phoebe Brewer until the happening of the condition which would terminate the trust.

As above stated, the evidence does not directly show when the youngest child reached the age of 21 years. It is stated in the brief of counsel for the respondent, and not denied by the appellant, that that event occurred in November, 1905. It also appears from the evidence, however, that on the 7th day of November, 1905, Phoebe Furman (formerly Brewer), as "the distributee of all the estate of Samuel G. Brewer, deceased," and "Samuel A. Brewer, named as trustee under said will, but not mentioned in the decree of distribution of said estate," conveyed to Charles N. Brewer, one of the named beneficiaries under the trust clause of said will, all of the N. W. ¼ of section 28, township 19 S., range 22 E. M. D. B. and M., the same being the quarter section described in the will and the decree of distribution; that on the 8th day of November, 1905, Phoebe Furman (formerly Brewer) conveyed by deed all of said quarter section to the said Charles N. Brewer; that on the same day (November 8, 1905), the said Charles N. Brewer conveyed to Phoebe Furman (formerly Brewer) the south half of said quarter section. It was, perhaps, to those conveyances that counsel for the plaintiff refer when they say in their brief that in the month of November, 1905, the youngest child arrived at the age of 21 years and that thereupon a division of the property was effected. The record, as it is presented before us, does not make a clear or satisfactory disclosure of what action was taken by the trustee in the final disposition of the portion of the estate subject to the trust provisions of the will. This, however, is not material to the decision of the question above considered, and our conclusion as to that question is, as must be manifest from the foregoing discussion, that the homestead challenged here was and is perfectly valid. Mrs. Furman, as seen, was at all times in exclusive occupation of the whole of the quarter section and living and paying the taxes thereon. It cannot be doubted that a party is entitled to protect by a homestead any interest he has in land which may be coveted by creditors, if no conditions exist which, under the statute, as construed by the courts, prevent the acquisition of a homestead right. See Kilmer v. Garlick, 185 Ill. 406, 56 N. E. 1103; Bailey v. Dunlap Mer. Co., 138 Ala. 415, 35 South. 451; Arendt v. Mace, 76 Cal. 317, 18 Pac. 376, 9 Am. St. Rep. 207; Orr v. Shraft, 22 Mich. 260. And it may be added that the effect of the homestead on the south half of the quarter section—the land in question here—was not destroyed because of the release of the homestead as to the part of the tract subject to the trust clause of the will. Dickey v. Gibson, 113 Cal. 26, 45 Pac. 15, 54 Am. St. Rep. 321; Estate of Fath, 132 Cal. 609, 64 Pac. 995; Aldrich v. Thurston, 71 Ill. 324.

[7] Another point is made by the appellant, and that is that the plaintiff is estopped from the maintenance of this action because he qualified as executor of the will of his deceased wife, Phoebe Furman. There is no merit in the point. Sulzberger v. Sulzberger, 50 Cal. 385, 387, 388; Estate of Firth, 145 Cal. 236, 239, 78 Pac. 643.

The judgment appealed from is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(38 Cal. App. 696)

## SHIELDS v. RANCHO BUENA VENTURA.

(Civ. 2524.)

(District Court of Appeal, First District, Division 1, California. Nov. 21, 1918. Hearing denied by Supreme Court Jan. 20, 1919.)

1. MASTER AND SERVANT ⊂⊃70(3)—WAGES—CONSTRUCTION OF CONTRACT—"PROCEEDS."

Under contract giving ranch manager certain compensation only if such amount could be made out of net proceeds, the term "proceeds" embraced, not only money received from actual sales of produce, but the increase in value of stock or produce.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Proceeds.]

2. MASTER AND SERVANT ⊂⊃80(6)—WAGES—ACTION—BURDEN OF PROOF.

In ranch manager's action for compensation under contract making compensation for each year contingent on net proceeds of the particular year and requiring manager to render account for each year, burden was upon manager to show right to compensation for certain year by proof that net proceeds for the particular year entitled him thereto.

3. MASTER AND SERVANT ⊂⊃80(10)—ACTION FOR WAGES—SUFFICIENCY OF EVIDENCE.

In ranch manager's action for several years' compensation under contract making compensation for each year contingent upon net proceeds of particular year and requiring manager to render an account for each year, evidence of

a net balance at end of several years of management, without showing of net proceeds of any particular year, was insufficient to support verdict for manager.

4. MASTER AND SERVANT ⟸80(6)—ADVANCEMENTS—ACTION FOR—BURDEN OF PROOF.

Ranch manager, suing for compensation and for money advanced in operation of ranch, has burden of showing specific payments made and facts upon which his right to reimbursement depends.

5. MASTER AND SERVANT ⟸80(10)—ACTION FOR ADVANCEMENTS—SUFFICIENCY OF EVIDENCE.

In such case evidence *held* insufficient to show manager entitled to reimbursement for money paid during year of sale, where such payments were not distinguished from payments during previous years.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by A. J. Shields against the Rancho Buena Ventura, a corporation. Judgment for plaintiff and defendant appeals. Reversed.

Short & Sutherland and Carl E. Lindsay, all of Fresno, for appellant.

Frank Kauke and George Cosgrave, both of Fresno, for respondent.

LENNON, P. J. Plaintiff brought this action to recover the sum of $7,988.48, alleged to be due him for labor and services and for money advanced, with some added interest. Four counts were set out in the complaint, the first being for services for which, with interest, the sum of $4,320.34 was claimed, and the second for the sum of $3,217.66 for money had and received. The aggregate of these two sums forms the total demand. The third count sets out a cause of action for the same aggregate amount, based upon allegations that the plaintiff and defendant entered into a written contract, by which the plaintiff was employed to manage a large ranch owned by the defendant, and that while so employed there became due to him from the defendant a sum in excess of $4,000 as compensation for his services; that this sum was not paid to him, but that he allowed it to be retained by the defendant and invested in the business of the ranch, together with additional sums advanced by him, making up the aggregate of the first and second counts; and the fourth count represents the whole sum demanded as having been loaned to the defendant upon a promise to repay it with interest.

The cause was tried by a jury, and resulted in a verdict for the sum of $7,069.94. It is difficult to determine from the record just how this precise sum is arrived at, but respondent has assisted us in solving this problem, and states in his brief that it is made up as follows:

"His (plaintiff's) salary at the rate of $1,500 per annum, computed from January 1, 1910, to October, 1912, amounted to $4,250, and the money advanced and not repaid amounted to $3,000 additional, which with some other small items of account added, left a balance after sundry credits of $7,069.94."

Judgment was entered in favor of plaintiff for this amount, and defendant appeals. The record discloses no motion for a new trial; and in support of the appeal the only point made is that the verdict and judgment are without any support whatever in the evidence, and defendant asks that the judgment be reversed, and that the trial court be ordered to enter judgment in its favor.

The record shows that the defendant was the owner of a stock ranch, consisting of between 2,000 and 3,000 acres, in Shasta county, known as the Rancho Buena Ventura, the operation of which constituted the sole business of the corporation. The entire capital stock of the company, outside of one or two qualifying shares, was owned by Frank H. Short, who was president of the corporation, A. J. Shields, the plaintiff—who was also its vice president—and one Hoxie. Shields, at the time this controversy arose, owned a little more than one-fourth of this capital stock, and of the remainder Short was the owner of the major part. For several years the ranch was managed by the plaintiff, the proceeds being devoted to its operating expenses, its further improvement, and in payment of the services of the plaintiff. In its undeveloped state the proceeds were insufficient to meet these expenses, and the deficit was contributed by these three stockholders, and additional capital stock issued to each in proportion to such contribution. Finally, this course of procedure not proving satisfactory, an agreement was entered into between the corporation and the plaintiff, by which the latter undertook to manage and operate the ranch at his own expense, with a contingent arrangement for his compensation. The condition of affairs which led to entering into this agreement is referred to in a letter written by Mr. Short to the plaintiff, in which he says:

"When you were down some months ago I mentioned that I thought it would be more satisfactory to all of us for it to be arranged that you should handle the ranch and personal property on some sort of annual leasing arrangement, in which we would be protected against taxes or expenses and possibly allowed some small return on the investment, and I thought with the ranch in its better developed state and with quite an acreage of producing alfalfa you ought to be able to handle it and make something out of it for yourself and keep us at least free from expenses."

This contract, while actually entered into on April 15, 1910, was to govern the relations

of the parties from January 1st of the same year. The part of this agreement material to the questions here involved is as follows:

"Whereas the party of the second part [plaintiff] for several years past, as the representative of the party of the first part, has been in charge of the ranch and property of the party of the first part near Cottonwood, Shasta county, California, and whereas it is desired to enter into a definite arrangement with regard to the operation, use and management of said property, being said ranch and the improvements, stock and personal property thereon.

"Now therefore, this agreement witnesseth that the party of the second part agrees to take charge and management of said property on his own account and at his own expense, and from the date hereof to conduct and manage said property upon his own credit, account and expense, upon the following terms and conditions, to wit:

"The said party of the second part is to have charge and use of said ranch, together with the improvements and crops growing thereon, together with the horses, cattle, farming utensils and personal property thereon or used or connected therewith, and will manage and conduct said ranch in a thoroughly good and farmerlike manner, and take proper care of the trees, vines, alfalfa, and other crops growing thereon, and in proper season and in a good and farmerlike manner plant, cultivate, farm and look after said ranch and pasture or dispose of the pasture lands thereon for as good rental as can be obtained therefor * * * and in like manner carefully look after, care for and feed all of the stock upon the said premises and the increase thereof, and manage and care for all of the same in the best manner and to the best advantage possible, and harvest and dispose of all crops grown on said premises.

"The party of the second part is to keep full and correct books of account, showing all receipts and expenditures by him received, incurred or made in connection with said ranch, all business and the products thereof, and all of the same, and on the first day of January of each year the party of the second part will render a complete, full and correct statement of his accounts and transactions, receipts and expenditures as aforesaid, and shall pay and discharge at his own account and expense all of the expenses of conducting, farming and managing said ranch and property, and everything done or to be done under or in accordance with the terms of this lease, and will pay all taxes; * * * and the proceeds of said ranch shall be first applied upon and in or toward the satisfaction thereof, and after all of said charges and expenses are first paid, the second party shall have and receive for his use and benefit and as full compensation for his services, fifteen hundred dollars for each year, or a like amount for the fractional portion of any year during which he shall remain in possession and charge of said premises, and all of the rest, residue and remainder of said proceeds of said ranch in excess of the expenses thereof as aforesaid shall be paid over on or before the first day of January of each year by the party of the second part to the party of the first part.

"It is the understanding and intention that the household and living expenses of the second party and his family shall, as heretofore, be considered a part of the expenses of running and maintaining said ranch, and shall be charged and paid for out of the proceeds thereof as heretofore, but not otherwise; and it is the understanding and intention that in the event of a sale of said premises and property, or any substantial part of said real property by the party of the first part, that this agreement shall immediately cease and determine and be at an end, and the party of the second part shall be entitled to if necessary remain in possession of said premises so that he can receive the credits and income thereof for the year during which said sale occurs, or else the party of the second part shall be entitled to receive and shall receive fair and just compensation and allowance for expenses incurred in connection with the planting, care and cultivation of any crop or crops that have not been by him harvested and disposed of, so that upon such termination of said lease all rights and interests of the respective parties hereto shall be equitably and fairly settled."

The contract also contained a provision by which either party could terminate it by giving 30 days' notice preceding the first day of January of any year, and, if not sooner terminated, its duration was to be five years from January 1, 1910.

The plaintiff, by virtue of this contract, continued in the management and operation of the ranch until about the end of October, 1912, when the entire ranch and all personal property upon it, including farming implements, hay, and stock, were sold for the sum of $115,000. In the meantime, the annual account required by the contract had not been rendered in spite of frequent and urgent requests on the part of the company's president, and it was not until November, 1914, more than two years after the sale took place, that the plaintiff rendered an account. We set the account out in full. It is as follows:

Rancho Buena Ventura.

Receipts.

From January 1, 1910, to October 31, 1912.

| | |
|---|---|
| Sale of hay | $ 8,402.63 |
| Sale of pasture | 1,665.62 |
| Sale of live stock | 15,729.07 |
| Sale of wagon | 40.00 |
| Sale of produce | 1,465.78 |
| Inventory | 11,850.00 |
| Cash on hand Oct. 31, 1912 | 397.72 |
| | $39,550.82 |

Disbursements.

From January 1, 1910, to October 31, 1912.

| | |
|---|---|
| Paid for labor | $ 7,731.41 |
| Paid for live stock | 12,915.18 |
| Paid for farm implements, etc. | 395.00 |
| Paid for general supplies | 8,061.68 |
| Gain | 10,447.55 |
| | $39,550.82. |

[1-3] There can be no doubt that the plaintiff was required by his contract to render an account annually; and it is apparent that without this annual account there was no basis upon which a settlement could be ar-

rived at between the parties. The plaintiff's compensation of $1,500 per annum was contingent upon this amount being earned by the operation of the ranch during the year. There is nothing in this account nor elsewhere in the record to show what the proceeds of the farming operations were for the year 1910. The same is true for the year 1911. The fact that the single account rendered purports to show a gain for the entire period covered by the plaintiff's operations under the contract affords no inference that there were any net proceeds for the year 1910, nor for the year 1911, out of which the plaintiff's compensation for those years could be paid. It is quite possible that for the year 1910 there were no net proceeds. If so, the plaintiff was not entitled to any compensation. And, of course, the same is true of the following year. We do not mean to intimate that the net proceeds referred to in the contract means actual cash arising from sales of produce of the ranch. We think a proper construction of this contract, having in mind the conditions under which it was entered into and its objects and purposes, would treat as proceeds, not only money received from actual sales of produce, but the increased value of stock or produce on hand at the end of a given year over the value of stock or produce on hand at the end of the preceding year; for it was the duty of the plaintiff, under his contract, to manage the business prudently and for the best interests of his employer, and it would not be to that interest that he should, in anticipation of the closing of the annual period, make hasty and ill-advised sales of produce merely for the purpose of having money on hand applicable to the payment of expenses and his own compensation; but, as we have said, there is nothing in the record to show what was the result of the plaintiff's operations for any year covered by the contract. It is quite possible, and indeed probable, that the facts existed entitling the plaintiff to some payment for the years 1910 and 1911; but, if so, the burden was upon him to show it. This was the view taken by the trial court. In its instructions to the jury the court advised that body that the plaintiff must recover, if at all, under and in accordance with the terms of the written agreement; that he was to present his accounts and settle annually with the defendant; and that the plaintiff was not entitled to any part of the compensation of $1,500 per annum unless during said year he had received and obtained an amount in excess of the expenses of operating and conducting the ranch. The court also instructed the jury, and correctly, that the operation by the plaintiff of the ranch was as to each year a separate and distinct transaction, and not a continuous transaction for the entire period. The jury, in the condition of the evidence upon which the cause was submitted, had no means of knowing whether for the years 1910 and 1911 there was anything due from the defendant to the plaintiff under the terms of his contract. Its verdict, therefore, by which it awarded to him the sum of $125 per month for this period is against the evidence, and cannot stand.

[4] The same conclusion must also be reached as to the amounts paid out by plaintiff for expenses of operation during these years, unless there was an unconditional promise on the part of the defendant to pay these—a question which we will consider later. The burden was upon the plaintiff to show specifically these payments and the facts upon which his right to reimbursement depended.

[5] Coming now to the year 1912, the contract provided that in the event of a sale during any year the contract should immediately terminate, and the plaintiff should be "entitled if necessary to remain in possession of said premises so that he can receive the credits and income thereof for the year during which said sale occurs, or else, the said party of the second part shall be entitled to receive and shall receive fair and just compensation and allowance for expenses incurred in connection with the planting, care and cultivation of any crop or crops that have not been harvested or disposed of, so that upon such termination of such lease all rights and interests of the respective parties hereto shall be equitably and fairly settled." This clause of the contract, construed with relation to its object and purpose, required the parties to reach a settlement for the operations of the year 1912 upon an equitable basis. The record does not disclose that any effort to this end was made by the plaintiff, nor does it contain the facts upon which the court could arrive at an equitable adjustment. The plaintiff in his complaint treated this part of the period of his employment in the same way as the first two years, and asked to be allowed compensation at the same rate of $125 per month, and to be reimbursed his expenses without regard to any equitable considerations, such as the profit accruing to the defendant as the result of his labors. This part of the plaintiff's case seems to be in much the same situation as that already considered; he neglected to place in evidence the facts upon which his right to recovery depended.

The respondent, however, contends that his consent to the sale of the ranch was only given upon the condition that certain sums, amounting to about $3,000, claimed to have been paid out by him in the purchase of cattle for stocking the ranch, and therefore coming within the designation of expenses of conducting and operating it, should be paid to him. The evidence upon this point is that an offer of $115,000 (the sum for which it was ultimately sold) had been made for the ranch, including the whole amount of personal property used in connection with it and the live

stock. This offer was at variance with that made by the company, which did not include certain live stock; and upon its receipt the president of the corporation sent the following telegram to the plaintiff:

"Moore is ready to close, but understood all personal property was included and went with ranch. I had supposed he had your list and understood that part of property only went with sale, but as he is ready to close and sale will be net to us, and others may fall down as heretofore, I prefer to close including all personal property. Either telegraph approval or come down without fail. Lease to be canceled but Moore wants to arrange for you to continue on ranch. Answer quick."

To this telegram the plaintiff replied as follows:

"Gave Avus typewritten list of all personal property ever offered for sale with ranch when he asked for an inventory of all personal property on ranch which I gave him, which I wrote you. The difference between the first and second inventory means about four thousand dollars to me personally and must be protected. That being understood, approve sale."

Mr. Short, the president, replied to this telegram, asking what the plaintiff meant by the expression "to me personally," to which the plaintiff sent the following reply:

"Four thousand dollars represents about what it will take for labor, taxes and a balance on some cattle I bought. This explains to you what personally to me means. Am in favor of sale."

The sale was thereupon closed at the figure of $115,000 for the entire property.

The contention of the plaintiff is that this exchange of telegrams, followed by the sale, constituted an undertaking by the defendant to reimburse to the plaintiff an amount approximating $4,000, including a sum undetermined, which the latter had paid out for cattle, which were included in the sale of the ranch. It is quite evident that the object which the plaintiff has in view in reserving part of the live stock from the sale was that it might be sold separately, and a fund thus created which would be in his control and which he could apply to the payment of expenses incurred by him, including the purchase of cattle, in the operation of the ranch. But such reimbursement could only be made in accordance with the terms of the contract; and to this reimbursement, according to those terms, the plaintiff was entitled, irrespective of whether the funds for that specific purpose passed through his hands or not. Whether the reserved live stock was sold separately or as a part of the entire ranch, they were still "proceeds" applicable to the payment of his demands. The value of this live stock was readily ascertainable; and its amount, deducted from the $115,000, was proceeds from the operation of the ranch out of which the plaintiff's expenses and outlays were payable, the balance of the $115,000 representing the price of the ranch itself. We may further observe as to this matter, without desiring to place much emphasis on what follows: First, that it is by no means clear that the consent of the plaintiff was necessary to effect the sale upon the terms proposed; second, that although the first telegram of the plaintiff above set out gives his consent to the sale conditionally, the second telegram ends with the words, "Am in favor of sale," without referring to the condition; and, third, testifying as to what these outlays were for which he was desirous of reserving the live stock in question from the sale, he stated:

"It was what I was personally responsible for anyhow, that I had given my collateral and so forth for when I bought the ranch. I owed those bills, and I was trying to provide a way, and I told you distinctly that if that was gone (referring to this live stock) then I had nothing to pay with. * * *"

But it appeared elsewhere in the testimony that capital stock in the company had been issued to the plaintiff for all claims existing up to January 1, 1910, a time long subsequent to the purchase of the ranch, and, if the plaintiff was still indebted to the persons from whom he bought this live stock for its price, that was no concern of the defendant, and the plaintiff would not have been entitled to pay this debt from the proceeds of the defendant's property. However, we think it better to place our decision as to this point upon the broad ground that the inclusion in the final sale of the live stock in question did not deprive the plaintiff of any rights which he possessed against the defendant. The live stock was the property of the defendant, although the money for its purchase might have been advanced by the plaintiff; and at the trial of this case it was not contended otherwise.

Considerable emphasis is laid by the respondent upon what he terms the lack of equity shown by the defendant in resisting his claim. A perusal of the record will show, however, that the plaintiff, if he had produced the evidence which was probably at his disposal, had no need to resort to any considerations of equity for a recovery, but could have stood upon his strict legal rights; and it will show that the equities were not all on his side, for the president of the company, Mr. Frank H. Short, for years attended to the business, financial and legal affairs of the corporation, including the time covered by the contract here under consideration, and was himself instrumental in procuring the sale of the ranch, all of which he did without any compensation whatever from the defendant. The record also shows that from the time when the first account of the plaintiff was due to the time it was actually rendered by him—a period of nearly three years—the president of the company continually urged

upon the plaintiff the necessity of rendering his accounts. He neglected to do this without any excuse other than that he was busy with the affairs of the ranch. An ordinary compliance with simple business procedure, under a contract the terms of which are extremely simple and unambiguous, would have avoided all the trouble of this litigation, not only to himself but to others, who were in no way responsible for the plaintiff's delay and neglect.

We think it clear from the foregoing that as to none of the various amounts making up the verdict of the jury was there any evidence upon which it could be based. The judgment is therefore reversed.

We concur: STURTEVANT, Judge pro tem.; BEASLY, Judge pro tem.

---

38 Cal. App. 739

JORDAN v. SCOTT et al. (Civ. 2587.)

(District Court of Appeal, Second District, California. Nov. 23, 1918.)

1. LANDLORD AND TENANT ⟸208(1) — SALE AND TRANSFER BY TENANT—RELEASE.

Sale and transfer of lease held by tenant, even with landlord's consent, does not release him from liability under lease covenants.

2. NOVATION ⟸7 — ASSENT OF THREE PARTIES.

There could be no novation between landlord, tenant, and tenant's assignees, in absence of assent of the three parties.

3. RELEASE ⟸13(2)—RELEASE OF TENANT—ASSIGNMENT OF LEASE—"CONSIDERATION."

Where tenant, two months after he had assigned, gave landlord instrument of assignment to assignees in consideration of parol agreement by landlord to release him from liability for rent, tenant was not released, under Civ. Code, § 1541; there having been no new "consideration" for landlord's parol agreement as defined by section 1605, but mere performance of a legal obligation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Consideration.]

4. LANDLORD AND TENANT ⟸79(1) — TRANSFER OF ENTIRE TERM BY TENANT—"ASSIGNMENT."

Where tenant transfers entire interest in either whole or part of demised premises, legal effect is "assignment" and not subletting, by whatever kind of instrument or conveyance term is disposed of.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Assignment.]

5. LANDLORD AND TENANT ⟸208(4) — ASSIGNMENT OF TERM—LIABILITY BY PRIVITY OF ESTATE.

Where tenant demised portion of leased premises for term one day longer than his own, legal effect being assignment, and assignee sold to one who went into possession, latter became liable by privity of estate to pay landlord share of rental reserved in lease in proportion with part of premises occupied.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by C. E. Jordan against F. T. Scott and others. From judgment for defendants, plaintiff appeals. Reversed.

George H. Woodruff and Clyde C. Shoemaker, both of Los Angeles, for appellant.

Eugene A. Tucker and Harriman & Ryckman, all of Los Angeles, for respondents.

MYERS, Judge pro tem. Plaintiff appeals from a judgment in favor of defendants in an action to recover rent due and unpaid under a written lease of a certain storeroom in the city of Los Angeles. On December 1, 1911, plaintiff's assignor, Marsh, leased the premises in question to defendant Scott for a term which, as extended by a supplemental agreement in writing, expired January 31, 1915, and Scott entered into possession thereunder. November 30, 1912, Scott, by a written agreement which was in form and terms a sublease, but which plaintiff contends was in legal effect a pro tanto assignment, demised a specified portion of the leased premises to one Ostrow for a term one day longer than his own term, to wit, until February 1, 1915, and Ostrow entered into possession of that portion of the premises.

On January 1, 1913, Scott sold, assigned, and delivered to Gaudreau & Wilson his lease from Marsh and his lease or contract with Ostrow, and Gaudreau & Wilson thereupon entered into possession. On March 19, 1913, Ostrow sold and assigned to defendant Tuck her sublease or agreement for a specified part of the premises, and Tuck entered into possession thereof.

No part of the rent was paid to plaintiff or his assignor subsequent to June, 1913, but defendant Tuck paid in full the rent reserved under his contract for a portion of the premises so long as he continued in possession thereof, to defendant Gaudreau. This was paid at the rate of $55 per month, which plaintiff alleged and produced evidence to prove was the proportionate share of the rent of the whole premises chargeable to the portion thereof occupied by Tuck. The foregoing facts were all found by the court, except that it made no finding as to the proportionate rental value of the premises occupied by Tuck. The court held that Tuck's contract was a sublease and that he was therefore not liable to the plaintiff.

[1] As to the defendant Scott, the court found that on March 1, 1913, two months after he had sold and delivered his lease-

hold interest to Gaudreau & Wilson, the landlord, Marsh, released him from the covenants of his lease by an agreement made at that time. The sole question in this connection is whether or not the finding is supported by the evidence. It is well settled that a sale and transfer of his leasehold by a tenant, even with the consent of the landlord, does not have the effect of releasing him from his liability under the covenants of the lease. Bonetti v. Treat, 91 Cal. 223, 27 Pac. 612, 14 L. R. A. 151; Brosnan v. Kramer, 135 Cal. 36, 66 Pac. 979; Schehr v. Berkey, 166 Cal. 157, 135 Pac. 41; Henne v. Summers, 23 Cal. App. 763, 139 Pac. 907.

[2] The court further found that thereafter Marsh recognized and accepted Gaudreau & Wilson as his tenants, received and collected rents from them, and at no time thereafter recognized Scott as a tenant, or demanded rent from him, prior to the bringing of this suit. But no claim is here made of a novation, and there could be none, because the assent of three parties is requisite to such a contract and there is no evidence of such assent on the part of Gaudreau & Wilson.

The substance of the testimony of defendant Scott in support of the finding of a release (reduced to narrative form) is as follows:

"I had a talk with Marsh in March, 1913. He said he wanted me to make the transfer over to the other parties, the parties in possession, and I agreed to do it. He said at the present time he was not situated to collect the rents from them, and they would like to have the matter fixed up so they could recognize the other parties and accept their rents. And he said that he would give me a release from the original lease that I held, had held, and he brought out papers, and I signed them and gave them back to Mr. Marsh. He said that if I signed those papers I would be absolutely released from the payment of any other moneys."

The paper which he then signed was as follows:

"Los Angeles, Cal., 3/1, 1913.

"In consideration of one dollar, the receipt whereof is hereby acknowledged, I hereby transfer, assign and set over unto Gaudreau & Wilson all my right, title and interest in the within lease, subject to all its terms and conditions. This transfer does not consent to any further transfers of the within lease. F. T. Scott."

[3] This testimony was corroborated by another witness and denied by Marsh; but it was, of course, amply sufficient to support the finding, if such a parol agreement under those circumstances could have the legal effect of a valid release. Section 1541 of the Civil Code provides:

"An obligation is extinguished by a release therefrom given to the debtor by the creditor, upon a new consideration, or in writing, with or without new consideration."

Here there was no release in writing, and it remains only to consider whether there was "a new consideration."

Consideration is defined by Civil Code, § 1605, as follows:

"Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise."

As was well said by the Supreme Court of New Jersey in Conover v. Stillwell, 34 N. J. Law, 54, at page 57:

"It must be either such as deprived the person to whom the promise was made of a right which he before possessed, or else conferred upon the other party a benefit which he could not otherwise have had. Thus, part payment of a debt overdue is not a valid consideration for an agreement to postpone or discharge the payment of the residue (citing cases). So a promise to pay increased compensation for services which the party was under a prior legal obligation to render is not valid" (citing cases).

Was Scott deprived of any right, or did he suffer or agree to suffer any prejudice on this occasion? We think not. The only thing he did or promised to do was to sign the written assignment of lease to Gaudreau & Wilson. He had already, two months previously, sold, assigned, and delivered said lease to them, and they had entered into possession thereunder. The sale and delivery of the lease transferred all his interest, and left nothing remaining in him thereafter to be transferred. If further paper evidence of the transfer was of any value, it was his duty to furnish it.

A similar question arose in the case of Sullivan v. Sullivan, 99 Cal. 187, 33 Pac. 862. Michael Sullivan had died owing $854 to the estate of his deceased brother John. He left a policy of life insurance payable to his widow, Margaret, the policy being among the papers of John's estate in the possession of his executor. It was necessary for Margaret to obtain the policy in order to collect thereon. She entered into a written contract with the executor whereby he agreed to search for, find and deliver the policy, in consideration of which she agreed to pay the $854 out of the proceeds thereof. He performed the contract on his part, and she, after collecting the money, refused to pay, whereupon he sued on the contract and recovered judgment. The Supreme Court, in reversing the judgment for lack of consideration to support the contract, said:

"It is well settled that neither a promise to perform a duty, nor the performance of a duty, constitutes a consideration of a contract."

In Estate of Casner, 1 Cal. App. 145, 81 Pac. 991, Jane Casner had conveyed certain property to her daughter and son-in-law upon their agreement to support her during her natural life. Thereafter she assigned certain other property to them upon the same consideration. This court, in holding the latter assignment void for want of a consideration, said:

"Support which they were already bound to give her could hardly form a consideration for the further assignment of property by Jane Casner to the appellants."

So, too, in Heim v. Butin, 109 Cal. 500, 42 Pac. 138, 50 Am. St. Rep. 54, where the mortgagee in foreclosing a mortgage agreed with the mortgagor that, if the latter would suffer his default to be taken and would not bid at the sale, he would not take a deficiency judgment, and, the mortgagor having defaulted and remained away from the sale, the mortgagee, in violation of the agreement, procured a deficiency judgment against him, the Supreme Court held the agreement void for want of consideration because the mortgagor had no defense to the action, and therefore suffered no prejudice because of the default.

Applying the doctrine of these decisions to the facts here, it is apparent that Scott suffered no prejudice by reason of signing and delivering the written assignment. It remains only to consider whether or not any benefit was conferred on Marsh thereby.

It is apparent that Marsh acquired no right thereby which he did not already possess. The written assignment conferred upon him no right of action as against either Gaudreau or Scott. His right to recover the rents from Gaudreau grew out of the latter's occupancy of the premises by reason of privity of estate. Bonetti v. Treat, supra; Baker v. Maier, 140 Cal. 530, 74 Pac. 22. No privity of contract between Marsh and Gaudreau could be created by the act of Scott. As this court said, with respect to a somewhat similar situation, in Lutton v. Rau, 173 Pac. 1111:

"We do not think that * * * the production of such an assignment would aid the plaintiff in making out his claim against the defendant for rent which accrued subsequent to the date of the transfer of possession of the premises from respondent to the last holder."

We conclude that the release in question, being neither in writing nor upon a new consideration, was of no legal effect, and that the finding of the trial court upon this point is therefore contrary to the evidence.

[4, 5] As between appellant and the defendant Tuck, the correctness of the judgment depends upon the single question whether or not the contract between their respective assignors was a sublease or an assignment of the term as to a portion of the premises demised. If it was the former, the judgment is correct; if it was the latter, it was erroneous. As stated above, the instrument purported to be and in form and terms was a sublease, but it was for a term one day longer than that demised by the principal lease.

Questions similar to this have frequently arisen in the courts, and there is an apparent conflict in the decisions which can be in the main resolved by separating those cases wherein the controversy arose between the original tenant and his lessee or assignee from those wherein the controversy was between the original landlord and the lessee or assignee of his tenant. In the latter class of cases (and the case at bar comes within that class) the clear preponderance of authority is to the effect that where a tenant transfers his entire interest in either the whole or a part of the demised premises, the legal effect thereof is an assignment and not a subletting, and that it is immaterial by what kind of an instrument or conveyance the term is so disposed of. 24 Cyc. 972 to 976, and cases cited; 18 A. & E. Encyc. of Law (2d Ed.) 656, 657, and cases cited; 1 Tiffany on Landlord and Tenant, § 151; Wood on Landlord and Tenant, § 69; Smiley v. Van Winkle, 6 Cal. 605; Jeffers v. Easton, Eldridge & Co., 113 Cal. 345, 352, 45 Pac. 680.

The legal effect of the contract between Scott and Ostrow was to create an assignment of the term with respect to that portion of the premises described therein. Defendant Tuck, having entered into possession thereunder, thereby became liable by privity of estate to pay to the lessor Marsh a proportionate share of the rental reserved in the lease. 24 Cyc. 1180; Taylor on Landlord and Tenant, § 443; Wood on Landlord and Tenant, § 311; Ellis v. Bradbury, 75 Cal. 234, 17 Pac. 3. It is obvious that this liability could not be discharged by the payment of rent to Gaudreau, who is not claimed to have been an agent for Marsh.

The judgment appealed from is reversed.

We concur: CONREY, P. J.; JAMES, J.

35 Cal. App. 546

CHRISTIE v. McCALL. (Civ. 2233.)

(District Court of Appeal, First District, California. Dec. 12, 1917. Rehearing Denied by Supreme Court Feb. 9, 1918.)

1. MUNICIPAL CORPORATIONS ⟸706(1)—COLLISION ON STREET—PLEADING.

Allegation that defendant neglected and omitted to operate his automobile, so as to prevent it from running into plaintiff and injuring him, was sufficient as against a demurrer.

2. APPEAL AND ERROR ⟸1040(10)—HARMLESS ERROR—PLEADING.

In action by bicyclist for injuries in a collision with defendant's automobile, overruling a demurrer to complaint on ground of uncertainty, in that it could not be told whether defendant was charged with exceeding rate of speed prescribed for one approaching a sharp curve or that applying to a crossing of intersecting street, was not prejudicial, where case went to trial and facts were all fully developed.

3. MUNICIPAL CORPORATIONS ⟸706(5)—COLLISIONS—NEGLIGENCE.

In an action by a bicyclist for injury in a collision with defendant's automobile, evidence *held* to sustain a finding that defendant was negligent.

Appeal from Superior Court, Humboldt County; George D. Murray, Judge.

Action by Melville Christie against W. E. McCall. Judgment for plaintiff, and defendant appeals. Affirmed.

Pierce H. Ryan, of Eureka, for appellant.
Coonan & Kehoe, of Eureka, for respondent.

KERRIGAN, J. This is an appeal by the defendant from a judgment in favor of the plaintiff in an action brought to recover damages for personal injuries sustained in a collision between the defendant's automobile and the plaintiff upon his bicycle, alleged to have occurred through the negligence of the defendant in the operation of his vehicle.

[1] The first point made by the defendant for a reversal of the judgment is that the court erred in overruling his demurrer to the complaint. The complaint is in two counts, the first of which is attacked on the general ground of lack of facts, and further on the grounds of ambiguity and uncertainty in its failure to specify the particular acts constituting the negligence complained of. In this behalf this count of the complaint merely in effect alleges that the defendant neglected and omitted to operate his automobile so as to prevent it from running into the plaintiff and injuring him. Under the authorities in this state, this is a sufficient allegation of negligence, for they hold that it is sufficient to charge negligence by a general averment that the defendant negligently did the particular act which resulted in the damage to plaintiff. Rathbun v. White, 157 Cal. 248, 254, 107 Pac. 309; Arbunich v. U. R., 28 Cal. App. 291, 152 Pac. 51; Smith v. Buttner, 90 Cal. 95, 99, 27 Pac. 29; Stein v. U. R., 159 Cal. 368, 113 Pac. 663.

[2] A demurrer on the same grounds is entered against the second count of the complaint. This count includes all of the allegations contained in the first count, and an additional allegation that the defendant was turning at the intersection of two streets at a greater rate of speed than one mile in four minutes. This is the rate of speed prescribed by the Motor Vehicle Act for observance by the driver of an automobile when approaching a sharp curve, while when traversing intersecting streets no specific limit of speed is prescribed, but the driver is held down to that rate "which is reasonable and proper having regard to the traffic then on such highway and the safety of the public." As it also appears from this count of the complaint that the accident occurred at the intersection of two streets, the uncertainty and ambiguity aimed at by the special demurrer is as to whether the complaint is charging the defendant with exceeding the rate of speed prescribed for one approaching a sharp curve, or that applying to the crossing of intersecting streets. But since the case went to trial and the facts were all fully developed, we think this case falls within the rule followed in the case of Stein v. U. R., supra, where, in dealing with the same question, namely, whether it was error to overrule a demurrer for uncertainty, the Supreme Court said:

"Even if it were error * * * to overrule the demurrer for uncertainty, it was error without prejudice unless the demurring party was misled by defects in the pleadings and the case was not fairly tried on the merits. Here it appears that the issues were fully, fairly, and understandingly tried."

[3] The main contention of the appellant is that the evidence is insufficient to sustain the verdict of the jury. The facts are briefly as follows: In the city of Eureka, C street runs north and south, and Cedar street runs east and west, intersecting C street but terminating on the east side thereof. On the day of the accident, plaintiff was riding a bicycle southerly along the westerly (right) side of C street, and when he came to the northerly line of Cedar street he deflected his course so as to proceed diagonally in a southwesterly direction in order to reach the sidewalk at the southwest corner of C and Cedar streets. As he neared this corner, the defendant was on Cedar street approaching C street from the west, and was about half a block away, and being late for an engagement was driving "pretty fast." When the plaintiff, propelling his bicycle at a slow rate of speed, had reached a point three or

four feet from the curb at the corner indicated, the defendant, without reducing the speed of his car, in attempting to turn said corner, collided with plaintiff's bicycle, and plaintiff sustained the injuries for which he recovered in this action. From the force of the blow plaintiff was rendered unconscious, and was unable later when testifying as a witness to say that he had looked down Cedar street to learn whether or not he could cross the intersection of said streets in safety before attempting to do so; but from the testimony of a disinterested witness, who was near the scene of the collision at the time of its occurrence, it appears that immediately before it happened the plaintiff recognized and bowed to her, and in doing so was looking in the general direction from which defendant was approaching, and doubtless saw him, and must have believed that he would so operate the car as to avoid colliding with him. The defendant's view of the plaintiff was unobstructed, and there is no good reason why he should not have done so. In fact, the defendant admitted that he saw the plaintiff in plain view before the accident, but said that he was late for an engagement and was hurrying to keep it. He did not sound his horn or give any other warning of his hurried approach, and there is some intimation in the record that he became excited and lost control of his machine. If plaintiff saw the defendant approaching, he evidently believed that if he intended to turn into Cedar street and proceed southerly he would so operate his car as to avoid running into him. In any event, we think the evidence was sufficient to leave it to the jury to say if the collision was caused by the negligence of the defendant, and, they having so determined, we will not interfere with their conclusion.

The judgment is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

---

(39 Cal. App. 1)

## RICHMOND WHARF & DOCK CO. v. BLAKE. (Civ. 2515.)

(District Court of Appeal, First District, Division 1, California. Nov. 26, 1918. Rehearing Denied Dec. 26, 1918; Denied by Supreme Court Jan. 23, 1919.)

1. DAMAGES ⟸120(3)—BREACH OF CONTRACT—CONTRACT TO FILL IN LAND.

In action for breach of contract to build sea wall around submerged land and fill it in, measure of damages is difference between contract price and reasonable cost to owner of having work completed.

2. DAMAGES ⟸175—BREACH OF CONTRACT—EVIDENCE.

In action for breach of contract to build sea wall around submerged land and fill it in, consideration to be paid defendant contractor having been one-half of land after it was filled, evidence should have been admitted showing value of such full consideration, so that such sum could be deducted from cost of work to reach measure of damages.

3. CONSTITUTIONAL LAW ⟸93(1)—VESTED RIGHTS—PATENT TO SUBMERGED LANDS.

Title of patentee of submerged land from tideland commissioners under legislative authority was vested right which could not be divested by subsequent legislative act, conveying land to city and giving it power to prosecute actions for recovery of possession from private owners.

4. CONTRACTS ⟸328(1)—ACTION FOR BREACH—DEFENSE—IMMATERIAL MATTER.

Where patentee of submerged lands contracted to have sea wall built and filling in done, which should have been completed under the contract in 1911, contractor could not defend action for breach by patentee's assignee on any ground that in 1913 state, by statute, divested patentee's title, so that he could not convey half the land in payment.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by the Richmond Wharf & Dock Company, against Anson S. Blake. From judgment for plaintiff, defendant appeals. Reversed.

See, also, 185 Pac. 186.

Chickering & Gregory, of San Francisco, for appellant.

Reed, Nusbaumer & Bingaman, of Oakland, for respondent.

LENNON, P. J. This is an appeal from a judgment for the plaintiff, who is the assignee of the rights of one A. S. Macdonald against the defendant herein.

In 1906 Macdonald was the owner of certain submerged land in the city of Richmond, which land is known as "Tide Lot No. 16," and lies under the waters of the Bay of San Francisco. The outer boundary line of said land runs about along the line of what is known as the bulkhead harbor line in the Bay of San Francisco as established by the United States government. The defendant was at that time the owner of the uplands lot lying back of Macdonald's land. Macdonald and the defendant entered into a contract under which the defendant was to do certain work, such as building a sea wall around and filling in the land owned by Macdonald, and when such work was completed Macdonald was to convey to the defendant an undivided one-half interest in said land. Five years' time was given to complete the work, and time was made of the essence of the contract. The defendant failed to complete the work; Macdonald assigned his

rights to plaintiff, who sues for damages for breach of contract.

The chief point made by appellant is that the court erred in excluding evidence as to what would have been the value of the land if it had been filled and walled, because such value of one-half of the land was the consideration moving to defendant for the work to be done upon the land, and defendant should be credited with such amount when he is charged with the cost of doing the work which he contracted to do.

[1] The measure of damages upon a breach of a contract like the one under consideration is the difference between the price at which the contractor agreed to do the work and the reasonable cost to the owner of the property of having such work completed.

[2] Evidence was admitted showing the reasonable cost of doing the work as contracted for. The consideration to be paid defendant was one-half of the land after it was filled. He was to receive not unfilled land and be credited with the cost of filling the same, but he was to receive filled land and to receive the benefit, if any, of having such filled land contiguous to other filled land, the property of the plaintiff. To every part of this consideration, or its money equivalent, he was entitled, having in theory performed his contract by paying the plaintiff in damages the amount necessary to perform it. We think evidence should have been admitted showing the value of this full consideration to be paid, so that such sum could be deducted from the cost of doing the work.

The method employed by the trial court in measuring the damages is not the same in theory, and may or may not be the same in practice. It may be that if evidence of the value of the filled land had been considered by the court, it might have found that the plaintiff was not damaged, and was entitled merely to nominal damages. The contract specially provided that after the work on the land was completed, and not before, then the plaintiff should convey to the defendant a one-half interest in the filled and walled land. The plaintiff should have recovered the exact amount necessary to do the work contracted for, which is virtually a fulfillment of the contract by the defendant, and thereupon the defendant should receive what he was to receive for such fulfillment of the contract, or its equivalent in money value, in the way of a set-off. The contract provided that the defendant was to receive one-half of the land after it had been filled. Therefore evidence as to the value of one-half of the land if filled was improperly excluded, and the judgment will have to be reversed on that ground.

The defendant in his answer, after denying the allegations of the complaint, set up as a separate defense that the plaintiff did not have title to the land involved in the contract, and could not have performed his part of the contract by conveying to defendant an undivided one-half interest in fee, and that the contract was void as against public policy, as it was a contract to trespass upon lands held in trust by the state for all its citizens.

Defendant bases his argument upon the act of the Legislature of June 11, 1913 (St. 1913, p. 605), which conveyed the land in question, among others, to the city of Richmond, and gave the city power to prosecute all actions for the recovery of possession of the same from private owners. This act recited that all tidelands were held in trust by the state for the benefit of its inhabitants for the purposes of navigation, commerce, and fishing, and that the state has not the general power of alienation of such lands, but may, when the interests of commerce, navigation, and fishing require it, convey to municipalities limited and defined areas of such lands, with the power to govern, control, improve, and develop the same in the interest of all the inhabitants of the state. The plaintiff held his title through mesne conveyances, by virtue of a deed from the tideland commissioners.

[3, 4] Prior to the passage of the act of 1913, a patent by the tideland commissioners, issued under the same legislative acts under which the patent here was issued, and by the same board of tideland commissioners, was upheld in the case of Knudson v. Kearney, 171 Cal. 250, 152 Pac. 541. In that case the court discussed the matter fully, and pointed out that the acts under which the patent was issued provided that the boundaries of navigable waters should be fixed, and the water front line delineated, and, in effect, that the land not required for docks, piers, slips, or other purposes should be subject to sale outright. Under this, and the other decisions referred to in this case, we think the title to this property was a vested right in the plaintiff, and could not be divested by this subsequent legislative act. But even conceding that such title could be divested, defendant would be in no better position in regard to his contention, for, as stated in the brief of respondent, if the contract had been fulfilled by the defendant, the work would have been completed in 1911, and the plaintiff would have been bound to convey the one-half interest in this land at that time. That was two years before the act relied upon by appellant was passed. The defendant would therefore have gotten his title free from any cloud created by this act, and if later a cloud was cast upon the title to his property, that would be his misfortune, and would be a matter in which the plaintiff would have no concern, having conveyed the title free and clear of all incumbrances at the time the conveyance was due. We,

therefore, think that the demurrer to the separate defense was properly sustained.

The judgment is reversed.

We concur: BEASLY, Judge pro tem.; STURTEVANT, Judge pro tem.

---

38 Cal. App. 750

TISDALE v. BRYANT et al. (Civ. 1892.)

(District Court of Appeal, Third District, California. Nov. 23, 1918. Rehearing Denied Dec. 23, 1918.)

1. CONTRACTS ⟸95(1)—DURESS.

An agreement between plaintiff and defendants, whereby the latter were to join in a partition of lands, to refrain from questioning the validity of a certain deed, and to pay a certain indebtedness, was not void for duress merely because defendants were financially embarrassed and plaintiff took advantage of their necessity for the lawful purpose of obtaining a promise to pay a debt which they actually owed.

2. CONTRACTS ⟸95(1)—DURESS.

An agreement, whereby defendants were to assume and pay a certain obligation from which plaintiff had promised to release them, was not procured by duress on his part merely because he had refused to execute the release, leaving defendants the alternative of enforcing the promise or executing the agreement, which they were forced to do by reason of financial embarrassment.

3. DEEDS ⟸17(1)—CONSIDERATION—SUFFICIENCY.

A promise in good faith by grantee to pay one-half the upkeep of the property, contribute a certain sum to his parents, and to send one of grantor's sons to school, take him into partnership after graduation, and to leave him the practice on retirement, constituted a sufficient consideration for the deed.

4. DEEDS ⟸70(1)—FRAUD—FAILURE TO PERFORM CONSIDERATION FOR CONVEYANCE.

A mere failure to perform an agreement which constitutes the consideration for a deed does not amount to fraud, although it may form the basis for an action for breach of contract.

5. CONTRACTS ⟸277(1)—PERFORMANCE—NECESSITY OF DEMAND—TIME FOR DEMAND.

Where no term is specified for the doing of an act other than the payment of money, a demand of performance made within a reasonable time is necessary in order to put the promisee in default.

6. CANCELLATION OF INSTRUMENTS ⟸34(1)—CONSIDERATION—PERFORMANCE—LACHES.

Where land was conveyed in consideration of the purchaser's promise to keep up the property and to do certain other things, but no demand was made for performance for more than 10 years after execution, and action to set aside the deed was not instituted until nearly four years thereafter, the right to set the deed aside was barred by laches; no excuse being shown.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by Lieuella Tisdale against Melodile Bryant, Calhoun Bryant, and others, with cross-complaint by the named defendants. From a judgment for plaintiff, the named defendants alone appeal. Affirmed.

Kottinger & Shepardson, of Oakland, for appellants.

Jordan & Brann, of San Francisco, for respondent.

BURNETT, J. The action was for the partition of some 480 acres of land in Kings county, it being alleged in the complaint that the plaintiff and the defendant Melodile Bryant each owned an undivided one-half interest in the land. The other defendants had liens on the property, and they made no contest; but appellants in their answer denied that respondent had any interest whatever in the land, and they claimed that Melodile Bryant was the sole owner thereof. They also filed a cross-complaint, seeking thereby to set aside a certain agreement, attached to their pleading and marked "Exhibit B," of the date of September 1, 1915, executed by them on the one part, and by respondent and Edgar R. Bryant, now deceased, on the other. Their attack upon the agreement is based upon the claim that said respondent and Edgar R. Bryant coerced them into signing said agreement, by taking advantage of their financial necessities and embarrassment in connection with securing the money with which to pay off a $3,500 mortgage on appellants' $80,000 Modesto ranch, which mortgage was about to become due and could not be renewed. They sought also to have a deed executed by appellants to Edgar R. Bryant, the predecessor in interest of respondent, on the 5th day of July, 1901, set aside on the ground of fraud in procuring the same.

In addition, they brought an independent suit to accomplish the same purpose, alleging in their complaint substantially the same facts as appear in the cross-complaint herein. It is admitted that these two pleadings involve the same legal principles and the decision as to one will cover and determine the other.

[1] In this agreement of September 1, 1915, appellants promised "to join in an equal division of the lands" involved in the partition suit and "never again to question the validity of the deed executed by Melodile Bryant and Calhoun Bryant to Edgar R. Bryant on the 5th day of July, 1901." The particular feature of this agreement, however, concerning which appellants com-

plain and on account of which they asked to have the agreement set aside, was the promise therein contained on their part "to assume to pay certain indebtedness and evidences of indebtedness, amounting to the sum of about $4,300, growing out of the affairs of the Bryant Investment Company, and plaintiff's management thereof, and other matters from which said Calhoun Bryant and Melodile Bryant were to have been released from paying." The claim seems to be that the invalidity of this covenant vitiates the whole agreement, as the former is an inseparable part of the contract, and the said promise to pay the indebtedness is sought to be nullified for the reason already stated. But under the authorities, it is plain that the facts alleged do not amount to duress or coercion and compulsion as recognized by the law, and, for this reason that it appears the advantage, if any, was taken of appellants' necessities for the legitimate and lawful purpose of obtaining from them a promise to pay a debt which they actually owed. The authorities on this point are cited in the brief of respondent, to which appellants have made no reply, and they seem decisive of the question.

Cable v. Foley, 45 Minn. 421, 47 N. W. 1135, was a case where, plaintiff being without means to pay his men, defendants refused to pay him what they then owed him, unless he would sign three written contracts unfavorable to him. He signed them and afterward sued the defendants to recover the excess he would have been entitled to if he had not been so coerced into said settlement. The trial court directed a verdict for the defendants, and in sustaining its action the Supreme Court said:

"The mere threat to withhold from a party a legal right which he has an adequate remedy to enforce is not, in the eye of the law, duress; certainly not such as will avoid the execution of a contract."

In Hackley v. Headley, 45 Mich. 569, 8 N. W. 511, the defendants, being indebted to the plaintiff in a large amount on a logging contract and taking advantage of the fact that plaintiff was in great need of money with which to pay his woodsmen, who were cutting logs for plaintiff, refused to pay him what was due him unless he would take $2,000 less than what he was entitled to and receipt in full for all claims against the defendants. Plaintiff took the lesser sum and gave the defendants a receipt in full and subsequently sued them for the $2,000, relying upon duress to avoid the contract.

Judge Cooley, speaking for the court, said:

"In what did the alleged duress consist in the present case? Merely in this: That the debtors refused to pay on demand a debt already due, though the plaintiff was in great need of the money and might be financially ruined in case he failed to obtained it. It is not pretended that Hackley & McGordon had done anything to bring Headley to the condition which made this money so important to him at this very time, or that they were in any manner responsible for his pecuniary embarrassment except as they failed to pay the demand. The duress, then, is to be found exclusively in their failure to meet promptly their pecuniary obligation."

It was held that it would be "a dangerous, as well as a most unequal, doctrine" to enunciate that the contract was invalid because of the financial necessities of the plaintiff.

In Silliman v. United States, 101 U. S. 465, 25 L. Ed. 987, the owners of certain barges, which were employed by the quartermaster's department, claimed that they were forced by duress of their property to sign new charter parties at a reduced rate, but it was held:

"That neither the forcible retention of the barges nor the refusal to pay the compensation agreed upon constituted duress."

The court declared:

"We are aware of no authority in the textbooks or in the adjudged cases to justify us in holding that the last charter parties were exacted under duress."

Fuller v. Roberts, 35 Fla. 110, 17 South. 359, involved the foreclosure of a mortgage to secure the payment of a note for $1,000. The defense was based upon duress, it being the claim that the note and mortgage were given to secure the dismissal of certain proceedings begun by the plaintiff. The lower court sustained a demurrer to the defense, and in upholding this ruling the Supreme Court of Florida said:

"Legal duress implies that a party has been unlawfully constrained by another to perform an act under circumstances which prevent the exercise of free will. The act of the party compelling the unwilling obedience of another must be unlawful or wrongful, and there can be no duress of goods in law where the act done or threatened is nothing more than what the party had a legal right to do"—citing cases.

In Morton v. Morris, 72 Fed. 392, 18 C. C. A. 611, the plaintiff brought an action to foreclose two certain mortgages executed by the defendant in settlement of their business affairs. The defense was that the mortgages were obtained by plaintiff through duress, in this, that when the settlement was made a financial crisis existed; defendant was exclusively engaged in business; it was very hard to raise money and plaintiff threatened to sue defendant for an accounting and to have a receiver appointed. This would ruin defendant, and to prevent plaintiff from carrying out his threat defendant gave the mortgages in question for an amount largely in excess of what he actually owed defendant. The United States District Court held that the facts averred were not suffi-

cient to avoid the mortgages, and this judgment was upheld by the Court of Appeals for the Eighth Circuit. Therein it was said:

"The intent which actuates a creditor in seeking to enforce a legal claim or demand is ordinarily of no concern to the debtor, and is not a matter for judicial inquiry. The latter is only entitled to complain when some act is done or threatened by the creditor which is, in itself, unlawful, or is contrary to equity. In the present case the acts charged in the answer as the basis for relief consisted in a demand made by the plaintiff for an accounting and settlement when the defendant was in embarrassed circumstances, and in a threat to enforce such demand by a civil action. Neither of these acts was unlawful, or so far harsh, oppressive, or unconscionable as to vitiate the settlement subsequently made."

A peculiarly hard case was Domenica et al. v. Alaska Packers' Association (D. C.) 112 Fed. 554, involving the employment of plaintiffs as seamen on a voyage to and from the salmon fishing grounds in Alaska; also to work as fishermen during the season; to assist in canning the fish on shore and loading them on the ships for transportation. After arriving in Alaska, they refused to carry out their contracts unless their wages were increased $50 apiece. Defendants' superintendent agreed to pay this additional compensation, because he could not get other men to take their places and great loss would be suffered, because of the shortness of the season, if plaintiffs did not go to work catching and canning fish at once. Defendants in settling with plaintiffs refused to pay them the additional $50 compensation, and in allowing them to recover it the court said:

"In the case at bar, if the parties deemed it for their mutual interest so to do, it was competent for them to enter into the new contract sued on, and when they did this there was an implied discharge of the former contract, and the new became the measure of their rights, unless the consent of the defendant thereto was obtained by duress; and the facts appearing here do not show that the defendant acted under duress, in making that contract"—citing Goebel v. Linn, 47 Mich. 489, 11 N. W. 284, 41 Am. Rep. 723, and Hackley v. Headley, 45 Mich. 569, 8 N. W. 511.

In Taylor v. Ford, 131 Cal. 440, 63 Pac. 770, plaintiff brought suit to cancel a note for $8,666.44 on which he had paid the defendant $6,000, alleging that—

"He was coerced into signing the note by threats of the defendant to sell his partnership in a lumber business in which they were associated 'to an entire stranger.'"

The court declared:

"The only coercion claimed by the plaintiff is that he was forced to enter into the contract and give the note in question by reason of defendant's threats to sell out to a stranger, in violation of his contract for a five years' partnership. That would not amount to coercion in law."

[2] It can make no possible difference if we regard the allegation of cross-complainants that respondent and the said Edgar R. Bryant had promised to execute a release of appellants from the obligation to pay said sum of $4,300. The violation of said promise would not constitute coercion in any sense. 9 Cyc. p. 448. Appellants had their choice of standing upon said promise or executing the agreement of September 1st. They chose the latter alternative and must abide by it. It is equally plain that said cross-complaint does not present a case of fraud or undue influence. It follows that by virtue of said agreement, Exhibit B, appellants were estopped from questioning the ownership of respondent in and to one-half of said real estate.

[3] But, assuming that the allegations of said cross-complaint are such as to warrant the annulment of said agreement of September 1st, and treating the situation as though said agreement was invalid, we are still confronted with the said deed of July 5, 1901, which conveyed to plaintiff's predecessor in interest the legal title to one-half of said property. It was sought, however, in the cross-complaint herein, and in the complaint in the other action to which we have referred, to have the deed set aside on the ground of fraud. It is quite plain, though, that as to this point the pleadings of appellants are radically defective. While there is an allegation that the grantor never received any adequate or valuable consideration for executing said deed, it does appear that she delivered said deed to Edgar R. Bryant upon his promises to pay one-half of the upkeep of the entire property, contribute $10 per month to the support of his parents, then living with appellants, and would prepare one of the grantor's sons for entry into a first-class medical school, thereafter at his own expense send said son to a medical school until he graduated, then associate said son with him in his practice, and, when he retired from practice, turn it over to the son, the latter to take care of his mother's failing eyesight, and the grantee further promised to reconvey the property to appellants before he should die. Of course, these promises constitute a sufficient consideration for the execution of the deed, and, it may be added, there is nothing in the pleadings to show that the promises were not made in good faith with the full intention to perform them. In fact, there is no hint of the perpetration of any fraud in the procurement of the deed. If it had been alleged that these promises were made for the purpose of deceiving the grantor and that the grantee had no intention of performing them, a different situation might be presented.

[4] Appellants, however, seek to set aside said deed solely upon the ground that the grantee failed to perform some of his promises. A mere failure to perform an agreement, which constitutes the consideration for a deed, does not amount to fraud, but it may be ground for an action for damages for breach of the contract.

Moreover, we agree with respondent that the laches of appellants afford an additional support for the conclusion of the lower court. It appears that no demand was made on Edgar R. Bryant to educate the son of appellants until April 19, 1912, more than 10 years after the promise to do so is alleged, and no excuse is shown for the delay; and this action to set aside the deed was not instituted until April 19, 1916, nearly 15 years after the deed was executed.

[5] The rule seems to be that where no term is specified for the doing of an act, other than the payment of money, that a demand of performance is necessary in order to put the promisee in default. Am. & Eng. Ency. of Law (2d Ed.) vol. 9, p. 200.

"The primary object of a demand is to enable defendant to perform his obligation or otherwise discharge his liability without being subject to the inconvenience and expense of litigation." 1 Corpus Juris, p. 979.

Furthermore, as there is no allegation that a time was fixed for the performance of this part of the consideration, it was incumbent upon appellants to make the demand within a reasonable time.

"A party cannot by his own negligence, or for his own convenience, stop the running of the statute. * * * The rule rests upon the principle that the plaintiff has it in his power at all times to do the act which fixes his right of action." Williams v. Bergin, 116 Cal. 56, 47 Pac. 877.

"If no cause for delay be shown, it would seem reasonable to require the demand to be made within the time limited by the statute for bringing the action. There is the same reason for hastening the demand that there is for hastening the commencement of the action." Meherin v. S. F. Produce Exchange, 117 Cal. 215, 48 Pac. 1074.

[6] Moreover, after making such demand, appellants waited nearly four years before bringing the suit to set aside the deed. No sufficient excuse is shown for such delay, and the authorities are numerous to the effect that such want of diligence is fatal in this kind of a case.

Respondent also points out that appellants must fail because the status quo cannot be restored; but we deem it unnecessary to pursue the subject further, as we are satisfied that there is no merit in the appeal.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

38 Cal. App. 785

BRYANT et al. v. BRYANT et al. (Civ. 1872.)

(District Court of Appeal, Third District, California. Nov. 23, 1918. Rehearing Denied Dec. 23, 1918.)

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by Melodile Bryant and another against Betty Bryant and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Kottinger & Shepardson, of Oakland, for appellants.

Jordan & Brann, of San Francisco, for respondents.

PER CURIAM. This is the independent suit to which reference is made in the opinion filed this day in case No. 1892, 177 Pac. 510. As stated therein, the two cases are similar, and they are controlled by the same principles.

For the reasons stated in said opinion, the judgment herein is affirmed.

38 Cal. App. 709

SHORR v. CITY OF AZUSA et al. (Civ. 1842.)

(District Court of Appeal, Second District, California. Nov. 21, 1918.)

1. HAWKERS AND PEDDLERS ⊜4(1)—LICENSES—REVOCATION—NOTICE.

Under a city ordinance providing that a peddler's license may be revoked at any time on giving the holder an opportunity to appear before the board of trustees by notice, notice must be given in a reasonable time; but, where the licensee requested no continuance, a notice for an immediate hearing was sufficient.

2. HAWKERS AND PEDDLERS ⊜4(1)—LICENSES—REVOCATION—SUFFICIENCY OF NOTICE.

Under a city ordinance providing for revocation of a peddler's license upon notice to appear before the board of trustees, it was immaterial whether a copy of the notice was left with the licensee, where he had full actual notice.

3. FALSE IMPRISONMENT ⊜31—EVIDENCE—SUFFICIENCY.

In an action for false imprisonment by a peddler arrested for peddling after his license had been revoked, evidence *held* to show good faith on the part of the town trustees in revoking such license on the ground of unfitness.

4. APPEAL AND ERROR ⊜757(3)—BRIEFS ON APPEAL—SUFFICIENCY.

Where an appeal is taken under the alternative method, the court will not search the typewritten transcript for evidence which the parties have omitted to print in their briefs in disregard of Code Civ. Proc. § 953c.

5. EVIDENCE ⊜83(2)—PRESUMPTIONS—REGULARITY OF OFFICIAL ACTION.

In an action for false imprisonment brought by a peddler arrested after his license was revoked, the court will presume that the board

of trustees of the municipality lawfully and properly exercised its discretion in revoking the license, in the absence of positive proof to the contrary.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by David Shorr against the City of Azusa and others for false imprisonment. From a judgment for plaintiff, defendants appeal. Reversed.

F. M. Steele, of La Crescenta, for appellants.

Baird & Gerecht, of Los Angeles, for respondent.

MYERS, Judge pro tem. The defendants Roach and Granville appeal from a judgment against them in the court below for damages in an action for false imprisonment. They were, respectively, president of the board of trustees and city marshal of the city of Azusa. On the 25th day of October, 1912, the plaintiff was the holder of a license, regularly issued, entitling him to engage in the business of peddling novelties within said city for a period of one month, from October 15th to November 15th of that year. On said 25th day of October, a special meeting of the board of trustees of said city was duly called and regularly held, at which all members of the board were present, as was also the respondent, the holder of said license. At said meeting, after a hearing upon the question whether or not said license should be revoked, it was moved, seconded, and carried by unanimous vote of all the trustees that the same be revoked. Thereupon the respondent returned to the streets and resumed his business of peddling novelties; whereupon he was arrested by appellant Granville, pursuant to instructions from appellant Roach. He was imprisoned in the city jail overnight, after which he was either discharged or released. Apparently the arrest was made without a warrant. The foregoing facts are disclosed by the portions of the record which are printed in the briefs here.

But one question is presented on this appeal, namely: Did the action of the board of trustees above referred to have the legal effect of revoking respondent's license? If it did, then respondent, in engaging in the business of peddling thereafter, was guilty of a misdemeanor in the presence of the arresting officer, and the arrest and imprisonment were therefore lawful. On the other hand, if said action of the board of trustees was void, then respondent was still a licensee and was guilty of no violation of law in continuing his business, from which it follows that the arrest, having been made without a warrant, was unlawful.

The license in question was issued pursuant to an ordinance of said city which provides that—

All licenses issued thereunder "are granted and accepted by all parties receiving licenses with the express understanding that the board of trustees of the city of Azusa, may revoke same at any time, * * * if satisfied that * * * the holder of any such license is an unfit person to be trusted with the privilege granted by such license; provided, however, that no license shall be revoked without first giving the holder thereof an opportunity to appear before the board of trustees in his own behalf by the notification in writing to the holder of such license giving and fixing the time and place of such hearing."

No question as to the validity of this ordinance is here raised.

Respondent contends that the notice to him of the meeting of the trustees was insufficient, with respect both to the time and the manner of service thereof, to give the trustees jurisdiction to revoke the license, and both parties agree that the trial court so held. The notice was in writing, the material portions thereof being as follows:

"City of Azusa, Los Angeles County, California.
"Azusa, Cal., Oct. 25th, 1912.

"Shorr *Bors.*—Gentlemen: You are hereby notified to appear before the board of trustees of the city of Azusa immediately upon service of this notice to show why your license shall not be revoked. I. D. Roach, President of the Board of Trustees of the City of Azusa."

It was given to the marshal for service, and he testifies that he found respondent in the company of his brother, who was engaged with him in peddling under the license in question. He further testifies:

"I gave the citation to one of the Shorr brothers, and he said he couldn't read it and gave it back, and then I read it to them and explained that they was wanted up there before the meeting; and they readily agreed to go down with me." "In reading the words 'Shorr Bors,' I read them 'Shorr Brothers.'"

This was only a few minutes prior to the time of holding the meeting.

[1] The ordinance does not prescribe the time when such notice shall be given, and in such case the law prescribes a reasonable time. What constitutes a reasonable time is to be determined in each case with reference to the circumstances of that case and the purposes to be subserved and the object to be accomplished by the notice. Here it appears that the purpose of the notice was to give respondent an opportunity to appear before the board and show cause why his license should not be revoked. This purpose was fully accomplished. Respondent did appear before the meeting and was there informed of the nature of the accusations against him and was given an opportunity to reply thereto. He made no objection to the holding of the hearing at that time and no request for a continuance. It is nowhere intimated or claimed that if he had been given further time he could have presented

any other or better reason for the retention of his license than that presented in his behalf by his brother at that meeting.

The case of Burden v. Stein, 25 Ala. 455, cited by respondent, is in point here. That case involved a hearing before a jury to determine the amount of damages which would accrue to Burden from the diversion of the waters of a creek. The notice was not served on him until the day of the hearing. On this point the Supreme Court said (page 458):

"If he had desired further time, or the notice given him was too short, to enable him to prepare for the protection of his interest, he should have made that the specific ground of his objection. The statute does not fix the length of time which must intervene between the notice and the view; this must, therefore, be construed to be a reasonable time; and what is reasonable depends upon the situation of the parties and the nature of the thing to be performed. It is not made affirmatively to appear that the time allowed in this case was unreasonable, and the maxim applies, 'What does not appear does not exist.'"

[2] What is here said applies equally to respondent's objection that a copy of the notice was not delivered to and left with the respondent. Whether or not service in the manner testified to was a technical compliance with the requirements of the law, it none the less fully served the purpose for which it was designed. As was said by the Supreme Court of this state in McLeran v. Shartzer, 5 Cal. 70, 63 Am. Dec. 84, "Where the object of notice was accomplished, it is immaterial whether there was notice or not."

The board of trustees had jurisdiction to consider and determine the question of the revocation of respondent's license. If it acted honestly after a hearing in good faith on the merits of the question, its action was valid and could not be set aside or disregarded by the courts. What occurred at that meeting appears from the testimony of Roach, printed in appellant's brief, as follows:

"After the meeting was called to order and the notice for which the meeting was called was read, I asked if Sam Shorr and Dave Shorr were present, and Mr. Granville said, 'Yes,' and the boys stood up, and I asked which one was Sam Shorr and which was Dave Shorr; and then I told them both—I said: 'Shorr brothers, you have been accused by the people of Azusa to-day of loud and boisterous conduct, unbecoming a gentleman, and of using vile language in the presence of women and children.' * * * That they had, according to the reports which had been brought to me, used vile language in the presence of women and children, and had provoked fights, and had been disturbing other people who were attempting to do a peaceable business alongside of them. And I asked them if there was any reason that they had to give us, why their license should not be revoked, and they should cease from peddling; and the larger one made quite a lengthy statement. He said he had come to Azusa at some little expense, and that he had some pennants left, and that if he wasn't allowed to sell them, that he should lose what he had already invested in them; and that if there were other people that were allowed to peddle on the streets, he didn't see why he couldn't. Then, after he had —he repeated that two or three times in the course of his address to the board. And after that I asked Dave Shorr if he had anything to say, why his license should not be revoked, and he shook his head; and then I called upon Mr. Granville, the city marshal, and asked him if he had anything to say to the board in regard to the conduct of these boys during the day in the city of Azusa, and he got up and made a statement that they had been a source of continual disturbance to the police force of Azusa during the whole day; that they had been annoying people who were engaged in matters not kindred to them; that they had provoked fights and used indecent language in the presence of women and children."

[3] This testimony appears to be wholly uncontradicted, and it warrants but one conclusion, namely, that the trustees acted in good faith after a hearing on the merits of the question, at which sufficient grounds were shown for the revocation of the license, and that their action in this respect was valid.

[4] Respondent asserts in his brief that the evidence shows that the trustees had given the exclusive right to peddle novelties to another person, overlooking the fact that the license in question had already been given to the respondent, and he argues from this that the action of the board revoking his license was in bad faith and for an improper purpose. He prints in his brief no evidence whatever in support of this assertion. This is an appeal under the "alternative method," and this court has repeatedly held that it will not search through the typewritten transcript in the effort to find evidence which the parties have omitted to print in their briefs in disregard of the express mandate of the statute. Code Civ. Proc. § 953c. See California Sav. & Comm. Bank v. Canne, 34 Cal. App. 768, 169 Pac. 395, and cases there cited.

[5] So far as appears from the record presented to us in the manner prescribed by law, there is neither allegation nor evidence of any fraud or bad faith or ulterior motive or arbitrary action on the part of the board of trustees, and we must therefore conclude that their action revoking respondent's license was valid. As was said by this court, in Goytino v. McAleer, 4 Cal. App. 655, at page 659, 88 Pac. 991, at page 992:

"A court will not interfere with the discretion reposed in a proper board or tribunal, but will assume that official duty has been properly and

lawfully performed, in the absence of positive proof to the contrary."

The judgment appealed from is therefore reversed.

We concur: CONREY, P. J.; JAMES, J.

---

38 Cal. App. 433

## WHITE v. DEERING. (Civ. 1827.)

(District Court of Appeal, Third District, California. Oct. 14, 1918.)

1. WILLS ⟹714, 781 — CONSTRUCTION — BEQUEST TO CREDITOR—ELECTION.

A bequest will be construed to be in lieu of an obligation due from testator to legatee, or in lieu of some other legal right or interest of the beneficiary in testator's estate, only where such intention is expressed in unmistakable language and appears from the will construed as a whole.

2. WILLS ⟹130 — HOLOGRAPH WILLS — EXISTENCE OF PREVIOUS WILL.

An instrument will not be given the effect of a holographic will, where there exists a previously made and unrevoked will, unless it clearly appears from its language that testator intended to make further testamentary provisions regarding disposal of his estate, or to explain, qualify, or modify provisions of previously made will.

3. WILLS ⟹130—HOLOGRAPH WILLS—LETTER.

Where testatrix had made will, and in two codicils had provided for bequests to be made to certain servant, an ambiguous letter, written by testatrix, concerning provision to be made for such servant, will not be construed a holographic will.

4. WILLS ⟹487(3) — CONSTRUCTION — HEARSAY EVIDENCE.

In action by servant of testatrix against executrix for compensation, defended on ground that bequest to servant in will was in lieu of compensation, a letter from testatrix to executrix was inadmissible for purpose of explaining bequest, or of qualifying effect thereof, being hearsay.

5. WILLS ⟹487(3) — CONSTRUCTION — SELF-SERVING EVIDENCE.

Such letter was inadmissible as self-serving.

6. WILLS ⟹487(3) — CONSTRUCTION — EVIDENCE—RES GESTÆ.

Such letter, having been written nine months after execution of codicils making bequest, was not admissible as part of res gestæ.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Gladys White against Mabel C. Deering, as executrix of the will of Sophia P. Comstock, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

White, Miller, Needham & Harber, of Sacramento, and Myrick & Deering, of San Francisco, for appellant.

C. E. McLaughlin, of Sacramento, and C. P. McLaughlin, for respondent.

HART, J. Sophia P. Comstock, a resident of the county of Sacramento, died on the 31st day of July, 1915, leaving a last will and testament, of which, after due proceedings, defendant, Mabel Deering, was appointed and qualified as executrix. In due time plaintiff presented to said executrix her claim against said estate for "services as nurse, housekeeper, and secretary, requiring constant service during the day and night, from December 12, 1913, to and including July 31, 1915, $1,963," which said claim was by the defendant rejected, and this action was brought to recover thereon. The case was tried before a jury, and a verdict was rendered for the amount sued for. From the judgment in favor of plaintiff, which followed the verdict, defendant prosecutes this appeal.

A codicil to the will of Miss Comstock, dated April 17, 1914, contained the following provision:

"I also give to Miss Gladys White my piano, my books and my Haviland china."

In another codicil, dated April 24, 1914, was the following provision:

"I give to Miss Gladys White in addition to the personal articles given to her by a previous codicil my fifty shares of Arcade Park stock or the sum of $1,500.00 as she may elect. If the shares are sold in my lifetime I reserve the right to redetermine the amount to be given to Miss White."

At the commencement of the trial, but before the jury was selected, counsel for defendant stated that they expected to show, both by written and oral declarations made by Miss Comstock, that she intended the legacies in her will in favor of the plaintiff to be in full compensation and in full payment for her services, and requested the court to require the plaintiff to elect whether she would proceed with the trial or would accept the legacies in full payment for her services. The court refused to require the plaintiff to elect, and a jury was selected. Before the introduction of any evidence, defendant renewed the motion to require plaintiff to elect, which the court again refused to do. The action of the court in this respect is assigned as error.

[1] The codicils to the will of the testatrix, whereby she gave to the plaintiff certain specified personal property and certain designated shares of stock, are in unambiguous language. They involve a plain and unmistakable expression of the intention of the testatrix to give and bequeath to Gladys

White the "piano, my books and my Haviland china," and in addition thereto "fifty shares of Arcade Park stock," or the sum of $1,500 in lieu of said stock, as the legatee may elect. The terms of the codicils are unconditional and unqualified. In other words, the bequests therein and thereby made to the plaintiff are in terms absolute and unqualified. There is absolutely no language therein from which it may even remotely be inferred that the testatrix intended that the bequests so made were to stand in lieu of any compensation which might become due to the plaintiff for any personal services which the latter might have rendered for the deceased during her (testatrix's) lifetime. To justify the conclusion that a testamentary bequest of money or other personal property is intended by the testator to be in lieu of a debt or some other obligation due from the testator to the legatee, or in lieu of some other legal right or interest of the beneficiary in the estate of the deceased, the expression of that intention must not only be in language so clear and unmistakable that there can be no reasonable ground for doubting that such was the intention, but such intention must be entirely gathered from the testamentary instrument itself whereby the bequest is made. The authorities expounding and applying the rule as it is thus stated are numerous, but we shall content ourselves by the mere citation of a few of our own cases, as follows: Estate of Gray, 159 Cal. 159, 112 Pac. 890; Estate of Cowell, 164 Cal. 636, 642, 130 Pac. 209; Estate of Prager, 166 Cal. 450, 137 Pac. 37; Estate of Whitney, 171 Cal. 751, 760, 154 Pac. 855; Estate of Wickersham, 138 Cal. 355, 363, 70 Pac. 1076, 71 Pac. 437.

It follows from the foregoing views that the case presented here is not one in which a legatee or beneficiary under the terms of a last will is required to make an election as to which of two alternative provisions of such an instrument bequeathing or devising certain portions of the estate of the testator to him he intends to rely on.

The only other point urged by the appellant here arises over the refusal of the trial court to allow the defendant to introduce in evidence, against the objection of the plaintiff, a letter written by the deceased to the defendant, executrix, and dated January 24, 1915, some nine months subsequently to the making of the codicils above referred to. The theory upon which said letter was offered in evidence was that, being entirely in the handwriting of the deceased, it practically amounted to a will, or a codicil to her will, and that it would show that the intention of the testatrix, as to the bequests made to the plaintiff in the two codicils above mentioned, was that said bequests should stand in lieu of compensation for any services performed for the testatrix by the plaintiff. The letter reads:

"Dearest Mabel: The other day Mr. Carly said in the presence of Gladys that I should will her my home place; that I owed her this. This I *do not wish*. Dear Gladys has been lovely to me, but after all she is an inexperienced girl, and I have suffered for care. Dear Gladys does all that she knows how to do, but she often neglects me. She does what she wishes, not what I wish; and of course I can say nothing. When she came to me, I told her I had no money with which to pay her for her services, but that I would give her my piano, my books and my dishes. She said she wanted nothing, not even what I offered her and that her only desire was to take care of me and restore me to health. I have provided for her in my will. The most of my money, as you know, it is my greatest desire, shall go to leave a monument *great* and *beautiful* in honor of my mother and to last for hundreds of years.

"Sophia P. Comstock.

"Please never mention this in your letters. Gladys usually reads everything I write to you and always reads your letters. S. P. C.

"If Gladys knew I sent you this she would punish me severely. This is proof enough of my desire. Save this letter."

We think the ruling excluding the letter as evidence of the intention of the testatrix with respect to the scope of the bequests made to the plaintiff in her will should be sustained.

[2] Obviously, the only theory upon which the letter could be held to be admissible for the purpose for which it was offered is that the letter was in legal effect a testamentary instrument or intended by the testatrix as a part of her will. To give an instrument the effect of a last will, holographic in form, such as is the letter refefred to, if anything in the nature of a testament, where there exists a previously made and unrevoked will of the testator, such instrument should be so phrased that there can be no doubt from its language that the intention of the testator was thus to make further testamentary provisions regarding the disposal of his estate—either that it was to explain, qualify, or modify certain provisions of his previously made will, or to make a different disposition of a part of his estate from that made of it in the original testament.

[3] The letter in question is not free from uncertainty or ambiguity as to its meaning and purpose. It is, for instance, reasonably susceptible of the interpretation that what was uppermost in the mind of the testatrix, when writing the letter, was the proposition suggested by the Mr. Carly mentioned in the writing, in the presence of the plaintiff, that she (testatrix) "should will her (referring to plaintiff) my house," which the testatrix expressed in the letter a disinclination to do—not in positive terms, but in a manner indicating that she was in more or less doubt as to whether she should do so or not; her language being, "This I do not wish." In this view of the meaning and purpose of the letter, it is therefore reasonably probable

that by the concluding words of the letter, viz., "This is proof enough of my desire," the testatrix had reference to her "desire" that the plaintiff should not receive or be given the house of the testatrix. Under this construction of the letter, the sole purpose of the testatrix in writing it and the thought which thus she intended to express were to enter a protest with her friend against giving to the plaintiff her house when she had already made provision for her in her testament, then existing.

But it may be conceded that the letter is capable of a different construction, and herein lies the insuperable difficulty which confronts the appellant in attempting to support the theory upon which she insists that the letter constitutes competent evidence of the intention of the testatrix with respect to the effect it is supposed to have on her bequests to the plaintiff; for thus it becomes clear that the writing is so obscure and uncertain as to its true meaning and purpose that it would require an overstraining of the imagination or much linguistic juggling to make out of the letter a testamentary instrument, or justly to say that the writer intended thereby to subject the right of the plaintiff to receive the bequests provided for her in the will to the condition that she would waive all claim to any and all compensation to which she might be entitled for personal services rendered to the deceased in the latter's lifetime.

Again, in determining whether the letter was intended as a testamentary instrument, no little significance should be attached to the fact that the deceased had previously not only made a will in due form and according to legal requirements, but had thereafter added thereto two codicils, the sole purpose and the effect of which were to give to the plaintiff certain of her personal property. Thus, it would seem clear, the testatrix well knew that, effectively to make a disposal of her estate to take effect after her death, it was necessary for her to do so by a will in accordance with the formalities prescribed by law, and it would seem equally clear that, had she intended qualifying or in any way changing the effect of her bequests to plaintiff, made under the most solemn circumstances known to the law, she would have done so, either by adding a new provision to the will effecting such result or have made an entirely new testament to take the place of that already executed by her and in existence when the letter was written.

[4-6] It will not be denied that the letter, not being testamentary in character, is wholly inadmissible for the purpose either of explaining or qualifying the effect of the bequests made in the will to plaintiff. It would be for such purpose hearsay and self-serving. Nor, the letter having been written nine months after the execution of the codicils whereby the plaintiff was bequeathed a portion of the estate of the deceased, would it be admissible under the rule of res gestæ. The cases in California are uniform upon this proposition, but in support thereof we need only to refer to In re Gilmore, 81 Cal. 240, 243, 22 Pac. 655; Estate of Tompkins, 132 Cal. 173, 175, 176, 64 Pac. 268; and Estate of Willson, 171 Cal. 449, 476, 153 Pac. 927. See, also, Underhill on Wills, § 912; Roper on Legacies, 1461; Harrison v. Haskins, 2 Pat. & H. 388; Aird's Estate, L. R. 12 Ch. Div. 291; Civ. Code, §§ 1318, 1340.

The further contention is made, however, that—

"There is a general presumption that a legacy to a servant or creditor is to be considered as a satisfaction of a debt for wages unless there are circumstances that take the case out of the rule."

The quoted language is from section 690, volume 2, of Labatt's Master and Servant, and the rule as thus stated, as the learned author of that treatise explains, is found in a few English decisions, although Lord Eldon, in La Sage v. Coussmaker (1794) 1 Esp. 188, rules that—

"A legacy was never deemed a satisfaction for a legal demand when that demand was unliquidated at the time of the legacy given, nor where it was given before the time when the demand accrued, or the debt was contracted, unless it was expressly said in the will that it should be a satisfaction."

There are to be found some American cases, which, like the English cases referred to by Labatt, hold that the presumption is that a legacy to a servant is to be regarded as in satisfaction of wages due from the testator to the servant. There are, on the other hand, many of our cases which have adopted and applied the rule as laid down by Lord Eldon, supra, and our opinion is that that is the sounder and more logical rule.

It is neither strange no wholly anomalous that a person, in making a testamentary disposal of his estate, should give a portion thereof to friends or persons, not related to him by blood or otherwise, who had been in the lifetime of the testator in such close association and on such terms of intimacy with him as to have won his lasting love, friendship, and confidence. Even a menial servant's relations to his master usually involve the administration of matters which directly affect the latter's personal comfort and material happiness, and it is therefore never a matter of surprise when it develops that in his last will a master has bestowed upon his servant, though his services have been of a menial nature, some benefaction, or given him a legacy solely out of consideration for his faithfulness as a servant. Hence the books are full of cases where servants have been left legacies by their masters of far greater value than any services they had rendered, or which they were capable of

rendering, in the capacities in which they were employed, are reasonably worth, and from those cases it may safely be laid down as the common rule, even in those instances where the fact is not directly expressed in the testament itself, that the master thus remembers his servant, not because in his opinion the servant has not been or will not have been sufficiently compensated for his services, or not because the master thus intends to pay for the services rendered him by the servant, but because of some sentiment of affection or personal attachment which the master has formed and fostered in his lifetime and to the end for the servant. Therefore it seems to us that the true rule is and ought to be, in the interpretation of such bequests, that the presumption is that they are not made in lieu or satisfaction of compensation due to the servant from the testator, unless there is language in the testament itself from which no other conclusion is permissible. As above stated, this conclusion is in accord with that announced in a number of the cases in this country and by courts of eminent standing. It is sufficient to give one of these cases special notice herein.

In Sheldon v. Sheldon, 133 N. Y. 1, 30 N. E. 730, the testator, in his lifetime, had received from his wife a sum of money which she had obtained from the sale of certain real estate, of which she was the owner in her own right, upon the understanding and agreement with his wife that he should control and invest the money for her benefit, and that he should, when requested, account to her for the same and whatever increase might accrue from the investment. No such accounting was had during the lifetime of the husband, and she presented in due form her claim for the amount against the estate of her husband who died testate. The claim was rejected by the executors of the will. By his testament the testator gave his wife a legacy of $7,000, which was paid to her by the executors of the will. On the trial of an action by the wife to recover the money due from her husband by reason of the transaction above mentioned, one of the defenses interposed was that the legacy was intended to extinguish and did extinguish said indebtedness, notwithstanding that the husband's will contained no language to that effect or indicating such to have been the intention of the testator. The trial court disallowed that defense, and the Court of Appeals sustained the ruling, saying:

"The legacy given to the plaintiff by the will of the husband did not operate as payment. The will contains no words from which any intent can be inferred or found to extinguish any pre-existing debt by means of the bequest. It was an absolute gift apart from any debt due by the testator to his wife, and no debt is even mentioned or referred to in the will. A legacy to a creditor is not to be deemed in satisfaction of his debt, unless so intended by the testator."

Other cases to the same effect are Clarke v. Bogardus, 12 Wend. (N. Y.) 68; Boughton v. Flint, 74 N. Y. 482; Phillips v. McCombs, 53 N. Y. 494; Eaton v. Benton, 2 Hill (N. Y.) 576; Williams v. Crary, 4 Wend. (N. Y.) 449.

In the footnotes of La Batt's treatise the California case of Smith v. Furnish, 70 Cal. 424, 12 Pac. 392, is referred to as supporting the rule laid down in those English cases in which it is held that the presumption is that a legacy to a servant or a creditor is for the purpose of wiping out a debt due from the testator to the legatee, but we do not consider it so. There the action was against the estate or the executors of the last will of the deceased on a claim, rejected by the executors, for services performed by the plaintiff for the deceased during the latter's last illness. In his will the deceased made a bequest to the plaintiff in the sum of $3,000, which expressly provided that the bequest should be "in consideration and in payment for her kind care and attention during my last illness." The court, in effect, held that the will itself thus made it clear that the legacy was to operate as compensation for any services rendered the deceased by the plaintiff, and, of course, the language of the bequest admits of no other conclusion.

We conclude that the judgment appealed from should be affirmed; and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

38 Cal. App. 8

## DONNATIN v. UNION HARDWARE & METAL CO. (L. A. 4282.)

(Supreme Court of California. Sept. 27, 1918.)

1. NEW TRIAL ⊜9 — ACTION FOR DAMAGES FROM NEGLIGENCE—VERDICT.

In action for damages from negligence, issue of damages is not alone ground of a motion for new trial, under Code Civ. Proc. § 657, as a verdict in such case must be regarded as a single and indivisible entity.

2. NEW TRIAL ⊜9—GENERAL MOTION—NEW TRIAL ON LIMITED ISSUES.

The court has discretion to order new trial generally, or only in part, on limited issues; its discretion in such regard being properly invoked by a motion for new trial of the entire case.

3. NEW TRIAL ⊜9—DENIAL OF LIMITED TRIAL—POWER OF COURT.

The trial court may properly deny a limited new trial, where it is of opinion that substantial justice requires that a new trial should cover all issues, and not be limited to that of damages alone.

In Bank. Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Charles E. Donnatin against the Union Hardware & Metal Company, a corporation. From a judgment for defendant, plaintiff appealed to the District Court of Appeal, and, after judgment of affirmance (175 Pac. 26), moves for transfer to the Supreme Court. Motion denied.

Horace S. Wilson and Frank G. Tyrrell, both of Los Angeles, and W. W. Middlecoff, of Visalia, for appellant.

John Murray Marshall and James S. Bennett, both of Los Angeles, for respondent.

PER CURIAM. [1-3] The petition for transfer to this court, after judgment in the District Court of Appeal (175 Pac. 26), is denied. It should be added that we do not understand the opinion of the District Court of Appeal to hold that a motion for a new trial of the issue of damages alone is authorized by our Code. Code Civ. Proc. § 657. The verdict, in a case of this kind may, for the purposes of such motion, be regarded as a single and indivisible entity. The power of the court to order a new trial on limited issues is well settled. It has discretion to order a new trial generally or only in part. Its discretion in this regard is properly invoked by a motion for a new trial of the entire case, and it may well be doubted whether this discretion can be circumscribed by means of a motion for a new trial of one issue alone. A determination of this question is, however, not essential to the decision of the present case, and we do not here determine it. In any view, the trial court may properly deny a limited new trial where it is of opinion, on the whole record before it, that substantial justice requires that a new trial, if granted at all, should cover all the issues. No such relief was sought here.

177 Cal. 303

## PEARL v. PEARL. (S. F. 7912.)

(Supreme Court of California. Jan. 25, 1918. Rehearing Denied Feb. 23, 1918.)*

1. TRUSTS ⊜371(3)—BREACH—PLEADING.

A complaint by an administratrix alleging that deceased quitclaimed land to defendant, without consideration, upon defendant's promise to take and hold the same in trust for benefit of decedent, or to convey according to direction of decedent, and upon his death to divide equally with his heirs, and that defendant sold and converted the proceeds of the land and failed to account therefor, stated a cause of action for a breach of trust.

2. EXECUTORS AND ADMINISTRATORS ⊜426—LIMITATION OF ACTIONS ⊜103(1)—BREACH OF TRUST—ACCRUAL OF ACTION—PARTIES.

A grantee selling land held in trust for benefit of the grantor, which on his death was to be equally divided among his heirs, the sale occurring during the life of the grantor, may be sued by the grantor's administratrix; the right of action arising at once upon its breach.

3. APPEAL AND ERROR ⊜704(1) — MATTERS REVIEWABLE—VERDICT.

Where a verdict is not certified as a part of the judgment roll, the point that it is not properly signed by the foreman of the jury, as required by Code Civ. Proc. § 618, is not reviewable.

4. LIMITATION OF ACTIONS ⊜103(2) — EXPRESS TRUSTS—ACCRUAL OF ACTION.

Limitations do not start to run in favor of the trustee of an express trust until the trust is repudiated.

5. LIMITATION OF ACTIONS ⊜201—INCAPACITY OF PARTY—"INSANE"—FINDINGS.

A finding that a person was incapable of caring for his property or transacting business or understanding the nature and effect of his acts was equivalent to a finding that he was "insane" within the meaning of the statute of limitations (Code Civ. Proc. § 352, subd. 2).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Insane.]

6. TRUSTS ⊜371(8)—EXPRESS TRUSTS—REQUISITES.

Where a complaint alleges an express trust, it is immaterial whether a promise of the trustee to do certain acts was made with or without the intention of performing, and proof of such an allegation is unnecessary.

* While rehearing was denied the second paragraph of the opinion was amended so as to read as it is now set forth herein.

7. Appeal and Error ⊂=928(2) — Matters Reviewable—Presumptions.

Where from the record it is impossible to tell what the court instructed the jury, it will be presumed that it instructed to disregard incompetent evidence admitted over objections.

Department 2. Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Isabelle L. Pearl, administratrix of the estate of John Q. Pearl, deceased, against James H. Pearl. Judgment for plaintiff, and defendant appeals. Affirmed.

Edward E. Cothran, of San Francisco, for appellant.

Louis O'Neal, Wm. F. James, and James P. Sex, all of San Jose, for respondent.

WILBUR, J. This is an appeal from a judgment for plaintiff rendered after a verdict by a jury on special issues and the decision by the court adopting said verdict. The action is brought by the plaintiff to compel an accounting from the defendant of the proceeds of the sale of certain real estate therein described. The complaint alleges that the defendant is the son of John Q. Pearl, deceased; that the said decedent, on April 28, 1902, executed a deed to the defendant to all his real estate, without consideration, upon defendant's promise to take and hold the same in trust during the lifetime of decedent for the use and benefit of decedent, or to convey according to the direction of decedent, and upon his death to share the property equally with the heirs at law of said decedent; that said promise was made by defendant without any intention of keeping or performing the same; that on February 4, 1907, without consideration, decedent executed a quitclaim deed to defendant of said property; that at the time decedent executed the same he "was aged and ill in body and mind, and physically and mentally weak, and incapable of understanding the nature or effect of his acts, and incapable of transacting business, and did not, in fact, understand the nature or effect of his said acts in so executing, in form, said last-mentioned deed, * * * and said John Q. Pearl from thenceforth continued to be, and was at the time of his death, so weak and ill in body and mind, and incapable of caring for his property, or transacting business, or understanding the nature or effects of his acts"; that on July 22, 1908, the defendant, without direction, consent, or knowledge of the decedent, sold the property; that the defendant received and converted to his own use and benefit the purchase price, the exact amount of which was unknown to plaintiff; that the defendant received large sums of money as income from said premises, and converted the same to his own use and benefit, and has failed and refused to account therefor, either to the deceased or to the plaintiff. The jury found, and the court adopted its findings, that the foregoing allegations of the complaint were true, except that there was no finding on the allegation that the promise to hold the property in trust made by the defendant to the decedent was without any intention of keeping or performing the same. The judgment of the court was for the sum of $5,000, proceeds of the sale of said real estate.

[1] The complaint stated a cause of action for a breach of trust. Defendant was not prejudiced by the overruling of the demurrer.

[2] Appellant claims that the administratrix does not have the capacity to sue, and that under the trust found the beneficiaries, the heirs alone have power to sue, and cites in support thereof the case of Janes v. Throckmorton, 57 Cal. 368; but in the case at bar the property was sold in violation of the trust, and the action is based upon said breach of trust and is to secure to decedent's estate the proceeds of such sale. The right of action arose at once upon the breach of trust (Norton v. Bassett, 154 Cal. 411, 97 Pac. 894, 129 Am. St. Rep. 162), and the administratrix is the proper party to enforce that right (sections 1452, 1581, 1582, 1583, Code Civ. Proc.; Collins v. O'Laverty, 136 Cal. 31, 68 Pac. 327).

[3] The transcript in this case contains what purports to be a verdict. This document is not signed by the foreman of the jury, as required by section 618, Code of Civil Procedure. As the verdict is not certified as a part of the judgment roll, the point that the verdict is not signed is not properly before us; neither is the alleged discrepancy between the verdict and the copy thereof contained in the findings.

[4, 5] As to the statute of limitations: This action is based upon the breach of an express trust. The statute did not begin to run until the trust was repudiated in 1908, when the property was sold by the defendant. It was alleged and found that at that time the decedent was of unsound mind and that he remained so until the time of his death. It is true that the complaint and findings use the language hereinbefore stated and do not use the words "unsound" or "insane," but the finding that he was incapable of caring for his property or transacting business or understanding the nature or effects of his acts was equivalent to a finding in express terms that the deceased was insane within the meaning of the statute of limitations. Section 352, subd. 2, Code Civ. Proc.; Crowther v. Rowlandson, 27 Cal. 376; Clarke v. Irwin, 63 Neb. 547, 88 N. W. 783; Barlow v. Strange, 120 Ga. 1015, 48 S. E. 344; 22 Cyc. 1109. The statute did not run

against him during the period of his incapacity.

[6] Error is claimed because of the failure of the court and jury to find upon the issue as to whether or not the promises of the defendant concerning the performance of the trust were made without the intention to perform the same, and therefore fraudulent. The complaint alleges an express trust, and whether or not the promise of the trustee was made with or without the intention of performing the same is immaterial.

Two exceptions are contained in the bill of exceptions to questions and answers as follows:

"What was the object and purpose stated by your father, John Q. Pearl, in making the deed of April 28, 1902, of said property to defendant?"

Defendant objected to the question and evidence upon the ground that the same was incompetent. The court thereupon ruled that the said evidence was admissible solely for the purpose of showing the mental condition of said John Q. Pearl at the time of the making of said deed of April 28, 1902, and overruled the objection. Plaintiff answered:

"Father told me he had deeded the Merced ranch to the defendant in trust—in a deed of trust."

It is true that the answer to this question did not at all tend to show that the decedent was of unsound mind, but it is not clear that the question might not have elicited something appropriate to that issue. No motion to strike out was made. Plaintiff was also asked to state what she knew of the quitclaim deed of said property dated February 4, 1907, to defendant. Appellant objected to said question upon the ground it was incompetent. The court overruled the objection. The plaintiff then testified as follows:

"I said to father: 'Jim [defendant] said he had a quitclaim deed to the Merced ranch.' Father said: 'Lizzie [plaintiff] if he has it I know nothing about it.'"

No motion to strike out was made. The question did not specifically call for a conversation, and her answer might have been competent.

[7] Assuming that there was error in the rulings on the objections to said questions, it is impossible, from the record, to say that they were prejudicial. For aught that appears, the court may have instructed the jury to disregard this evidence, and in support of the judgment it must be assumed that the court did so instruct the jury.

Judgment affirmed.

We concur: MELVIN, J.; SHAW, J.

---

37 Cal. App. 761

TULLOH v. BOYCE et al. (ALSTON et al., Interveners). (S. F. 8092.)

(Supreme Court of California. Sept. 6, 1918.)

MECHANICS' LIENS ⊂=268 — NOTICE OF LIS PENDENS.

Where action to enforce mechanic's lien is commenced within 90 days, lien continues during pendency of action, and notice of lis pendens is not essential, in view of Code Civ. Proc. § 1190, as to continuance of lien.

In Bank.

Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Action by William A. Tulloh against E. J. Boyce and others, with intervention by Bernice Alston and another. Judgment for interveners against plaintiff, and order denying plaintiff's motion to vacate judgment, etc., having been reversed by the Court of Appeals (174 Pac. 680), application for rehearing is made to the Supreme Court. Application denied.

Frank W. Sawyer, of San Francisco, for appellant.

W. B. Rinehart, of Oakland, for respondents.

PER CURIAM. In denying a hearing in this court we deem it proper to say that we are in entire accord with the opinion of that court in so far as it holds that filing of a notice of lis pendens is not essential to a continuance of the lien. By reason of the commencement of the action to enforce the lien within the 90 days, the lien continues during the pendency of the action, in view of the provisions of section 1190, Code of Civil Procedure. Further than this it is not essential to go on this appeal.

The application for a hearing in this court is denied.

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(177 Cal. 767)

## A. F. ESTABROOK CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION.

## KLAMATH S. S. CO. v. SAME.

(S. F. 8315, 8316.)

(Supreme Court of California. March 19, 1918. On Petition for Rehearing, April 17, 1918.)

1. CONSTITUTIONAL LAW ⟹42 — PERSONS ENTITLED TO RAISE CONSTITUTIONAL QUESTION.

Plaintiff employer, a "resident," is not entitled to attack Workmen's Compensation, Insurance and Safety Act, § 75a, added by St. 1915, p. 1101, on the ground that it discriminates against "nonresidents" contrary to Const. U. S. art. 4, § 2, declaring that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, and Amendment 14, prohibiting any state from denying to any person within its jurisdiction the equal protection of the laws; plaintiff not belonging to the class alleged to be discriminated against.

On Petition for Rehearing.

2. APPEAL AND ERROR ⟹832(4)—POINTS NOT SUGGESTED ON ORIGINAL SUBMISSION—REVIEW.

A point not suggested in argument on which petitioner submitted case for decision will not be considered, where made for the first time on petition for rehearing.

In Bank. Separate proceedings by the A. F. Estabrook Company and others and by the Klamath Steamship Company against the Industrial Accident Commission to test the validity of awards made pursuant to Workmen's Compensation, Insurance and Safety Act, § 75a. Awards affirmed.

Ira A. Campbell, of San Francisco (McCutchen, Olney & Willard and John F. Cassell, all of San Francisco, of counsel), for petitioners.

Christopher M. Bradley, of San Francisco (Warren H. Pillsbury, of Oakland, of counsel), for respondent.

SLOSS, J. In North Alaska Salmon Co. v. Pillsbury, 174 Cal. 1, 162 Pac. 93, L. R. A. 1917E, 642, we held that the Workmen's Compensation, Insurance and Safety Act, as originally enacted, did not authorize an award of compensation where injury to the employé had occurred beyond the boundaries of this state. The question decided was simply one of interpretation. It was assumed that the Legislature had power to require employers to compensate "injured employés whose employment was created in this state, regardless of the place where the injury may have been sustained." The language of the statute, as read by the court, indicated, however, that the Legislature had not intended to make the compensation scheme applicable to cases of injury arising outside the state. In 1915 the scope of the act was extended by the addition of a new section (75a), reading as follows:

"The commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state in those cases where the injured employé is a resident of this state at the time of the injury and the contract of hire was made in this state and any such employé or his dependents shall be entitled to the compensation or death benefits provided by this act." Stats. 1915, p. 1101.

We have before us, in each of the above-entitled proceedings, a writ of certiorari issued on behalf of the employer to test the validity of an award made pursuant to the terms of this section. The two proceedings are presented on a single set of briefs.

[1] The petitioners do not question the existence of the general legislative power which, in our opinion in the North Alaska Salmon Company Case, we assumed to exist. The sole ground of attack is that section 75a involves an unjustifiable discrimination against employés who are not residents of this state, and thus violates the provision of the Constitution of the United States declaring that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states" (art. 4, § 2), and that prohibiting any state from denying "to any person within its jurisdiction the equal protection of the laws" (Amendment 14, § 1). Under settled principles of constitutional law, the petitioners are not in a position to raise this question. Generally speaking, the courts will not consider the constitutionality of a statute attacked by one whose rights are not affected by the operation of the statute. 12 C. J. 760; Scheerer v. Deming, 154 Cal. 133, 142, 97 Pac. 155. More specifically, a contention that a statute denies equal rights and privileges by discriminating between persons or classes of persons "may not be raised by one not belonging to the class alleged to be discriminated against." 12 C. J. 768; 10 Cent. Dig. col. 1284 et seq.; Estate of Johnson, 139 Cal. 532, 534, 73 Pac. 424, 96 Am. St. Rep. 161. Thus the validity of a statute excluding colored persons from serving on juries cannot be questioned by whites. Commonwealth v. Wright, 79 Ky. 22, 42 Am. Rep. 203. Nor may a male question the validity of a statute as discriminating against women. McKinney v. State, 3 Wyo. 719, 30 Pac. 293, 16 L. R. A. 710. On like grounds, it has been held that a resident or citizen is not entitled to assail an act on the ground that it discriminates against those who are not residents or citizens. Bozeman v. State, 7 Ala. App. 151, 61 South. 604; Schmidt v. Indianapolis, 168 Ind. 631, 80 N. E. 632, 14 L. R. A. (N. S.) 787, 120 Am. St. Rep. 385; Gallup

v. Schmidt, 154 Ind. 196, 56 N. E. 443; State v. Kirby, 34 S. D. 281, 148 N. W. 533.

Very directly in point is the decision of the Supreme Court of the United States in Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576, 35 Sup. Ct. 167, 169 (59 L. Ed. 364). The validity of the Workmen's Compensation Law of Ohio was there questioned. That law deprived a certain class of employers of five or more men of various defenses available to employers of less than five. The plaintiff in error, who was an employer of more than five, and within the class designated, assailed the legislation on the ground, among others, that the act discriminated unjustly against workmen in shops employing less than five men. The court held that this ground of attack was not available to the employer, saying:

"Much of the argument is based upon the supposed wrongs to the employé, and the alleged injustice and arbitrary character of the legislation here involved as it concerns him alone, contrasting an employé in a shop with five employés with those having less. No employé is complaining of this act in this case. The arguments based upon such discrimination, so far as it affects employés by themselves considered, cannot be decisive; for it is the well-settled rule of this court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of. Southern Railway v. King, 217 U. S. 524, 534 [30 Sup. Ct. 594, 54 L. Ed. 868]; Engel v. O'Malley, 219 U. S. 128, 135 [31 Sup. Ct. 190, 55 L. Ed. 128]; Standard Stock Food Co. v. Wright, 225 U. S. 540, 550 [32 Sup. Ct. 784, 56 L. Ed. 1197]; Yazoo & Mississippi Valley R. R. v. Jackson Vinegar Co., 226 U. S. 217, 219 [33 Sup. Ct. 40, 57 L. Ed. 193]; Rosenthal v. New York, 226 U. S. 260, 271 [33 Sup. Ct. 27, 57 L. Ed. 212, Ann. Cas. 1914B, 71]; Darnell v. Indiana, 226 U. S. 390, 398 [33 Sup. Ct. 120, 57 L. Ed. 267]; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544 [34 Sup. Ct. 359, 58 L. Ed. 713]; Missouri, Kansas & Texas Ry. v. Cade, 233 U. S. 642, 648 [34 Sup. Ct. 678, 58 L. Ed. 1135]."

This reasoning is decisive of the present case. If section 75a contains—we do not say it does—an unwarranted discrimination against nonresidents, the only persons entitled to attack the law on this ground are members of the class thus excluded from the benefits of the legislation. No constitutional right of the employer is invaded by the action of the Legislature in subjecting him to a less extensive liability than might have been imposed. Not being required to pass upon the constitutional question sought to be raised, we would not be justified in entering into a discussion of its merits.

Each of the awards is affirmed.

We concur: ANGELLOTTI, C. J.; RICHARDS, Judge pro tem.; WILBUR, J.; MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

On Petition for Rehearing.

PER CURIAM. [2] On petition for rehearing, the petitioners contend that the award should be annulled because, as is claimed, the facts were such as to bring each of the proceedings within the exclusive admiralty jurisdiction of the federal courts. No such point was suggested in the argument on which the petitioners submitted the cases for decision. It is the settled rule of this court that points made for the first time on petition for rehearing will not be considered.

On the questions actually argued, we are satisfied with the conclusions declared in the opinion filed. The petition for rehearing is denied.

---

(178 Cal. 337)

## CALIFORNIA WELL DRILLING CO. v. CALIFORNIA MIDWAY OIL CO.

(L. A. 4395.)

(Supreme Court of California. May 28, 1918.)

1. TRIAL ⟸356(1)—GENERAL VERDICT—UNANSWERED INTERROGATORY.

It may well be that, the jury having found a general verdict for plaintiff, it must be considered to have found an acceptance by defendant of plaintiff's work under the contract sued on, even though the special interrogatory requiring finding thereon was unanswered.

2. TRIAL ⟸253(10)—INSTRUCTION—IGNORING ISSUES.

In an action for the price of drilling oil wells, an instruction on plaintiff's request that if the jury found that defendant accepted a well at 3,215 feet, and defendant thereafter requested plaintiff to straighten the hole and casing, which plaintiff proceeded to do, and did in a workmanlike manner, and defendant refused to accept the well as straightened, the jury would find plaintiff was entitled to judgment, was erroneous as ignoring the question of actual drilling into oil sand or to a depth of 3,500 feet, if required by defendant, and as based wholly on plaintiff's untenable theory of the case that the well was accepted as complete on a certain date.

3. MINES AND MINERALS ⟸109—CONTRACT TO DRILL WELL—ACCEPTANCE—EVIDENCE.

In such action, evidence *held* insufficient to justify a finding of acceptance of the well by defendant in August, 1912.

4. CONTRACTS ⟸304(2)—ACCEPTANCE OF PERFORMANCE.

Where plaintiff contracted to drill an oil well for defendant, and, after sinking it to a certain depth, it was discovered that the well was not straight, and plaintiff engaged to straighten it, and thereafter a contract for a second well was made, wherein it was stipulated that monthly payments should be suspended until completion of the first well, there was no acceptance of the first well by defendant prior to the date of such contract.

5. CONTRACTS ⊜176(1) — CONSTRUCTION — QUESTION FOR COURT.

The terms of written contracts having been ascertained, the court should have construed them, and instructed the jury as to their meaning and effect.

6. MINES AND MINERALS ⊜109 — DRILLING OIL WELLS—CONSTRUCTION.

Where plaintiff contracted separately to drill two oil wells for defendant, and the contract covering the second well referred to the contract covering the first, stating in effect that if the first was not completed the second should be regarded as having been drilled in lieu thereof, if the first well was not completed, plaintiff could recover the contract price for drilling the second well, less a stipulated credit for materials, etc., furnished it while drilling the well.

7. MINES AND MINERALS ⊜109—CONTRACT FOR OIL WELL—CONSTRUCTION.

A contract to drill an oil well, providing that the well should be drilled into the oil sand and to a depth of 3,500 feet if required, was not complied with by drilling into any oil sand at any depth, but, the oil sand contemplated being producing sand, in default of such sand the contractee was justified in requiring the well to be drilled to 3,500 feet, unless the phrase "into the oil sand" had some other special local meaning or customary construction with reference to which the parties contracted.

8. CONTRACTS ⊜176(3)—CONSTRUCTION—EXTRINSIC EVIDENCE.

Where extrinsic evidence is introduced to aid in the construction of a contract, it is still the court's duty to construe the contract in the light of such evidence.

9. CONTRACTS ⊜176(3)—CONSTRUCTION—EXTRINSIC FACTS—DISPUTE.

Where extrinsic facts, brought forward to aid in the construction of a contract, are disputed, the jury must pass on them, and the case may go to the jury, with hypothetical instructions to render verdict one way if certain facts are found, and another way if found differently.

10. CONTRACTS ⊜176(3) — CONSTRUCTION — MATTER OF LAW.

The construction of a contract in the light of the real facts is a matter of law.

11. APPEAL AND ERROR ⊜930(1)—REVIEW—ASSUMPTION AS TO APPLICATION OF LAW.

The question of the completion of the work, the price of which was sued for, having been submitted to the jury as a mixed question of law and fact, in considering the contention that the evidence was insufficient to justify finding that the work was completed, the Supreme Court must assume the jury correctly construed the contract and applied the construction to the facts as presented to them.

12. CONTRACTS ⊜322(1) — PERFORMANCE — BURDEN OF PROOF.

In an action for the price of drilling an oil well, the contract having required drilling to producing sand or to a depth of 3,500 feet, the burden was on plaintiff to show that sand reached at 3,215 feet, less than the alternative depth of 3,500 feet, was producing sand.

13. MINES AND MINERALS ⊜109—DRILLING OIL WELL—PERFORMANCE—SUFFICIENCY OF EVIDENCE.

In such action, evidence *held* insufficient to justify a jury finding that the well was drilled into producing sand, as required by the contract.

14. TRIAL ⊜234(7)—INSTRUCTION—CONFUSING CHARACTER.

In such action, in view of the facts that no oil was produced from the well, and that the burden was on plaintiff to establish its completion, an instruction that if the jury found there was no custom as to who should test the oil sand, plaintiff did not have to show it tested the sand, unless the contract expressly or impliedly provided for such test, was erroneous as tending to confuse.

In Bank.

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Action by the California Well Drilling Company, a corporation, against the California Midway Oil Company, a corporation. From judgment for plaintiff, and an order denying motion for new trial, defendant appeals. Judgment and order reversed.

Thomas Scott, Sr., and Geo. E. Whitaker, both of Bakersfield, and Bradner W. Lee and Bradner W. Lee, Jr., both of Los Angeles (Kenyon F. Lee, of Los Angeles, of counsel), for appellant.

E. L. Foster and Chas. A. Barnhart, both of Bakersfield, for respondent.

WILBUR, J. This is an appeal from a judgment after verdict for $44,452.19, the contract price for drilling two oil wells by plaintiff for defendant, and from the order denying defendant's motion for a new trial. Well No. 7 was drilled under contract dated February 7, 1912. Well No. 6 was drilled under a contract dated December 31, 1912. Both wells were to be paid for by the foot. It is admitted that well No. 6 conformed to the contract, and that plaintiff is entitled to be paid the contract price therefor. All the difficulties in the case grow out of the contract for the drilling of well No. 7 and its relation to the second contract. The question is whether or not the plaintiff completed the well as required by the contract for the drilling of well No. 7, and, if not, whether said well was accepted by the defendant as completed in August, 1912, at which time plaintiff claims that it had sunk well No. 7 to a depth of 3,215 feet, and "into the oil sand," and had placed therein at the request of the defendant a perforated four-inch pipe; that the well was thereupon accepted as completed, but that five days thereafter, defendant having discovered that the well was crooked,

returned it to the possession of the plaintiff to be straightened; that thereafter, for a year the plaintiff was actively engaged in attempting to straighten the well, and in July, 1913, having straightened the well and sunk it to a depth of 3,241 feet—26 feet further than it was at the time it was accepted by the defendant—they had thus fully performed their contract. The case thus presented two main questions, that of acceptance and of completion.

[1-4] Plaintiff contends that, the jury having found a general verdict in its favor, it must be considered to have found an acceptance, even though the special interrogatory, requiring a finding thereon, was unanswered, and this may well be true. Benson v. S. P. Ry. Co., 171 Pac. 948. Defendant claims that the evidence was insufficient to justify such a finding. On this subject, at the request of the plaintiff, the jury was instructed as follows:

"* * * If you find from the evidence that the defendant accepted well No. 7 at 3,215 feet, and that the said defendant thereafter requested the plaintiff to straighten the hole and the casing in said well, and that the plaintiff thereupon proceeded so to do, and actually did straighten the casing in said well in the manner as testified, in a workmanlike manner as provided for in said contract, and that the defendant refused to accept said well as straightened, you will then find that the plaintiff is entitled to judgment under the terms of the contract."

The contract for drilling well No. 7 recited that it was the purpose of the parties to "drill a well for oil," and therein the plaintiff "agrees to drill a well on said land at the location indicated * * * into the oil sand or to a depth of 3,500 feet if required by said first party," etc. It provided that certain payments were to be made "60 days after the perforated casing is carried into the oil sand, or to 3,500 feet." This instruction completely ignores the question of actual drilling "into the oil sand or to a depth of 3,500 feet if required by said first party," and is based wholly upon plaintiff's theory of the case that well No. 7 was accepted as complete in August, 1912. But plaintiff's theory was not tenable. It is undisputed that five days after such alleged completion and acceptance the well was returned to plaintiff for further work thereon, which work continued for nearly a year. During the progress thereof the contract of December 31, 1912, for drilling well No. 6, was entered into by the parties, in which it is, in effect, expressly agreed that said well No. 7 was uncompleted and unaccepted, by the following provision therein contained:

"It is further understood and agreed by the parties hereto, that the fifty per cent. monthly payments herein provided for shall be suspended *until the completion of that certain well on the property of the party of the first part, known as well No. 7, on which the party of the second part is now drilling under an agreement dated February 7, 1912;* but all payments so suspended shall become due and payable as agreed *upon completion of said well No. 7. In the event well No. 7 cannot for any reason be completed according to its contract,* then the said well herein provided for to be drilled shall be understood by the parties hereto to replace said well No. 7 and to be *so accepted* by the party of the first part as the well provided to be drilled in said contract of February 7, 1912." (Italics ours.)

[5] There was not only no sufficient evidence to justify a finding of acceptance in August, 1912; but, in view of the contract of December 31, 1912, the jury might have been properly instructed that there was no acceptance and no completion of well No. 7 prior to December 31, 1912, and as no acceptance at any time after August, 1912, was claimed by plaintiff, the instruction complained of should not have been given. The case was tried and the jury instructed upon the theory that it was to construe the contracts involved, and to this end a number of rules of construction were given to the jury, and the refusal to give others is assigned as error. But, the terms of the contracts being ascertained, the court should have construed the same and instructed the jury as to the meaning and effect thereof. Luckhart v. Ogden, 30 Cal. 547, 556; Swain v. Grangers Union, etc., 69 Cal. 186, 10 Pac. 404; Holloway v. McNear, 81 Cal. 154, 157, 22 Pac. 514. It would serve no useful purpose to set out at length the various provisions of the contract for drilling wells Nos. 6 and 7. Suffice it to say that the contract for drilling well No. 7 provided that, in the event of the failure to drill that well to a sufficient depth, a well should be drilled in lieu thereof, and made certain stipulations in regard to the expenditures in drilling such well. The later contract of December 31, 1912, for the drilling of well No. 6, referred to the contract for drilling well No. 7, stating, in effect, as above quoted, that if No. 7 was not completed, No. 6 should be regarded as having been drilled in lieu thereof. The parties herein differ upon the question as to whether or not, under a proper construction of these two contracts, the defendant was entitled to credit upon the contract price for drilling the second well (No. 6) of the amount expended by it for materials, etc., furnished to the plaintiff while drilling said well, in the event that No. 7 was not completed, stipulated to be $17,077.78.

[6, 7] The construction of these two contracts was a question of law for the court, and the jury should have been instructed that in the event it found that well No. 7 was not completed, the verdict should have been for the contract price for drilling well No. 6, less the stipulated credit of $17,077.78. Instruction No. 15, given at plaintiff's request, based upon the theory that such cred-

it could not be allowed unless a mutual mistake in the execution of the contract of December 31, 1912, was proved by a preponderance of the evidence, was erroneous; as it was also to leave the jury to determine whether the contract of December 31, 1912, as executed, provided for such credit. In determining whether or not the plaintiff had completed its contract for well No. 7 when it was drilled to a depth of 3,241 feet and tendered to the defendant, we are required to construe the contract. At plaintiff's request the jury was instructed:

"* * * If you find from the evidence that well No. 7, was drilled *into oil sand* to the depth alleged by the plaintiff, which is 3,241 feet, *in accordance with the terms of the contract*, and that the well was finished in a workmanlike manner, you must find for the plaintiff. * * *" (Italics ours.)

And again:

"You are to determine whether well No. 7 was drilled *into the oil sand* according to such contract."

And at defendant's request the jury was instructed:

"If you find it to be a fact from the evidence introduced in this case that the term 'oil sand' means a 'sand producing oil,' and that plaintiff did not drill into a sand 'producing oil,'" etc.

While both parties thus induced the court to present the question of completion to the jury as a mixed question of law and fact, to be determined by them, a fair construction of the plaintiff's instructions left it to the jury to say that any drilling into any "oil sand" was a sufficient compliance with the contract. Construed in the light of the purpose and terms of the contract, the provision that the well should be drilled "into the oil sand or to a depth of 3,500 feet if required by said first party," etc., was not complied with by drilling into any oil sand at any depth. The well was drilled to secure oil in paying quantities. The jury should at least have been instructed that "the oil sand" contemplated by the contract was producing oil sand, and that in default of such producing oil sand defendant was justified in requiring the well to be drilled to a depth of 3,500 feet, unless the phrase "into the oil sand" has some other special local meaning, or customary construction, with reference to which the parties contracted. Both parties introduced evidence as to the meaning of the terms of the contract. We are therefore not called upon to consider the admissibility of such evidence, as to which we express no opinion.

[8-10] But where extrinsic evidence is introduced to aid in the construction of a contract, it is still the duty of the court to construe the contract in the light of such evidence. Note, 12 L. R. A. 376; Blashfield's Instructions to Juries, vol. 1, § 66, p. 131. If such extrinsic facts are disputed, the jury must pass on these disputed facts. "The case may go to the jury with hypothetical instructions from the court to render a verdict one way if certain facts are found, and another way if the facts are found differently." Id., vol. 1, § 66, p. 133. The construction of the contract in the light of the real facts is a matter of law. As was said by this court in a recent case involving the use of extrinsic evidence to construe a will:

"In such cases where the evidence of the facts is in conflict, it is permissible for * * * the jury to find the facts. * * * But the application to the will itself of the facts found, admitted, or established present a question of legal construction which is as purely a question of law as is the construction of the will without resort to extrinsic evidence. * * * Again, it is fundamental that in all cases where extrinsic evidence is admissible to aid in expounding the will, the evidence is limited to this single purpose. It is considered for the purpose of explaining and interpreting the language of the will, and is never permitted to show a different intent or a different object from that disclosed, though perhaps obscurely, by the language of the will itself. 6 Wigmore on Evidence, pp. 2472–2474." Estate of Donnellan, 164 Cal. 14, 19, 127 Pac. 166.

See, also, Estate of Thomson, 165 Cal. 296, 131 Pac. 1045; First National Bank v. Bowers, 141 Cal. 253, 74 Pac. 856.

[11-13] The question of the completion of the well being thus submitted to the jury as a mixed question of law and of fact, appellant contends that the evidence was insufficient to justify the finding of the jury that the well was completed. Inasmuch as the jury was clothed with no power to incorrectly decide the law, we must, in considering this contention, assume that they applied the law correctly to the facts. In other words, we must assume that they correctly construed the contract and applied that construction to the facts as presented to them. The contract, as we construe it, required the drilling of the well into producing oil sand, that is, sand producing oil in reasonably paying quantities, and in default of such a showing of oil to continue to drill the well to a depth of 3,500 feet if required by the defendant. The question, then, is, Does the evidence justify the finding of the jury that the plaintiff completed the well by drilling the same into producing oil sand? The theory of the plaintiff is that it had drilled a well "into the oil sand" when it had attained the depth of 3,215 feet, that the well was then accepted and returned to it merely for straightening, and that when they had straightened the well and again sunk it to a depth of 3,215 feet they had completed the well, in that it was again just as far into the oil sand as it was in the first instance. The defendant denied that it ever accepted the well or ever considered it as completed, or ever took it over as completed. It is admitted by the plaintiff that it never tested the oil well ei-

ther by pumping or bailing. It is shown beyond question that the well never produced any oil, and that no oil was ever taken therefrom except the oil that was pumped into it for the purpose of testing it. In the effort to straighten and deepen the well the point of 3,215 feet was passed at least four times; that is to say, by reason of loss of tools and other defects in the well it was necessary to go back and redrill the well, and in so doing the well was drilled past this point at least four times. Plaintiff's general manager testified that they had no log of any of these drillings which showed any oil sand; that when the well had reached a depth of 3,241 feet it was in blue shale. The log of the original drilling to a depth of 3,215 feet was lost as to the drilling for the last week or two, in July and August, 1912, and the only testimony offered as to the showing of oil sand was the testimony of some of the well drillers and of plaintiff's general manager. One of these drillers testified that in his opinion the well showed signs of oil sand for about 10 feet. On cross-examination he admitted that the rotary drill might show signs of oil sand long after it had been passed through, and that a showing of 10 feet of oil sand by a rotary drill might mean only 4 or 5 feet of oil sand. If it is true that there were 4 or 5 feet of producing oil sand at about 3,215 feet, the fact remains that the plaintiff, upon whom the burden lay of showing that such sand was producing sand, made no effort to test the well. It would seem that this was a case for the application of the doctrine that where weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust. Code Civ. Proc. § 2061, subd. 7. But, viewed in the light of the conduct of the parties subsequent to the alleged acceptance of the well, it is clear that the well was never completed. If we assume in favor of the respondent that when the contract of December 31st referred to well No. 7 as uncompleted, it had reference to the fact that the well was crooked and in a process of being straightened, and that when straightened to a depth of 3,215 feet it would be considered by the parties as complete, we are met by a great many difficulties. On March 13, 1913, the plaintiff entered into a contract with two subcontractors to drill well No. 7 to a depth of 3,300 feet. No good reason for making this contract is offered consistent with the theory that the well was to be completed when down to a depth of 3,215 feet and straight. There was correspondence between the plaintiff and defendant in regard to the completion of well No. 7. On May 31, 1913, plaintiff wrote the defendant:

"We are undecided whether to go on and try and finish No. 7 or not. If we do not finish No. 7, the string of four and a quarter inch casing which is in No. 7 could be used on No. 6. We have some drillers who are very anxious to take another labor contract to finish No. 7. They say they are pretty sure of finishing well No. 7, but we are pretty badly disgusted with this well, and will hold up the contract until the writer sees you. We have about concluded that if your company will pay us for No. 6 at the contract price of $6.50 per foot, then we will quit No. 7 as it is, and by doing that the string of four and a quarter inch casing could go to No. 6 and we would drill a new well for No. 7 under No. 7 contract. But if your company wants to hold up the payment on No. 6 until No. 7 is completed, we will take one more chance in contracting the completion of No. 7. There is a chance, although small, of finishing No. 7. But if your company would prefer to have a new well drilled we will start drilling on a new well, or you may take No. 7 as it is and pay us for No. 6 at the contract price and wait until you finish No. 6, and then the condition may be favorable for your going ahead with No. 7."

Plaintiff's general manager, Mr. Edwards, testified that on June 4 or 5, 1913, he made defendant a proposition that:

"If they would accept No. 6 and pay for it at the contract price and release me on well No. 7 that I would accept it. I also stated that the outlook of finishing well No. 7 was very discouraging; that we had been working on it pretty nearly a year, and had not made any headway toward getting it finished, and we would either drill a new well to replace No. 7, or take another chance of going ahead and finishing, or I believe I told them at that time I would take one more chance of finishing it under some new men who thought very strongly that they could finish the well. That was Mr. Chappis and Mr. Gibson. They didn't accept my proposition, so I put my men on No. 7 and went to work again."

Mr. Chappis testified that when he went to work on well No. 7 the tools went down somewhere in the neighborhood of 3,217 to 3,220 feet. The evidence, therefore, is insufficient to justify the finding of the jury that the well was drilled into the oil sand according to the contract.

[14] At the plaintiff's request the court instructed the jury as follows:

"The court instructs the jury that if you find that there was no custom in the west side oil fields as to who should test the oil sand, then the plaintiff does not have to show that it tested the oil sand, unless the contract expressly or impliedly provides for such test."

In view of the fact that no oil was obtained from well No. 7 and that the burden was on the plaintiff to establish completion of the well, this instruction could only tend to confuse the jury. The question as to whose duty it was, by custom or otherwise, to test the well was not properly involved in the case. The effect of the instruction must have been to suggest to the jury that it was

unnecessary for plaintiff to give evidence of a test of the well in order to recover.

The judgment and order are reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; SHAW, J.; RICHARDS, Judge pro tem.; VICTOR E. SHAW, Judge pro tem.

---

39 Cal. App. 56

## In re TURNER'S ESTATE. (Civ. 2679.)

(District Court of Appeal, First District, Division 1, California. Dec. 4, 1918.)

1. COURTS ⟸207(5)—PROBATE PROCEEDINGS —JURISDICTION—DISTRICT COURT OF APPEAL.

District Court of Appeal has no jurisdiction in the first instance of a petition for writ of prohibition directed against a judge of the superior court, where it pertains to a probate proceeding in which it would not have original appellate jurisdiction if an appeal were to be taken from any action therein.

2. PROHIBITION ⟸5(1)—ACTS OF JUDGES.

Petition for writ of prohibition against a judge of superior court will be denied, where it affirmatively appears from the petition that all of the acts and things complained of were performed by the judge in the exercise of the undoubted jurisdiction of the court over which he presided.

In the matter of the estate of Mary E. Turner, deceased. Petition for writ of prohibition against the judge of Department 8 of the Superior Court of the State of California. Denied.

See, also, 172 Pac. 759.

H. S. Herrick, of Bakersfield, in pro. per.

LENNON, P. J. The petitioner here, in person, heretofore presented a petition for an alternate writ of prohibition directed to the judge of department 8 of the superior court of the state of California, in and for the city and county of San Francisco, commanding him "to cease and desist from threatening, oppressing or intimidating petitioner on any hearings of said matter, or from fining or otherwise penalizing him for his efforts to enforce his rights" in and to the above-entitled estate, which the petitioner alleges is pending probate in said superior court.

[1] The petition cannot be acted upon by the court in its entirety because of the fact that the judge against whom the writ is requested is now sitting as a justice pro tem. of this court, and said judge is disqualified by constitutional provisions from participating in any case or proceeding sought to be reviewed in which he sat as the trial judge. Without consultation with said judge, we have concluded that the writ should be denied because it pertains to a probate proceeding in which this court would not have original appellate jurisdiction if an appeal were to be taken from any action therein, and, consequently, under the practice inaugurated by the Supreme Court, the petition should have been presented there in the first instance.

Moreover, the petition was not accompanied (as required by rule 26, section 2, of the Supreme Court [119 Pac. xiv]), with the points and authorities upon which the petitioner relied in support of his petition.

[2] Aside from these considerations, we are of the opinion that the petition should be denied upon the merits because it does not state, nor attempt to state, facts sufficient to warrant the issuance of the writ, in this: That it affirmatively appears from the petition that all of the acts and things complained of therein were done and performed by the judge against whom the writ is sought, in the exercise of the undoubted jurisdiction which the court over which he presided had to deal with and dispose of the probate of the estate pending therein.

Done in chambers this third day of December, 1918.

I concur: BEASLY, Judge pro tem.

---

39 Cal. App. 58

## Ex parte RILEY. (Cr. 823.)

(District Court of Appeal, First District, Division 1, California. Dec. 4, 1918.)

LICENSES ⟸7(3)—VALIDITY OF ORDINANCE— DISCRIMINATION AND CLASS LEGISLATION.

License ordinance of town which discriminates between dyeing and cleaning businesses situated within and without town, discrimination being based solely on location of businesses, is void as attempt to enforce discrimination not based upon difference in nature of businesses transacted, etc.

In the matter of the application of A. W. Riley for writ of habeas corpus. Petitioner ordered discharged from custody.

A. Kinkaid, of Redwood City, and Heller, Powers & Ehrman and Jerome B. White, all of San Francisco, for petitioner.

Albert Mansfield, City Atty., of Redwood City, for respondent.

BEASLY, Judge pro tem. The petitioner, Riley, was arrested upon a complaint made in the recorder's court of the town of Redwood, San Mateo county, in which he was charged with a misdemeanor, to wit, the violation of Ordinance No. 195 of said town. He seeks his discharge on habeas corpus.

Riley conducted a cleaning and dyeing

business situated outside of the town of Redwood, for which establishment he collected and delivered dyeing and cleaning work within the corporate limits of said town. Petitioner claims that the ordinance under which he is being prosecuted is illegal and void because it discriminates unreasonably between cleaning and dyeing businesses conducted without the city limits and soliciting business therein and the same kind of an establishment with a fixed place of business within the limits of the town, and that the discrimination is solely based upon the location of the business.

The respondent does not seem to dispute the statement that the ordinance does so discriminate between businesses so conducted within and without the town. If this be true, the petitioner is entitled to his discharge under the authority of the case of In re Thomas Hines, 33 Cal. App. 45, 164 Pac. 339, in which it is held that such an ordinance is discriminatory and void as an attempt to create and enforce a discrimination not based upon differences in the nature of the business being transacted, or differences in the manner of conducting the same business, or any other difference other than the mere fact of difference in destination of the goods collected and delivered by wagons collecting for laundries located outside of the city and the destination of goods collected for delivery to laundries within the city.

The principle applicable to this case is exactly that stated in the Hines Case. The respondent undertakes to avoid the effect of that decision by appealing to Ex parte Haskell, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527; but the very language of Ex parte Haskell distinguishes it from the case of Hines, supra, for while it is there said that the power to license for purposes of regulation and revenue involves the right to discriminate between different trades, and between essentially different methods of conducting the same general character of business or trade, it is further said:

"There is no unlawful discrimination, in requiring a special license fee for traveling salesmen, where there is no discrimination in favor of residents or against nonresidents of the municipality."

In the last clause of the sentence quoted, a distinction is made between the two classes of cases which is perfectly clear.

It follows that the ordinance attacked is invalid, and that the petitioner should be discharged from the custody of the town marshal from whom he was taken, and it is so ordered.

We concur: LENNON, P. J.; STURTEVANT, Judge pro tem.

38 Cal. App. 774

## PEOPLE'S WATER CO. v. SWEET et al.

(Civ. 2586.)

(District Court of Appeals, First District, Division 1, California. Nov. 26, 1918.)

1. APPEAL AND ERROR ⟸901—ABSENCE OF EVIDENCE—EXTENT OF REVIEW.

The burden is on appellant to show error.

2. APPEAL AND ERROR ⟸907(2)—FINDINGS OF LOWER COURT—PRESUMPTION.

In the absence of the evidence from the record, the findings of court are conclusively presumed to be supported by the evidence.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by the People's Water Company, a corporation, against Albert H. Sweet and others. Judgment for plaintiff, and defendants appeal. Affirmed.

T. F. Bachelder, of Oakland, and O. F. Meldon, of Sausalito, for appellants.

Tom M. Bradley and Harry E. Leach, both of Oakland, for respondent.

LENNON, P. J. The plaintiff brought this action in ejectment to recover from the defendants possession of a tract of land situate in the county of Contra Costa, alleging that on January 1, 1914, it was the owner thereof and entitled to its possession, but that the defendants Albert H. Sweet and his wife, Leona J. Sweet, believing said land to be part of the public domain of the United States, had theretofore entered thereon, and at said date were in possession thereof. Said defendants answered, setting up various facts, among others, that the land in controversy had originally been part of a Mexican land grant; that at a certain date stated in the complaint one Joseph Naphtaly was entitled to purchase it from the United States but had failed to do so; and that it had thereupon become unoccupied public land of the United States, and as such open to homestead entry; that said defendants had lawfully and regularly entered thereon.

A trial of the cause being had, the court found that the land was a part of a United States grant to the Western Pacific Railroad Company; that by the consolidation and amalgamation of said railroad company with the Central Pacific Railroad Company the latter succeeded to the rights and estate of said first-named corporation in said lands; and that after the commencement of this action said Central Pacific Railroad Company had received from the United States a patent thereto; and that by mesne conveyances the plaintiff, prior to the commencement of the action, had succeeded to said company's rights. As to the allegations of the answer upon which said defendants based their claim

of title, the court found some of them to be true and others untrue, culminating in the finding that neither of said defendants is entitled to any right, title, or interest in and to said land, nor had they ever acquired any right or estate against said plaintiff or its predecessors by adverse possession or otherwise. Judgment was accordingly entered in favor of plaintiff.

[1, 2] The defendants have appealed, making the contention that the findings of the court in plaintiff's favor are against the evidence, but have brought to this court no record containing any of the evidence taken at the trial. In that situation it is, of course, impossible for this court to know if the contention of the appellants is well or ill founded. As has been said by appellate courts many times, the burden is upon the appellant to show error; and in the absence of a record of the evidence the findings of the court are conclusively presumed to be supported by the evidence taken at the trial. It is not necessary to cite authorities to this effect.

The state of the record in this case requires the affirmance of the judgment and order from which the appeal is taken. It is so ordered.

We concur: BEASLY, Judge pro tem.; STURTEVANT, Judge pro tem.

---

39 Cal. App. 53

CARR v. CARR CO. et al. (Civ. 2585.)

(District Court of Appeal, Second District, Division 1, California. Dec. 4, 1918.)

1. DIVORCE ⊂=249(1)—PROPERTY RIGHTS—LEGAL TITLE OF WIFE—SUFFICIENCY OF DECREE TO VEST.

Where decree in wife's divorce suit determined she was owner of realty in her own right and as her own separate property as against her husband and a company, joined as defendant, which owned legal title, issues having been voluntarily presented by parties for decision, decree was sufficient to vest complete legal title in wife.

2. DIVORCE ⊂=249(1)—PROPERTY RIGHTS—QUIETING TITLE TO REALTY.

In wife's divorce suit, seeking adjudication as to separate character of realty and decree quieting title, issue as to property having been fairly submitted by both parties, court had jurisdiction to determine question involved as to character of property, and to quiet title of owner.

3. DIVORCE ⊂=255—DECREE AS TO PROPERTY RIGHTS—FINALITY AND EFFECT AS CONVEYANCE.

Where decree in wife's divorce suit determined that realty, legal title to which was held by company, was owned by plaintiff wife, having become final, decree cannot be avoided in wife's suit to quiet title by contending different form of decree should have been entered, and that it did not constitute conveyance in itself.

4. DIVORCE ⊂=255—RES ADJUDICATA—DECREE IN DIVORCE ACTION—PROPERTY RIGHTS.

In suit to quiet title by divorced wife claiming under decree in divorce suit, court properly refused to allow defendants, former husband and others, to give evidence of claims based on facts in existence at time of trial of divorce action, which they attempted to use to defeat effect of decree.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Fanny Briggs Carr, also known as Fannie A. King, against the Carr Company, a corporation, Maurice A. King, P. Halloran, and others. From judgment for plaintiff, the Company and King appeal. Affirmed.

Andrew J. Copp, Jr., of Los Angeles, for appellants.

H. H. Appel and William Schreider, both of Los Angeles, for respondent.

CONREY, P. J. This is an appeal from a judgment quieting the plaintiff's title to certain described real property. The evidence of plaintiff's title consists of the judgment rendered in a certain action of divorce, wherein Fannie A. King was plaintiff and Maurice A. King and the Carr Company were defendants. Upon issues voluntarily presented by the parties for decision in that action, the court determined therein that said real property was purchased or traded for by the defendant King with property then and there the property of the plaintiff, except as to the sum of $500, which the defendant King had contributed by purchasing a mortgage upon certain personal property of the plaintiff, which thereafter was used in trading for said acreage; that the defendant King, taking advantage of his relationship with the plaintiff as her husband and of the trust and confidence which she reposed in him, had caused the title to said land to be placed in the name of the Carr Company without the knowledge or consent of the plaintiff; that the defendant King controlled the business of said corporation for his own use and benefit; that the defendant King commingled the funds of the Carr Company and his own personal funds and the funds of the plaintiff continuously and in such a manner that it was impossible to separate the same at the time of the trial of that action, and had used them indiscriminately for his own purpose, for the support of plaintiff and himself, and for the purpose of the Carr Company; that the defendant corporation never had any right, title, interest, or estate in and to the property mention-

ed in the pleadings therein and that the title to the 16½ acres of land (being the land involved in the present action), was held by the defendant corporation for the use and benefit of the plaintiff; and that she was at all times mentioned in the pleadings therein the absolute owner thereof as her own separate estate. Pursuant to the findings in that action, the court decreed that the plaintiff was the owner in her own right and as her own separate property of said real property. In that action it was claimed by the defendants that said real property when conveyed to the Carr Company was the sole and separate property of the defendant King, and that the plaintiff had no interest whatever therein; that the defendant corporation was indebted to the defendant King in a sum exceeding $11,000, evidenced by a note of the corporation to defendant King, secured by a mortgage upon said real property. The court found that the defendant King was the owner of the note in said sum executed to him by the defendant corporation, secured by mortgage on said real property, executed by the defendant company, but nevertheless determined and decreed that the plaintiff was the owner of said real property, subject only to certain liens which are not involved in the present action.

[1, 2] The first contention made by appellants is stated as follows:

"The plaintiff, possessing an equitable interest in the real property, is not entitled to a judgment quieting title to said real property as against the Carr Company, the owner of the legal title. In the divorce action the court had no jurisdiction to make any award as to the separate property of the wife, and the finding by that court in said divorce proceeding that the property in question was the separate property of the wife divested it of every jurisdiction over the same, and the decree purporting to do so was a nullity."

These two propositions, which we have treated as one, cannot successfully be maintained. The decree in question determined that the plaintiff was the owner of said property in her own right and as her own separate property and estate. This was not merely a determination of the equities claimed by her. It was sufficient to vest in her a complete legal title. Conceding that in an ordinary proceeding for divorce the court is not authorized to dispose of the separate property of either party, that rule does not apply in a case where the action is dual in its character, seeking not only a divorce but an adjudication as to the separate character of certain described property and a decree in effect quieting plaintiff's title thereto. The issue as to the property having been fairly made and by both parties submitted to the court for determination, the court had jurisdiction to determine the question involved as to the character of the property, and to quiet the title of the rightful owner thereto. Glass v. Glass, 4 Cal. App. 604, 88 Pac. 734; Allen v. Allen, 159 Cal. 197, 113 Pac. 160.

[3, 4] The remaining proposition of appellants is stated as follows:

"The decree in the divorce action, purporting to award plaintiff's separate property to her, of itself did not constitute a conveyance of the property, and it appeared from the records in that action that no writ of assistance or execution had ever been issued or enforced to compel a conveyance from the Carr Company, holding the legal title, to the plaintiff, the owner of the equitable title."

The trouble with this proposition is that it is based upon the findings of fact in the former action, rather than upon the conclusions of law and the decree. It may be that it would have been appropriate for the court in that action to hold that the legal title was vested in the defendant corporation in trust for the plaintiff, and order that the corporation execute the trust by making a deed of conveyance to the plaintiff. But the court, acting within its jurisdiction, chose the direct method of affording relief by judicially determining and decreeing that the plaintiff was the owner of the property. That decree having become final, its effect may not now be avoided by contending that a different form of decree should have been entered. The court committed no error in refusing to allow the defendants to give evidence of claims now asserted by them, based upon facts which by their own admission were in existence at the time of the trial of the former action, and which they here have attempted to use as a means of defeating the effect of the judgment in that action.

The judgment is affirmed.

We concur: JAMES, J.; MYERS, Judge pro tem.

39 Cal. App. 8

## DIMOND v. BESSEMER GAS ENGINE CO.

(Civ. 2527.)

(District Court of Appeal, First District, Division 1, California. Nov. 29, 1918. Rehearing Denied by Supreme Court Jan. 27, 1919.)

1. PRINCIPAL AND AGENT ⟸23(1)—EXISTENCE OF AGENCY—SUFFICIENCY OF EVIDENCE.

Evidence *held* to show that plaintiff, who was engaged in sale of products manufactured by defendant, was not defendant's agent, but was mere employé of third party, whose contract with defendant, giving him exclusive territory, expressly stipulated that he was to be merely a dealer, and that defendant was not to be liable for his expenses.

2. EVIDENCE ⟸471(30)—CONCLUSIONS—EXISTENCE OF AGENCY.

In action involving existence of agency between manufacturer and salesman employed by dealer having exclusive territory for sale of manufacturer's products, statements by dealer, while testifying during salesman's trial for embezzlement, that salesman was agent of manufacturer, were mere conclusions and inadmissible.

3. EVIDENCE ⟸265(6) — DECLARATIONS BY DEALER—EFFECT ON MANUFACTURER.

In action involving existence of agency between manufacturer and salesman employed by dealer having exclusive territory for sale of manufacturer's products, statements by dealer, while testifying during salesman's trial for embezzlement, that salesman was agent of manufacturer were not binding upon manufacturer.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Frank Dimond against Bessemer Gas Engine Company, a corporation. From a judgment for plaintiff and from order denying motion for new trial, defendant appeals. Order and judgment reversed.

Sullivan & Sullivan, and Theo. J. Roche, of San Francisco (Louis V. Crowley, of San Francisco, of counsel), for appellant.

Frank W. Taft, of Willits, and G. E. Redwine, of Ukiah, for respondent.

PER CURIAM. This action was brought by plaintiff to recover the sum of $2,995 for money alleged to have been laid out and expended by him on behalf of defendant, and for damages. Judgment went for plaintiff in the amount prayed for, and this appeal is from the judgment and from an order denying defendant's motion for a new trial.

[1] The cause of action was based upon a contract of agency claimed to have been entered into between plaintiff and defendant. Several grounds are relied upon for a reversal, but as we view the evidence, we are of the opinion that it fails to show that any contract whatever existed between plaintiff and defendant, and our consideration of the case may be confined to this question alone.

The evidence may be summarized as follows: Defendant is a foreign corporation engaged in the manufacture of gas engines in the state of Pennsylvania. On the 21st day of March, 1912, it entered into a written contract with one Julius Beeman for the sale of its engines in the states of Arizona and California. In the latter state Kern county and the oil fields were excepted from the operation of the contract for the reason that defendant in these locations maintained its own sales force and employés, and sold directly to the trade. Under the terms of his contract Beeman agreed to cover all but the excepted territory with a selling organization, and to manage the same, and any of the stated territory not looked after by Beeman was under the agreement to be considered open territory by defendant company. It was expressly stipulated in the contract that Beeman was to be a dealer merely, and that the company would assume no liability for expenses or debts contracted by Beeman. The contract further provided that Beeman was to install the engines sold by him without cost or expense to the company. The compensation which Beeman was to receive under the contract was the difference in the costs of the engines to him, which was fixed by schedule attached to the contract, and the amount he received from the purchaser.

After the execution of this contract between the parties Beeman organized his sales force in the territory contracted for. In the state of California he did business under the firm name of the "Bessemer Company." On or about June 23, 1912, Beeman and plaintiff entered into a written contract, whereby the latter became a member of Beeman's selling organization in California. This contract provided, in substance, that plaintiff should canvass certain allotted territory for Beeman; that at his own expense he should open and maintain an office in San Francisco; that within a given period of time he should sell at least $12,000 worth of engines, basing this sum on the cost price to him, and as compensation for his services that he should receive the difference between the cost of the engines to him as fixed by Beeman and the amount paid for them by the purchaser. This was the only compensation he was to receive for his services. This contract was made in conformity with the contract Beeman had with the defendant company, the terms of which plaintiff was familiar with, it being expressly made a part of his contract. Upon the conclusion of this arrangement plaintiff opened offices and proceeded to canvass for the engines he had contracted to sell. He obtained certain orders, but experienced difficulty in making deliveries. The delay in this respect was due to

factory strikes and other troubles that defendant company was contending with. Plaintiff's agreement with Beeman made no provision for expenses incurred by him in selling the engines; such expenditures being a matter which he was to assume.

Shortly after plaintiff had entered upon the performance of his contract and constantly thereafter he complained to Beeman that his own resources were exhausted, and he solicited and obtained aid from Beeman from time to time in the way of advancement of commissions to enable him to continue in his work, for which he gave Beeman his note as security. Other evidence in the case clearly shows that the claimed relation of agency never existed. The record is a voluminous one, and the evidence in part consists of numerous letters written by plaintiff to defendant and Beeman. The letters conclusively establish the status of plaintiff, and show that he was a mere employé of Beeman, and not an agent of defendant as contended. Almost immediately after his employment plaintiff commenced to address these communications to defendant company. Defendant objected to this practice on the part of plaintiff, and complained to Beeman about it, stating that it did not wish to become in any manner involved with Beeman's sales force. Beeman notified plaintiff of defendant's objection to his habit of letter writing, but, notwithstanding this fact, plaintiff continued in the practice. In one of these letters a loan is requested of defendant by plaintiff in order to enable him to continue in his employment with Beeman; and in another, and after he had been discharged, he sought employment directly with defendant company. His discharge followed the collection by him of certain sums for engines sold which he had failed to turn over to Beeman. For this act he was arrested and charged with embezzlement. Upon this charge he was acquitted. It appears herein from his own testimony that upon such trial plaintiff testified that he was an employé of Beeman, and that he never had any contract with defendant whatever, and further that he was selling gas engines for Beeman, and not for the defendant, and that in making such sales he signed his contracts as a salesman for Beeman, and not for defendant, and that all his orders were forwarded directly to Beeman.

[2, 3] We do not deem a further discussion of the evidence necessary. Suffice it to say that there is nothing in the record to show that any contract ever existed between plaintiff and defendant, except evidence of statements made by Beeman at the trial of plaintiff for embezzlement to the effect that plaintiff was an agent of defendant, and of other statements made by the same witness concerning reimbursements that the company might make. These statements were mere conclusions of the witness, in no manner binding upon defendant, and were improperly admitted.

It is not claimed that defendant ever directly employed plaintiff. His claim is based upon the theory that Beeman was an agent for the company, and that as such he had the power and did employ plaintiff, and that under his employment the claimed expenditures were made by him in furtherance of defendant's business. His contract and the evidence conclusively show otherwise. Even if it be assumed that the evidence did show such a relation to have existed, still we are of the opinion that plaintiff cannot recover. No question of ostensible agency is here involved. Plaintiff, before his employment, had knowledge of and understood the terms and provisions of Beeman's contract, for they were a part of his own, and under that contract the right to bind defendant company was expressly denied to Beeman. Plaintiff's claim, if any he has, is one against Beeman and not the defendant company, with whom he had no contractual relations, either express or implied. There is no foundation in the evidence upon which the judgment rendered can be based. This being so, the order and judgment are reversed.

---

39 Cal. App. 48

## GUDERITZ v. BOADWAY BROS.

(Civ. 2605.)

(District Court of Appeal, Second District, Division 1, California. Dec. 4, 1918.)

1. MUNICIPAL CORPORATIONS ⟸706(5)—COLLISIONS—IDENTITY OF VEHICLE—SUFFICIENCY OF EVIDENCE.

In an action by a bicyclist for personal injuries by being run into by a motor truck, evidence *held* sufficient to support a finding that the truck belonged to defendant.

2. APPEAL AND ERROR ⟸995—WEIGHT OF EVIDENCE.

The appellate court has no concern with the question of the preponderance of testimony.

3. MUNICIPAL CORPORATIONS ⟸706(5)—COLLISIONS—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

In an action by a bicyclist, injured by a truck coming up behind him, evidence *held* sufficient to sustain a finding that defendant was negligent.

4. DAMAGES ⟸132(1)—EXCESSIVE DAMAGES.

It cannot be held that a verdict for $2,500 was excessive for a boy of 10 years, who was knocked unconscious, bled from his head, mouth, and forehead, and was confined to his bed for 1½ weeks, and was changed from a bright intelligent, and dependable boy into a dull, stupid listless, and forgetful one.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

5. New Trial ⟸102(1)—Newly Discovered Evidence—Diligence.

A new trial should not be granted on the ground of newly discovered evidence, where it is not shown why the testimony of the witness could not have been produced at the trial, if a diligent effort had been made to procure it.

6. New Trial ⟸104(1)—Newly Discovered Evidence—Cumulative Evidence.

Where newly discovered evidence is simply cumulative, a new trial should be granted only where such evidence, if it had been presented on the trial, would probably have produced a different result.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by John Guderitz, Jr., an infant, by Leonard L. Riccardi, his guardian ad litem, against Boadway Bros., a corporation. From a judgment in favor of plaintiff, and an order denying its motion for a new trial, defendant appeals. Affirmed.

Hahn & Hahn, of Pasadena, for appellant.

Ticknor & Carter and George S. Carter, all of Pasadena, for respondent.

MYERS, Judge pro tem. Defendant appeals from a judgment in favor of plaintiff and from an order denying defendant's motion for a new trial, after verdict for the plaintiff in an action to recover damages for personal injuries alleged to have been sustained by plaintiff as a result of the negligence of the defendant.

The plaintiff, a boy of 10 years, was riding a bicycle easterly on Colorado street in the city of Pasadena, between 11 and 12 o'clock in the forenoon, and was riding on the right-hand side of the street, within 3 or 4 feet of the curb. An automobile truck loaded with furniture overtook him from the rear, and in attempting to pass him collided with him and threw him to the pavement. The injuries suffered by him were due to the fall on the pavement.

[1, 2] Appellant contends that the evidence is insufficient to establish the identity of the truck as one belonging to defendant. Counsel say:

"We submit that the preponderance of the testimony does not show that the truck in question was the truck of the defendant."

Of course, this court has no concern with the question of the preponderance of the testimony. It is not within our province to weigh the evidence and determine where the preponderance lies. The only question for our determination in this connection is: Was there evidence which, if given its fullest effect in support of the verdict, was legally sufficient to support a finding in favor of plaintiff upon this issue? We find that one witness, who saw the accident, positively identified the truck as one belonging to the defendant, and further stated that it had defendant's name painted upon its side. Another witness also identified it as defendant's truck, though not so positively. The fact that his testimony was somewhat shaken upon cross-examination might well have been argued to the jury, but is of no importance here. The testimony was amply sufficient, if believed by the jury, to support a finding in favor of the plaintiff upon this issue.

[3] It is contended that the evidence is insufficient to support the implied finding of negligence on the part of the driver of the truck. One witness, who at the time of the accident was driving easterly on Colorado street, about half a block in the rear of the plaintiff, testified that the truck in question passed her going at the rate of about 30 miles per hour; that—

"They turned in and then out again to the left, and went in front of me, and then turned out again. When they turned out again the boy was lying on the pavement. The truck did not stop."

Another witness testified that no horn was blown, and further described the accident as follows:

"I should say the truck was from 3 to 4 feet from the curb when I first saw it. The truck swerved in nearer the curb when it struck the boy. I do not think it could have helped see the boy. There were two men on the truck. They were looking ahead as far as I could see. The truck crowded the boy into the curb. When the boy was hit, he did not have a chance to get onto the sidewalk, so you can judge how close the truck must have been."

This testimony was clearly sufficient to support the finding of negligence, and the circumstance that some discrepancy was developed in the testimony of these two witnesses upon cross-examination was a consideration which addressed itself to the jury in the court below, but is of no moment here.

[4] Appellant contends that the verdict, which was in the sum of $2,500, is excessive, and that the evidence wholly fails to show that the plaintiff suffered any such amount of damages.

"It is only where the verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts, as to shock the sense of justice, and raise at once a strong presumption that it is based on prejudice or passion rather than sober judgment, that the judge is at liberty to interpose his judgment as against that of the jury." Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 164, 47 Pac. 1019, 1021.

Giving to the evidence, as we must, its fullest effect in support of the verdict, we find that the plaintiff, when picked up some minutes after the accident, was unconscious and bleeding from his head and mouth and

forehead; that he was confined to his bed for about a week and a half; that after the accident he went to the public school only a short time; that before the accident he was bright, alert, active, intelligent, industrious, and dependable; that thereafter he was dull, stupid, listless, and forgetful, and suffered from headaches and dizziness, from all of which he had never suffered prior to the accident; that the latter conditions obtained right up to the time of the trial. If the jury had specially found that plaintiff sustained injuries resulting in physical and mental impairment of a permanent character, we could not say that such finding was not supported by this evidence, and under these circumstances we cannot say the verdict is "so grossly disproportionate as to shock the sense of justice or raise a presumption that it is based on prejudice or passion."

[5, 6] It is contended that the trial court should have granted a new trial on the ground of newly discovered evidence. This evidence, as disclosed by the affidavit, consisted of the statements of two former employés of the Lyon-McKinney-Smith Company of Los Angeles to the effect that said company owned a truck closely answering to the description of the truck involved in this accident, and that said truck made a trip to Pasadena loaded with furniture on the morning of the accident. The question of the identity of the truck involved in the accident was one of the principal issues at the trial. No sufficient reason is disclosed by the affidavit why the testimony of these two witnesses could not have been produced at the trial, if a diligent effort had been made to procure it.

"The claim of newly discovered evidence warranting a new trial is universally looked upon by the courts with distrust and disfavor. Public policy demands that a litigant should be compelled to exhaust every reasonable effort to produce at his trial all existing evidence in his behalf." People v. Byrne, 160 Cal. 217, 225, 116 Pac. 521, 525.

"In order to obtain a new trial because of newly discovered evidence, the applicant must show that he used reasonable diligence to discover it prior to the trial and that he failed to discover it and did not, in fact, know of it in time to produce it, or in time to apply for a continuance in order that he might produce it, at the trial." Pollard v. Rebman, 162 Cal. 633, 636, 124 Pac. 235, 237; Gallatin v. Corning Irrigation Co., 163 Cal. 405, 420, 126 Pac. 864, Ann. Cas. 1914A, 74.

Furthermore, this evidence, if it had been produced, would have been merely cumulative to other evidence which was produced by defendant upon the trial. The question before the trial court, where the newly discovered evidence is simply cumulative, is—

"whether if such evidence had been presented on the trial of the cause it would probably have produced a different result. The determination of that question is peculiarly within the province of the trial court. It is a matter addressed wholly to its discretion, and as a general proposition whether its ruling is favorable or unfavorable on a motion for a new trial based on newly discovered evidence which appears to be merely cumulative, that discretion will not be reviewed, except for manifest abuse." Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 135, 138 Pac. 712, 715.

There is here no showing of abuse of discretion by the trial court in denying the motion for new trial on this ground.

The judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; JAMES, J.

---

39 Cal. App. 29

## PEOPLE v. NICHOLS. (Cr. 454.)

(District Court of Appeal, Third District, California. Dec. 2, 1918.)

1. BURGLARY ⊂⊃41(1) — EVIDENCE — SUFFICIENCY.

Evidence, while not insufficient as a matter of law to support a verdict of guilty, *held* not so overwhelming or of so convincing a character in proof of defendant's connection with burglary as to compel reviewing court to say that no other verdict could have been reasonably found.

2. CRIMINAL LAW ⊂⊃1172(2)—ERRONEOUS INSTRUCTION—REVERSIBLE ERROR.

In view of slight evidence of defendant's guilt, it was prejudicial error to instruct, in substance, that unexplained possession of goods immediately or soon after burglary is presumptive evidence, not only that defendant stole the goods, but that he made use of the means by which access to them was obtained.

3. BURGLARY ⊂⊃29—BURDEN OF PROOF.

The presumption of guilt arising from the unexplained possession of goods obtained by means of burglary is insufficient to cast the burden of proving innocence upon accused.

4. BURGLARY ⊂⊃38, 42(1)—EVIDENCE—SUFFICIENCY.

Unexplained possession of goods obtained by burglary is a circumstance proper for the jury to consider, but is insufficient to justify a verdict of guilty.

5. BURGLARY ⊂⊃46(7)—UNEXPLAINED POSSESSION—INSTRUCTION—EVIDENCE.

Evidence, in prosecution for burglary, *held* insufficient to justify the giving of instruction with reference to unexplained possession of the goods obtained by the burglary.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

D. C. Nichols was convicted of burglary, and he appeals. Reversed and remanded.

Joseph H. Tam, Walter F. Lynch, and Frank A. Henning, all of Stockton, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was, by information filed by the district attorney of San Joaquin county, in the superior court thereof, jointly charged with one John Wilson with the crime of burglary. Against him, as was likewise done as to his codefendant, a prior conviction of burglary was charged in said information. Upon his arraignment, he admitted the prior conviction charged in the information and pleaded not guilty to the crime for which he was informed against. Upon a trial of the charge, he was convicted, and it is from the judgment of conviction and the order denying his motion for a new trial that these appeals are prosecuted.

Two points for a reversal are made, viz.: (1) That the evidence does not support the verdict; (2) that the court erred to the prejudice of the accused in one of its instructions.

The crime charged was committed in the city of Stockton, at between 7 and 8 o'clock of the evening of February 26, 1918. The house alleged to have been burglariously entered was, at the time of the commission of the crime, occupied by one W. L. Walker and wife. There were taken from one of the rooms of the house a suit of underclothes, five or six shirts, a finger ring, a watch, a bracelet, and some cigars.

It appears that Bernard Phelan, a special agent or officer of the Southern Pacific Company at Stockton, left that city on the night of February 26th, taking the 11:15 p. m. train, and went to the town of Tracy, a railroad town situated a few miles south of Stockton. Upon the stopping of said train at Tracy, the officer observed the defendant and his codefendant, Wilson, in the act of leaving the "gondola car," attached to the said train. Wilson was carrying a valise or suit case, and the defendant was carrying no packages of any kind. Phelan took the two men to the baggageroom of the railroad station and questioned them as to where they came from, etc. The defendant said that he came from Stockton on the train referred to and that he and his companion, Wilson, met for the first time on said train. Phelan, assisted by another railroad officer, who was present when the two men were taken charge of, opened and examined the valise and therein found a suit of clothes, a pair of pantaloons, and several boxes of cigars. The two men were then taken to Stockton by Phelan and there lodged in the county jail.

One Solomon Silver, a pawnbroker and secondhand dealer in the city of Stockton, testified that, on the night of the burglary and within a very brief time after the crime was shown to have been committed, a party came into his place of business, and, giving the name of Brown, offered for sale a watch and a finger ring, which were identified by Walker, the owner, as among the articles taken from his house by the party or parties entering it. Silver bought the watch and the ring, and his son, who was present at the pawnshop at the time of the transaction, made a memorandum, in a book kept by Silver for that purpose, of the transaction and inserted in said book a general description of the seller and the clothes that he then wore. Said Silver further testified that he was quite certain that Nichols was the party who sold him the watch and the ring. Silver's son was not so certain that Nichols was the man.

The defendant testified that he had nothing whatever to do with the commission of the burglary and positively denied that he sold the watch and the ring to Silver. Nichols further testified that at Stockton he took the train from which he was seen to leave by officer Phelan at Tracy; that he had never before met his codefendant, Wilson, until the latter boarded the "gondola car," in which he was riding, at Lathrop, a station situated between Stockton and Tracy.

Wilson, Nichols' codefendant, admitted that he committed the burglary and took from Walker's house a number of articles, among which were the watch and the ring referred to, but positively declared that Nichols had absolutely nothing to do with the burglary and was not the man who sold the watch and the ring to Silver. Wilson further testified, corroborating Nichols, that the latter and he had never before met until he (Wilson) boarded the "gondola car" at Lathrop. Wilson also testified that, within less than an hour after he entered Walker's house and took therefrom a number of articles, he met on one of the streets of Stockton a man with whom he had previously become acquainted and known to him as "Brownie"; that, on meeting "Brownie," he requested him to take the watch and the ring to some pawnshop and sell them; that "Brownie" did take the watch and the ring to Silver's pawnshop and there disposed of those articles. This man "Brownie" was not produced as a witness at the trial of the defendant. In this connection it may be added that, a few days after his arrest, Wilson stated to the assistant district attorney, in the presence and hearing of others, that it was he who sold Silver the watch and the ring.

[1] The above is a statement in substance of all the evidence that was brought before the jury by both the prosecution and the defense. We would not say as a matter of law that the evidence does not afford sufficient support to the verdict, but we are required

to say that that presented by the people in support of the theory of the guilt of the defendant is by no means overwhelming or of so convincing a character in proof of the defendant's connection with the crime charged as to compel a reviewing court to say that no other verdict under the evidence could reasonably have been returned. The whole case of the people, it will be noted, practically rests upon the identification by the witness Solomon Silver of the defendant as the party who sold him the watch and the ring, and Silver's testimony does not appear to be altogether satisfactory. Of course, there were the other circumstances, viz., that the defendant was in Stockton when the burglary was committed and that he was found in the company of Wilson, who admitted responsibility for the crime; yet it is manifest that these circumstances acquire their evidentiary importance largely from Solomon Silver's identification of the defendant as the man who sold him the articles mentioned and would not, taken alone, be regarded as of sufficient force to justify the conviction of the defendant of complicity in the crime.

Thus we have reviewed the evidentiary features of the case, not because we think that there is not enough in the evidence to support the verdict, but because of an instruction which the court incorporated into its charge to the jury and to which the defendant here makes the objection that it not only involves an erroneous statement of the law, but that it was highly prejudicial to the accused. The instruction thus reads:

"The court instructs you that where goods have been feloniously taken by means of a burglary, and either immediately or soon after are found in the possession of a person who gives a false account, or refuses to give any account, of the manner in which he came into the possession, proof of such possession and guilty conduct is presumptive evidence, not only that he stole the goods, but that he made use of the means by which access to them was obtained."

[2] There can hardly be any doubt that the instruction does not contain a correct statement of any rule of law as applicable to criminal cases, and there can be no less reason for doubting that, in view of the slight evidence of the defendant's guilt of the crime of which he stands convicted, the instruction must have operated prejudicially against the accused in the minds of the jury.

[3, 4] If, by said instruction, the court intended to declare, as reasonably the instruction may be interpreted to mean, that the law is that the unexplained possession of goods shown to have been stolen from a building burglariously entered for that purpose is conclusive evidence of the guilt of the defendant of the crime of burglary, or that he is guilty of having stolen the goods, then clearly it is obnoxious to the objection that it involves an instruction upon questions of fact and is consequently an invasion of the constitutional function of the jury and to the further objection that there is no such presumption of law. If, however, this was not the purpose of the instruction, or, assuming that it could not be so construed as to convey such a meaning, still it is plainly subject to the objection that it involves the statement or at least tends to convey the notion that the presumption of guilt arising from the unexplained possession of stolen goods is sufficiently satisfactory as in proof of guilt to cast the burden of proving his innocence upon the accused. Of course, that is not the law. It is not true, as a legal proposition, nor does it necessarily follow as a matter of fact, that a party who, shortly after the crime, is committed, is found in the possession of stolen goods, obtained by some one by means of burglary, and fails or refuses to give a satisfactory account of such possession, committed the burglary or even obtained the goods dishonestly. As far as the law has ever gone or can logically go with respect to the fact of the possession of stolen goods by a person accused of the stealing of such goods is that the fact of such possession, unexplained, is evidence which it is proper for the jury to consider in determining the question of the guilt or innocence of the accused. In other words, such possession, unexplained, merely affords, if any at all, a very remote inference of guilt, and whether such inference may acquire any probative significance or evidentiary value in the establishment of the guilt of the accused must depend upon the character or nature of other incriminatory circumstances, if any be shown. At any rate, as above stated, and as the Supreme Court declared in People v. Boxer, 137 Cal. 563, 564, 70 Pac. 671, 672:

"Evidence of the recent unexplained possession of stolen property, standing alone, is not sufficient to justify a verdict of guilty, even in a case of larceny, and the court is not justified in intimating to the jury that a 'definite presumption of guilt' could arise upon any such state of facts."

[5] It may be added that the instruction is vulnerable in another view, and that is that there is no evidence to which it is applicable. The only evidence in the record that the defendant ever had possession of the watch and the ring is that which was brought in through the testimony of the pawnbroker. There is no testimony that the pawnbroker asked the defendant how he obtained the articles or from whom he obtained them, assuming that the defendant was the party who sold them to the pawnbroker. After his arrest, the defendant at all times, not only denied complicity in the burglary, but denied that it was he who sold the watch and the ring to the pawnbroker. His position, therefore, was such that there was no

occasion for him to account for the possession of the property or to refuse to do so. There was, in short, no explanation for him to make with reference to the articles. If he was the party who took the articles to the pawnbroker and the latter had asked him where and how he came into their possession and he had either refused to explain or was shown to have given a false account of how he obtained possession of the property, or if he had been apprehended by an officer or the owner of the property with the articles in his possession and had refused to explain his possession or given an untruthful statement thereof, then, in either event, we would have a case where a properly framed instruction as to the unexplained possession of stolen property would have been pertinent. But no such a situation as is covered by either of the supposititious cases is presented here.

The court's charge was otherwise a correct and fair statement of the principles applicable to the case as it was disclosed by the proofs, and, if the evidence of guilt had been so clearly shown as to warrant the conclusion that no other verdict but that of guilty could justly have been found and returned, it is very probable that the erroneous instruction above considered could well be declared to have been innocuous in its effect upon the substantial rights of the accused. But, as stated, we cannot, in view of the very slight proof of guilt made against the accused, see how we may justify ourselves in saying that the instruction did not result in preventing a fair and impartial consideration of the case by the jury.

The judgment and the order appealed from are therefore reversed, and the cause remanded.

We concur: CHIPMAN, P. J.; BURNETT, J.

---

39 Cal. App. 67

ROSENBERG v. RETAIL CLERKS' ASS'N, LOCAL 428, et al. (Civ. 2523.)

(District Court of Appeal, First District, Division 1, California. Dec. 4, 1918.)

1. INJUNCTION ⟸101(2) — STRIKES — BOYCOTTS.

While coercion, menace, or intimidation cannot be used to enforce a boycott, strikers may, where no contractual obligation interferes, present their cause by peaceful persuasion and argument.

2. INJUNCTION ⟸101(3) — STRIKES—PICKETING.

Picketing by strikers in its very nature tends to and does accomplish its object by the illegitimate means of physical intimidation and fear, and will be enjoined.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Samuel Rosenberg against the Retail Clerks' Association, Local 428, J. W. O'Sullivan, president, A. Franklin, secretary, and others. From a judgment granting only part of the relief demanded, plaintiff appeals. Modified and affirmed.

E. M. Rosenthal, of San Jose, for appellant.

Grant R. Bennett, of San Jose, for respondents.

PER CURIAM. Plaintiff herein sought and obtained an injunction against defendants, the Retail Clerks' Association and others, preventing them from harassing or obstructing him in the operation and conduct of his business. Being dissatisned with the form and extent of the judgment, plaintiff has appealed therefrom, and he claims that such judgment does not afford him the particular and specific relief prayed for by him in his complaint, and that it is not as favorable to him as the findings of the court warrant.

The record consists of the judgment roll alone. The complaint charges that the defendants, in pursuance of a confederation and combination among themselves, attempted to injure and ruin plaintiff's business by placing and maintaining, immediately in front of his store, pickets, wearing badges, who accost and call out to possible patrons and persons passing by:

"This is an unfair house; it is unfair to organized labor. Don't patronize it."

It is further alleged that by the presence of said pickets, and the statements made by them, many of plaintiff's patrons have been intimidated, and in consequence thereof have ceased to and have refrained from patronizing him, and that they will continue so to do as long as such pickets are maintained in the immediate vicinity of plaintiff's store, to his irreparable damage; the defendants being financially irresponsible. The prayer of the complaint asks that defendants be restrained and enjoined from further commission of the acts complained of.

The answer consists of general denials. After trial the court announced:

"That permanent injunction issue in the form of the modified order made as reported in Goldberg-Bowen Case, 149 Cal. Reports at page 435."

Thereafter findings of fact and conclusions of law and judgment were presented by plaintiff and adopted by the court, with the single exception of a finding to the effect that the conduct complained of intimidated customers and constituted a threat or menace. The judgment as given restrain-

ed defendants from interfering with, harassing, or obstructing plaintiff in the conduct of his business by means of threats, menaces, or intimidation through pickets in or about plaintiff's place of business.

It is the claim of plaintiff that the judgment as given means nothing and is without force, for the reason that the acts complained of are not found by the court to constitute either a threat, menace, or intimidation, and that he is entitled to a judgment upon the issue that patrons were intimidated by the admitted utterances of the pickets, and on account of such intimidation refrained from patronizing him. It is for this reason that the claim is made that the judgment is not supported by the findings and should be set aside.

[1, 2] The question presented involves the subject of peaceful picketing. The right of united labor to enforce a boycott by means of peaceable, oral persuasion, and to induce those sympathetic with such a cause to refrain or withhold their patronage from an employer, is one that has received extended consideration from the courts, and the decisions upon the subject are widely divergent. This principle, however, is not one of first impression in this state. The manner and extent to which organized labor may strike, the means that may be employed in furtherance thereof, and the respective rights of employer and employé, are subjects which have received elaborate consideration by our Supreme Court. Parkinson v. Building Trades Council, 154 Cal. 581, 98 Pac. 1027, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165; Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324; Goldberg-Bowen v. Stablemen's Union, 149 Cal. 429, 86 Pac. 806, 8 L. R. A. (N. S.) 460, 117 Am. St. Rep. 145, 9 Ann. Cas. 1219. It is unnecessary to discuss the principles reviewed and established in these cases, it being sufficient for the purposes of this case to say that while coercion, menace or intimidation cannot be resorted to for the purpose of enforcing a boycott, strikers have an unquestionable right, where no contractual obligation interferes, to present their cause by peaceful persuasion and argument. The question whether picketing is a peaceful and lawful means is one that has also received frequent judicial consideration. The cases in different jurisdictions are not harmonious upon the question. Some of the courts have recognized, or at least do not deny, that picketing may not be unlawful. The weight of authority, however, and the growing tendency, is to accept the contrary view, and to regard picketing as inherently illegal, for the reason that it is inseparably associated with acts that are indisputably illegal. Accordingly, it has been held that there is no such thing as peaceful picketing any more than there can be peaceful mobbing. Atchison, etc., Ry. Co. v. Gee (C. C.) 139 Fed. 582. In harmony with this view is the conclusion reached by our Supreme Court in Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324, where it is held that equity will enjoin striking employés who have established a boycott against their former employer, from maintaining a picket about his place of business, upon the ground that a picket in its very nature tends to and does accomplish its object by the illegitimate means of physical intimidation and fear. See, also, Com. v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346; Barnes v. Chicago Typographical Union, 232 Ill. 424, 83 N. E. 940, 14 L. R. A. (N. S.) 1018, 13 Ann. Cas. 54; In re Langell, 178 Mich. 305, 144 N. W. 841, 50 L. R. A. (N. S.) 412, and note.

This being so, it follows that as the trial court found that defendants committed the acts complained of judgment should have been rendered in accordance with the prayer of the complaint, declaring that such acts constituted a threat or menace against plaintiff's customers, and defendants should have been enjoined against a continuance thereof. This was the issue raised by the pleadings, and, the finding having been in plaintiff's favor, he was entitled to a judgment declaring that his patrons were intimidated by the admitted acts, and on account of such intimidation were restrained from patronizing him. Under the judgment as rendered, defendants being merely prohibited from interfering with or obstructing plaintiff in the conduct of his business by means of threats, menace, or intimidation, plaintiff would be compelled in order to enforce his judgment to institute proceedings upon a charge of violating the injunction on the assumption that the acts complained of came within its terms. This was the only issue in the present case, and it should have been finally disposed of by the judgment.

From what we have said it follows that the judgment appealed from is too general in its terms and does not answer the requirements of the findings. It is therefore ordered that the lower court modify its judgment by entering one in favor of plaintiff in accordance with the findings of the court and in conformity with the views herein expressed, and with this modification the judgment is affirmed.

(39 Cal. App. 42)

FILDEW v. SHATTUCK & NIMMO WAREHOUSE CO. (Civ. 2598.)

(District Court of Appeal, Second District, Division 1. California. Dec. 4, 1918.)

1. NEGLIGENCE ⊂⊃136(31) — CONTRIBUTORY NEGLIGENCE — AS PROXIMATE CAUSE—JURY QUESTION.

Assuming that an inspector of elevators was negligent in not looking at a railing before grasping it to pull himself onto the floor from crosshead on elevator, he cannot be held guilty of contributory negligence, as a matter of law, unless the evidence establishes that he could have seen the defective condition of the railing if he had looked.

2. NEGLIGENCE ⊂⊃136(27) — CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

Whether an inspector of elevators was guilty of contributory negligence in not seeing that a railing which he took hold of to pull himself to a floor from the crosshead of an elevator was defective *held* for jury.

3. WITNESSES ⊂⊃37(1) — KNOWLEDGE OF FACTS.

In an action by an elevator inspector for personal injuries occasioned by the giving away of a railing when he was attempting to pull himself to a floor from crosshead of an elevator, sustaining an objection to a question "For what purpose were the guard rails around the elevator shaft originally put there?" was proper, where no foundation was laid by showing that the witness had any knowledge of the original construction.

4. TRIAL ⊂⊃194(16)—INSTRUCTIONS.

An instruction on right of plaintiff to assume that guard rail would stand strain of taking hold of it while he stepped off of top of cage of elevator *held* not one upon a question of fact, except such as were hypothetically stated therein, and thereby submitted to the jury for its determination.

5. NEGLIGENCE ⊂⊃136(23)—ELEVATOR RAILING—JURY QUESTION.

In an action by an inspector of elevators, injured by the giving away of a railing which he grasped while attempting to pull himself from the crosshead of an elevator onto a floor, whether the defendant was negligent in the construction of a railing which would give away when used in such manner *held* for the jury.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by R. C. Fildew against the Shattuck & Nimmo Warehouse Company. From a judgment in favor of plaintiff and an order denying its motion for a new trial, defendant appeals. Affirmed.

J. Karl Lobdell and Ray E. Nimmo, both of Los Angeles (Douglas L. Edmonds, of Los Angeles, of counsel), for appellant.

R. T. Lightfoot, of Los Angeles, for respondent.

MYERS, Judge pro tem. The defendant appeals from a judgment against it and from an order denying its motion for a new trial, after verdict in favor of plaintiff in an action to recover damages for personal injuries alleged to have been sustained by plaintiff as a result of defendant's negligence.

Defendant was the owner of a warehouse, three stories in height, in Los Angeles, Cal., in the central portion of which was constructed a freight elevator consisting of an open platform about 14 feet square, attached by uprights at either end to a crosshead, consisting of a 12 by 12 beam, 14 feet in length, each end of which fitted into guides which extended vertically up and down the sides of the elevator shaft, the guides being fastened to vertical beams known as guideposts. The crosshead was about 10 feet above the platform of the elevator, which had no other covering or inclosure. The elevator shaft was not inclosed, except that there were at each floor sliding gates opposite the north and south sides of the opening and two railings on each of the east and west sides. The railings were respectively 1½ and 3 feet above the floor, and consisted of pieces of 2 by 4 scantling, one end of which was nailed to an upright support at the corner of the elevator shaft and the other end to the inside of the guidepost or upright beam upon which the guides for the elevator were fastened.

Plaintiff was an inspector of elevators in the employ of the Otis Elevator Company, which was under contract with the defendants to inspect, oil, and grease these elevators, and it was while so engaged that he was injured. He had just completed greasing the guides on one side of the elevator shaft, to do which it was necessary to stand upon the end of the crosshead. The elevator had been stopped, with its platform about 3 feet above the level of the first floor, for the purpose of unloading some freight upon a truck standing there. This left the top of the crosshead about 20 inches below the second floor. In attempting to step from the crosshead to the second floor plaintiff took hold of the top guard rail and, placing all his weight thereon, attempted to lift himself up to the second floor. The nails which held the guard rail in place gave way, and plaintiff was precipitated to the platform of the elevator, sustaining the injuries for which he sued.

Appellant's first contention is that the trial court erred in overruling defendant's motion for nonsuit for the reason, it contends, that it appears from the evidence that plaintiff was guilty of contributory negligence as a matter of law. This is predicated on plaintiff's own testimony, portions of which are as follows:

"When we finished greasing then I attempted to get off, on the second floor, and in so doing I had to step up on the floor, and take hold of the rail. I put one foot up to take hold of the rail; had to take the other foot off of the crosshead and put it on the floor, and when I did that the rail gave way and let me drop down headfirst onto the floor of the elevator. * * * As I was standing on the cross-beam and before I stepped over onto the second floor, I was in such a position that I could see that top railing. I could see how it was fastened to the beam. I did not look at it to see how it was fastened. I took it for granted that it was fastened right. * * * At the time I put my right hand up to take hold of the rail I did not test it at all to see if it was secure. I then followed it with my right foot without testing it to see whether it was securely fastened or not. I took it for granted the rail was securely fastened without even looking or testing it."

It further appeared that plaintiff was an experienced elevator inspector and had been engaged in regularly inspecting this elevator for several months prior to the accident; that he had never before gotten off this elevator at the second floor; that on previous occasions he had alighted from it in the same manner at the top floor; that this was the most practicable method of getting off from the crosshead; that the guard rails at the top floor were apparently of the same construction as those at the second floor.

[1] Appellant very earnestly contends that it clearly appears from this testimony, not only that plaintiff was not exercising reasonable care, but that he was not exercising any care at all; that a rational mind could not well draw any other conclusion therefrom, and that therefore he was guilty of contributory negligence as a matter of law, and the nonsuit should have been granted. But proof of plaintiff's negligence is not alone sufficient to warrant the granting of a nonsuit, however clear that proof may be. In addition thereto, it must further appear that plaintiff's negligence contributed proximately to his injuries. Conceding that plaintiff's negligence is here clearly established, we must then consider the further question whether it appeared with similar certainty that if he had looked he would have discovered the defect which caused the accident. Unless the evidence establishes this second element also to such a degree of certainty that but one conclusion can be rationally drawn therefrom, this court cannot, and the trial court could not, say that plaintiff was guilty of contributory negligence as a matter of law.

[2] As to the manner in which the guard rail was fastened, the evidence is conflicting. A witness for the plaintiff testified that it was fastened with four eightpenny nails driven through the two-inch thickness of the rail and thence into the upright, from which it follows that they projected into the upright only about one-half inch. Witnesses for the defendant testified that it was fastened with thirtypenny spikes. This latter testimony, of course, must be disregarded in considering the motion for nonsuit. Plaintiff's witness testified on this subject:

"After the accident I examined that one end [of the guard rail], and only found four eightpenny nails in it. I found this end that pulled away with Mr. Fildew had been hammered; that the nails were sunk in, also split the wood. It was a crack. I don't know how old it was; it looked to me from all appearances that it was an old crack."

From this somewhat meager discription we cannot say that it clearly appears as a matter of law that if the plaintiff had examined the guard rail even with great care, before trusting his weight to it, he would have discovered that it was insecurely fastened. We conclude, therefore, that the motion for nonsuit was properly denied. In each of the cases cited by appellant in support of its contention it appears, either that the plaintiff had actual knowledge of the defect which caused his injury, or that the nature of it was such that it would have been obvious to him upon even a casual inspection. This circumstance sufficiently distinguishes those cases from the case at bar.

[3] Appellant contends that the trial court erred in sustaining plaintiff's objection to the following question put by defendant to the witness W. J. Nimmo:

"Q. I will ask you for what purpose the guard rails around this elevator shaft were originally put there?"

Appellant points out that the question of the purpose of the original construction of the guard rails was put in issue by allegations of the complaint which were denied by the answer. Conceding, therefore, that the question was relevant, the objection was nevertheless properly sustained for the reason that no foundation was laid by showing that the witness had any knowledge respecting the purpose of the original construction of the guard rails, except as he may have gathered such knowledge from conversations with people who installed the elevator, which, of course, would be hearsay. This witness was permitted, as were other witnesses for defendant, to testify that during the ten years or more during which the guard rail in question had been in place it had always been used for the purpose of preventing any person from falling into the elevator shaft, and for no other purpose, to their knowledge; and plaintiff himself testified that such was the purpose for which such railings were usually installed. It nowhere appears that if the witness had been permitted to answer this particular question, he would have disclosed any other or different purpose.

[4] Complaint is made of the giving by the court of the following instruction at the request of plaintiff:

"While the plaintiff may have been employed to inspect the elevator of the defendant, yet, if you shall believe, from the evidence, that it was not the duty of the plaintiff to inspect the guard rails and the shaft of the said elevator, he had a right to assume that the guard rail in question, at the time of his injury, was in a reasonably safe condition, *and that the same would stand such a reasonable strain upon the same, such as the taking hold of the same with his hands for the purpose of enabling him to step from the top of the cage to the second floor of the building,* provided the taking hold of and use of the same was with the exercise of ordinary care and caution on his part."

It is urged that the portion italicized amounts to an instruction of the jury upon a question of fact, and is equivalent to telling the jury that if the plaintiff in the exercise of ordinary care took hold of the railing for the purpose of enabling him to step from the top of the cage to the second floor of the building, such constituted a reasonable strain upon the railing. This instruction is somewhat involved, and not well calculated to aid the jury by clarifying the issues submitted to it; but, as we construe it, it amounts to no more than saying that if the strain to which plaintiff subjected the railing was an exercise of reasonable care, then it could not be held by them to be an unreasonable strain. This does not appear to us to be an instruction as to a matter of fact upon which the jury was to find, except as the facts were hypothetically stated therein, and thereby submitted to the jury for its determination.

Defendant contends that the court erred in refusing to give instruction No. 23, requested by the defendant. This was substantially in the language of an instruction approved by the Supreme Court in Baddeley v. Shea, 114 Cal. 1, set forth at page 5 thereof, 45 Pac. 990, 991 (33 L. R. A. 747, 55 Am. St. Rep. 56). Conceding, as we must, the instruction to have been a proper one in that case, it does not necessarily follow that it should have been given here. In that case the negligence upon which the plaintiff relied did not consist at all in any claim of negligent construction, but rather in the failure to inspect for defects which might thereafter arise by reason of rot and decay. As the court said:

"It is not pretended by respondent that there was any defect in the construction of the steps or platform, except that he contends there was not sufficient ventilation under them."

Here the negligence claimed does not rest at all upon the failure to inspect, but upon a claim of improper and insufficient construction in the first instance, and to these issues the instruction in question was clearly inapplicable.

[5] Appellant contends that the evidence is insufficient to justify the implied finding that defendant was guilty of negligence because, it urges, there is no evidence in the record to support the conclusion that the railing was insufficiently fastened for the purpose for which it was ordinarily used, or for which the defendant could reasonably anticipate it would be used. In other words, appellant contends that the guard rail in question was used, and was intended to be used, only for the purpose of protecting persons from inadvertently walking or falling into the elevator shaft, and the fact that it gave way under the strain placed upon it by plaintiff does not even tend to prove its insufficiency for the purpose stated. We think, however, that the jury was warranted in concluding that a railing of such an apparently substantial character was designed and intended to serve some purpose beyond that of a mere warning sign, and that if the jurors believed, as they had a right to, the testimony of plaintiff's witness as to the manner in which it was fastened, they might conclude therefrom that it was inadequately constructed for any purpose to which it might reasonably be put. Each of the cases cited by appellant in support of this contention is distinguishable from the case at bar. Here the court properly instructed the jury that even though the railing was defective in construction, yet if they found that the plaintiff applied it to a purpose requiring greater strength than that which was intended, and that his fall was in consequence of such application and in using the railing, as plaintiff did use it, he was not exercising ordinary care, no negligence or breach of duty can be imputed to defendant on account of such defect in the construction thereof. We cannot say that the implied finding of the jury in response to that instruction is without any support in the evidence.

The judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; JAMES, J.

---

39 Cal. App. 62

TREMPER v. TREMPER. (Civ. 2518, 2533.)

(District Court of Appeal, First District, Division 1, California. Dec. 4, 1918. Rehearing Denied by Supreme Court Jan. 30, 1919.)

1. DIVORCE ⟸231, 310—ALIMONY.

Under Civ. Code, § 139, a divorced husband is required to maintain the children only during their minority, and the wife only while she remains single or until she dies.

2. DIVORCE ⟸249(1) — ALIMONY — REAL ESTATE.

Under Civ. Code, § 139, the court has no power to divide real property; there being no community property, and the wife having contributed nothing.

3. DIVORCE ⟸209 — TEMPORARY ALIMONY—AMOUNT.

Under Civ. Code, § 137, temporary alimony should be allowed only to cover current needs of wife, and fact that wife has incurred debts is not sufficient to authorize an award, unless the payment of such debts is necessary to enable the wife to further prosecute her action or defense.

4. DIVORCE ⟸214(3)—TEMPORARY ALIMONY—APPLICATION FOR.

To entitle a wife to temporary alimony or to a modification of an order granting temporary alimony, her affidavit must show the items and amounts of her needs.

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action for divorce by Criss W. Tremper against Eva Edna Tremper. From an interlocutory decree of divorce on defendant's cross-complaint awarding permanent maintenance to the wife, and from an order made after judgment awarding and increasing alimony pending appeal, the plaintiff prosecutes appeals. Judgment and order reversed.

Short & Sutherland and Carl E. Lindsay, all of Fresno, for appellant.

Gallaher & Aten, of Fresno, for respondent.

STURTEVANT, Judge pro tem. This case involves two appeals. The first (No. 2518) is an appeal from an interlocutory decree of divorce awarding permanent maintenance to the wife, and the second (No. 2533) is an appeal from an order made after judgment awarding and increasing alimony pending the first appeal. We will consider them in the order stated.

1. The husband brought an action for divorce, and the wife answered and filed a cross-complaint. Judgment went for the wife on her cross-complaint; the husband appealed, and has brought up the record under section 953a, Code of Civil Procedure. The appellant challenges the relief awarded to the respondent. The record shows that there was no community property, and that the wife had no separate property; but that the husband had real and personal property variously estimated as amounting to sums ranging from $65,000 to $80,000. There is no claim made that any of the said property was bought with moneys contributed by the defendant in whole or in part.

There were three minor children all residing with the defendant, who, prior to the commencement of the action, had left the family residence and had rented a house and made a home for herself and children. The plaintiff continued to occupy the former residence. In the interlocutory decree the court awarded to the defendant "the divided one-half" of the property, real and personal, excepting therefrom lands in Lake county of the value of $4,700.

Under the foregoing facts, the decree must be supported, if at all, by the provisions of section 139, Civil Code. That section provides as follows:

"Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support, during her life, or for a shorter period, as the court may deem just, having regard to the circumstances of the parties respectively; and the court may, from time to time, modify its orders in these respects."

[1] It will be noted at once that the section does not expressly confer power to transfer the title to real or personal property; it empowers the court to compel the husband "to provide for the maintenance of the children," and "to make such suitable allowance to the wife for her support"; and empowers the court from "time to time" to modify its orders in these respects. The plaintiff's duty toward his children is to maintain them "during their minority." As each child attains his majority, that duty will terminate.

The plaintiff's duty toward his wife is to support her while she remains single or until she dies. If she marries again, or if she dies, that duty toward her will terminate. As these contingencies may arise in any case, it is provided: "The court may, from time to time, modify its orders in these respects."

[2] A decree similar in form to the decree which we are now considering, but which was rendered by consent, was upheld (Thomas v. Thomas, 64 Mo. 353); and, where the wife's separate funds had been invested in the property, such decrees were sustained (Luick v. Luick, 132 Iowa, 302, 109 N. W. 783; Klekamp v. Klekamp, 275 Ill. 98, 113 N. E. 852, Ann. Cas. 1918A, 663, 666); and, where the property had been acquired through the joint labors of both husband and wife, such a decree was sustained (Markowski v. Markowski, 44 Wash. 594, 87 Pac. 914); and, again, where the statutes were so broad as to reasonably support the exercise of the power, such decrees have been sustained (Powell v. Campbell, 20 Nev. 232, 20 Pac. 156, 2 L. R. A. 615, 19 Am. St. Rep. 350; Miller v. Miller, 38 Wash. 605, 80 Pac. 816). But, where the statute on the subject was no broader than section 139, Civil Code, supra, the decisions are to the effect that the trial court should have made an allowance in money, and had no power to divide the properties in kind. Doe v. Doe, 52 Hun, 405, 5 N. Y. Supp. 514; Cizek v. Cizek, 69 Neb. 797, 96 N. W. 657, 99 N. W. 28, 5 Ann. Cas. 464 and note; Reynolds v. Reynolds, 68 W. Va. 15, 69 S. E. 381, Ann. Cas. 1912A, 889 and note; Ecker v. Ecker, 22 Okl. 873, 98 Pac. 918, 20 L. R. A. (N. S.) 421. While it is not

erroneous to make an allowance of money in a lump sum for the support of the wife (Robinson v. Robinson, 79 Cal. 511, 27 Pac. 1095; Huellmantel v. Huellmantel, 124 Cal. 583, 57 Pac. 582), it is better practice to make a monthly allowance to the end that the court can, "from time to time, modify its orders in these respects" (Doerle v. Doerle, 96 Misc. Rep. 72, 159 N. Y. Supp. 637, Ann. Cas. 1917A, 248).

It follows that the decree, as rendered, was in excess of the power of the trial court. Nothing herein said is opposed to the rule stated in Robinson v. Robinson, 79 Cal. 511, 21 Pac. 1095. In that case the trial court awarded to the wife a gross sum for the support of herself and children and made the allowance a lien on the husband's lands. That decree is clearly supported by the provisions of section 140, Civil Code. Gaston v. Gaston, 114 Cal. 542, 546, 46 Pac. 609, 55 Am. St. Rep. 86; Huellmantel v. Huellmantel, 117 Cal. 407, 49 Pac. 574; Id., 124 Cal. 583, 57 Pac. 582; Kerr v. Kerr, 216 Pa. 641, 66 Atl. 107, 9 Ann. Cas. 89 and note.

The record contains some adverse rulings as to the settlement of the pleadings. As the case must go back for a new trial, we think it advisable to direct that each party be allowed to make such amendments to his pleadings as he may be advised.

The record shows numerous adverse rulings on the admission or rejection of evidence; but on a new trial those matters may not arise again, and we think it is not necessary to discuss each of those rulings.

[3, 4] 2. After the interlocutory decree was entered, an application was made to the trial court for an allowance for the maintenance of the defendant and her children pending the appeal from the interlocutory judgment. In her affidavit in support of her application the defendant avers that on July 19, 1916, an order for maintenance was made in the sum of $100 per month, and that the same had been paid. The second application was made December 11, 1916. There is not in the defendant's affidavit, or in any other part of the record, any showing as to the needs of the wife and children; nor, if the first allowance was deficient in amount, is there any showing as to the items of, or the amount of, the deficiency. She alleged that her husband was in receipt of a net income of $10,000. He denied that statement and alleged that his net income was not to exceed $4,000. After the hearing was had, the court made an order awarding her $250 for herself and children, $100 for costs, and $350 for her attorney fees. The plaintiff appealed from that order and has brought up the record under the provisions of section 953a of the Code of Civil Procedure. The power to make such orders must be found in section 137 of the Civil Code. That section provides:

"When an action for divorce is pending, the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself and her children, or to prosecute or defend the action. * * *"

It will be noted that the allowances to be made under that section are such as are "necessary," etc. So far as we are advised, all of the authorities are to the effect that such allowances are to be made only for the purpose of covering the needs of the wife and her children. 14 Cyc. 749, 752, and 758; 2 Bishop on Marriage and Divorce, § 950; Schammel v. Schammel, 74 Cal. 36, 15 Pac. 364; Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345; Mudd v. Mudd, 98 Cal. 320, 322, 33 Pac. 114; Loveren v. Loveren, 100 Cal. 493, 495, 35 Pac. 87; Stewart v. Stewart, 156 Cal. 655, 105 Pac. 955. Viewed as an initial proceeding the defendant's affidavit should have shown the items and amounts of her needs. Viewed as an amendment or modification of the order of July 19, 1916, the rule is the same. Smith v. Smith, 147 Cal. 143, 147, 81 Pac. 411; Sharon v. Sharon, 75 Cal. 48, 16 Pac. 345. An award of temporary alimony should be made to cover the current needs of the wife and should not be allowed to take the place of a final decree disposing of the property rights.

The fact that the wife has incurred debts is not sufficient to authorize an award for necessary expenses (Loveren v. Loveren, 100 Cal. 493, 35 Pac. 87), but the further fact must appear that the payment of such debts is necessary to enable the wife to further prosecute her action or defense (Gay v. Gay, 146 Cal. 237, 242, 79 Pac. 885; Beadleston v. Beadleston, 103 N. Y. 402, 405, 8 N. E. 735).

It follows that the judgment and order should be reversed, and it is so ordered.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

38 Cal. App. 727

## FIMPLE v. SOUTHERN PAC. CO. et al.

(Civ. 1881.)

(District Court of Appeal, Third District, California. Nov. 22, 1918. On Rehearing, Dec. 22, 1918.)

1. MASTER AND SERVANT ⊂⊃333—INJURIES TO THIRD PERSONS—EFFECT OF JUDGMENT IN FAVOR OF SERVANT.

If negligence of the servant was not personally participated in or aided by some negligent act of the master, independent of the act of the servant, a verdict acquitting the servant necessarily acquits the master.

2. NEGLIGENCE ⊂⊃111(1)—PLEADING.

While general negligence may be relied upon without pleading specific acts of negligence, yet, where specific acts of negligence are relied upon for recovery, they must be specially pleaded.

3. RAILROADS ⊂⊃345(4) — ACCIDENTS AT CROSSINGS—NEGLIGENCE—PLEADING.

Under a complaint for death at railroad crossing alleging that M., the engineer in charge of a locomotive, negligently, without whistle being blown or bell rung, ran the locomotive across the highway at a great rate of speed, while the crossing was concealed from view by buildings and box cars, no recovery could be had on the ground that the placing of the box cars and buildings was a negligent act.

4. RAILROADS ⊂⊃304 — CROSSINGS—NEGLIGENCE—BUILDINGS—BOX CARS.

The placing of box cars and buildings near a crossing is not of itself negligence as to persons traveling over the crossing.

On Rehearing.

5. MASTER AND SERVANT ⊂⊃333—INJURIES TO THIRD PERSONS—NEGLIGENCE — ACQUITTAL OF SERVANT.

Recovery could not be had, the engineer being acquitted of negligence, on the ground that the fireman negligently failed to ring the bell, where the evidence was undisputed that the engineer was in control of the engine; the fireman's duty under the circumstances being immaterial.

6. RAILROADS ⊂⊃345(4)—INJURIES AT CROSSING—NEGLIGENCE—PLEADING AND PROOF.

Under a complaint for injuries at a railroad crossing, alleging that M., who was the engineer in charge of a locomotive, negligently, without whistle being blown or bell rung, ran the locomotive across the highway at a great rate of speed while his view at the crossing was concealed by buildings and box cars, recovery could not be had on the ground that the engineer was negligent in not ringing the bell.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Amanda Fimple, as administratrix of the estate of Thomas V. Fimple, deceased, against the Southern Pacific Company and William J. McKnight. Judgment for plaintiff against the first-named defendant, and the latter appeals. Reversed.

A. F. Jones and George F. Jones, both of Oroville, for appellant.

Guy R. Kennedy and J. D. Peters, both of Chico, for respondent.

HART, J. Plaintiff brought the action to recover damages for the death of her husband, alleged to have been negligently caused by the defendants. The jury returned a verdict in favor of defendant McKnight and in favor of plaintiff against the defendant Southern Pacific Company in the sum of $20,000. Judgment was entered accordingly, and defendant Southern Pacific Company appeals from that portion thereof awarding damages against it.

Thomas V. Fimple met his death on the 14th day of July, 1914, being struck by a "light" engine, then in charge of the defendant McKnight, while driving an automobile across the railroad tracks of the corporation, near the town of Durham, in Butte county. With Fimple in the automobile was a young man named William Drouillard, who was also killed. His father, Edward Drouillard, brought an action for damages against the same defendants, in which judgment was entered in favor of plaintiff. That action was before us on appeal (civil No. 1778), and a decision affirming the judgment was filed in this court on March 4, 1918. 172 Pac. 405. A very full statement of the circumstances under which the accident occurred may be found therein, to which we refer.

Appellant urges a reversal of the judgment on two grounds: (1) That the verdict of the jury exonerating defendant McKnight operated also to exonerate the defendant Southern Pacific Company; and (2) contributory negligence of the deceased.

[1] It cannot be doubted that it is the law that, unless the appellant participated in the negligence which it is charged produced the injuries and consequent death of the deceased, or that it committed some different and distinct act of negligence, separate from and independent of that of its engineer and codefendant, McKnight, which, concurring with that of McKnight, proximately produced the injuries whereby the deceased lost his life, the appellant cannot be held liable for the death of Fimple, since its codefendant and agent was acquitted by the jury of all blame or culpability for said injuries and death. In other words, if the damage was negligently produced by the defendant McKnight, the locomotive engineer, while he was engaged in discharging his duties as a servant or agent of the appellant, and the negligence of said defendant so producing the damage was not personally participated in or aided by some negligent act of the appellant wholly

independent of and dissociated from the act of the engineer, then a verdict acquitting the latter of culpable negligence is necessarily a verdict likewise acquitting the appellant, for the very obvious reason that, where injury is solely the result of the negligence of the servant while performing his duties as such, the principal's liability for such injury can follow only from the relationship existing between the master and servant as such. They are not joint tort-feasors, so that either or both may be sued for the tort committed.

The doctrine above stated has been explained and applied in many cases. Thus, in Lake Shore, etc., R. Co. v. Goldberg, 2 Ill. App. 228, one of a number of defendants jointly sued in trespass was acquitted. The appellant had committed the trespass, if any was committed, only through its agent. At the trial the appellant introduced as a defense the judgment exonerating the defendant first above referred to. The reviewing court, holding that the defense should be sustained, said:

"But where the real actor, none the less liable personally because acting for another, is not guilty, it necessarily follows that the party for whom he acted cannot be. The principal can be no more guilty by reason of the act of his agent than if he had committed the act in person, and the party who was alone charged to have committed the act in person was conclusively adjudged not guilty. We see no * * * escape from our conclusion, * * * and for authority refer to Thomas v. Rumsey, 6 Johns. (N. Y.) 26, and Emery v. Fowler, 39 Me. 326, 63 Am. Dec. 627."

In Doremus v. Root et al., 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649, the plaintiff brought the action against Root and the Oregon Railroad & Navigation Company for damages for injuries sustained by the plaintiff in a collision between two freight trains of the railroad company. Root was the conductor of one of the trains, and the plaintiff a fireman on the other. The collision was due, so it was alleged, to the failure of Root, who had been duly apprised of an approaching train from the opposite direction, to obey instructions given him to stop and side-track his train at a certain named station and there wait until the other train passed. The verdict rendered was in favor of the plaintiff as against the railroad company, but was silent as to Root, and the Washington court held such silence to be tantamount to an acquittal of Root of culpability. Judgment was rendered upon the verdict in favor of the plaintiff against the railroad company and in favor of Root, and the Supreme Court reversed the judgment and remanded the case, with instructions to the court below to enter judgment for the railroad company. The principle above referred to was elaborately considered in that case, the court holding that the exoneration of Root from legal responsibility for the injuries received by the plaintiff necessarily operated to acquit the railroad company of blame. The court, among other things, said:

"It must be borne in mind, however, that there are wide distinctions between the ordinary action for injuries, where all of the defendants participated in the wrongful act which caused the injury, and actions like the one before us, where one is liable because he committed the act and the other by operation of law, both with respect to the relations of the defendants to each other and to the injured person. Joint tort-feasors are liable to the injured person (other than that he may have but one satisfaction), as if the act causing the injury was the separate act of each of them, and they have, except in certain special cases, no right of contribution among themselves. But the defendants in this character of action are in no sense joint tort-feasors, nor does their liability to the plaintiff rest on the same or like grounds. The act of an employé, even in legal intendment, is not the act of his employer, unless the employer either previously directs the act to be done or subsequently ratifies it. For injuries caused by the negligent act of an employé not directed or ratified by the employer, the employé is liable because he committed the act which caused the injury, while the employer is liable, not as if the act was done by himself, but because of the doctrine of respondeat superior—the rule of law which holds the master responsible for the negligent act of his servant, committed while the servant is acting within the general scope of his employment, and engaged in his master's business. The primary liability to answer for such an act therefore rests upon the employé, and when the employer is compelled to answer in damages therefor he can recover over against the employé. Oceanic Steam Nav. Co. v. Compania Trans. Espanola, 134 N. Y. 461 [31 N. E. 987, 30 Am. St. Rep. 685]; note to Village of Cartville v. Cook [Ill.] 16 Am. St. Rep. 248; 1 Shearman & Redfield, Negligence (5th Ed.) § 242; 2 Van Fleet, Former Adjudication, p. 1162. * * * In such an action, whether brought against the employer severally or jointly with the employé, the gravamen of the charge is, and must be, negligence of the employé, and no recovery can be had unless it be proven, and found by the jury, that the employé was negligent. Stated in another way: If the employé who causes the injury is free from liability therefor, his employer must also be free from liability."

See, also, Railroad Co. v. Jopes, 142 U. S. 18, 12 Sup. Ct. 109, 35 L. Ed. 919.

In Bradley v. Rosenthal, 154 Cal. 420, 97 Pac. 875, 129 Am. St. Rep. 171, the plaintiff sued for the recovery of damages for injuries sustained while engaged in working for the defendant corporation, the complaint alleging that the plaintiff was employed by the company through Rosenthal, its agent, to assist in constructing telephone lines for the company, that the defendants carelessly, etc., furnished certain poles from which the wires were to be strung which were very brittle and unfit for said purpose, and that while

he was in the act of ascending one of said poles, in a careful and workmanlike manner, for the purpose of adjusting the wires thereto, said pole, "by reason of its brittleness and unfitness for said purpose, broke," the result of which was that he was thrown violently to the ground, receiving the injuries for which he sought damages. The defendants interposed separate answers, Rosenthal admitting his employment by the company as a lineman and that he employed the plaintiff, but averred that in the employment of plaintiff he did so solely as the agent of the company. He denied the furnishing of unfit and unsuitable poles. The cause was tried by a jury, and to them the trial court gave an instruction that, if Rosenthal was the agent of the company, and in his capacity as such agent employed the plaintiff, "you cannot find or assess damages against him." The jury found for Rosenthal, exonerating him from liability for the injuries received by the plaintiff and in favor of the latter as against the telephone company, and judgment was entered accordingly. Reversing the judgment, the Supreme Court said:

"Not one word of evidence tends to establish any direct personal participation, personal knowledge, or personal culpability upon its [the company's] part, or that its employé Rosenthal was in any way carrying out its express instructions in the particular matter for the doing of which negligence is charged; that under such circumstances the employer is liable only because of the rule of law which holds him responsible, as well for the undirected as for the directed act of the agent within the scope of his employment; that in such kind of cases, where there have been no express instructions for the doing of the act complained of in the particular way, the principal and agent, master and servant, are not joint tort-feasors. * * * The employé's responsibility is primary. He is responsible because he committed the wrongful or negligent act. The employer's responsibility is secondary, in the sense that he has committed no moral wrong, but under the law is held accountable for his agent's conduct. While both may be sued in a single action, a verdict exonerating the agent must necessarily exonerate the principal, since the verdict exonerating the agent is a declaration that he has done no wrong, and the principal cannot be responsible * * * if the agent has committed no tort. While no right of contribution exists between joint tort-feasors, whether sued separately or collectively, there exists in the kind of case here presented much more than the mere right of contribution. The principal who has been obliged thus to pay for the unauthorized negligent act of his agent resulting in injury may indemnify himself to the full amount against his agent."

See, also, Thompson v. S. P. Co., 31 Cal. App. 567, 575, 161 Pac. 21; 1 Cooley on Torts, (3d Ed.) 255, and the cases cited in Bradley v. Rosenthal, on pages 424 and 425 of 154 Cal., 97 Pac. 875, 129 Am. St. Rep. 171.

The record in this case does not disclose a particle of evidence showing or even tending to establish any "direct personal participation, personal knowledge, or personal culpability" upon the part of the appellant, "or that its employé, McKnight, was in any way carrying out its express instructions in the particular matter for the doing of which negligence is here charged." Therefore, as stated in the outset of this opinion, unless it is appropriately claimed by the complaint and shown by the evidence that the appellant personally participated in the negligence of which McKnight is alleged to have been guilty, or itself committed some act or acts of negligence, either of omission or commission, other than and separate from the act of negligence charged against McKnight, which contributed to the damage complained of, or, concurring with the negligence charged against McKnight, produced said damage, the judgment against the appellant cannot, upon the doctrine asserted in the cases above referred to and quoted from, be upheld. And that appellant was guilty of an act of negligence, separate and distinct from that charged against its employé, McKnight, which, in conjunction with that of McKnight, proximately caused the death of the deceased, is precisely what the respondent here claims as an offset to the ineluctable effect of the above-considered decisions in cases of this kind.

[2] It is contended that the plaintiff, in her complaint, not only pleads acts of negligence on the part of the engineer which bring home to the appellant liability for its servant's said acts under the rule of respondeat superior, but further pleads that the appellant itself was negligent in that, at and in close proximity to the crossing where the unfortunate accident occurred, it maintained permanent buildings, and, at the time of the accident, had side-tracked and maintained box cars near said crossing, which buildings and box cars so obstructed the view of the crossing by those in charge of a locomotive traveling in a southerly direction as to prevent them from seeing the crossing.

Thus an examination herein of plaintiff's pleading becomes necessary. First, it is well to state the well-understood rule of pleading in negligence cases that, while general negligence may thus be relied upon without pleading specific acts of negligence, yet, where specific acts of negligence are relied upon for a recovery, they must be specially pleaded. The charging part of the complaint is as follows:

"That while said Thomas V. Fimple was operating and driving said automobile along said public highway and county road as aforesaid, and as said automobile reached said public crossing at the point hereinabove alleged, at about the hour of 12:57 p. m. on said 14th day of July, 1914, and was crossing over and across said tracks of said defendant Southern Pacific Company, said defendant Southern Pacific

Company, through and by its agent, servant, and employé, defendant William J. McKnight, who was then and there the locomotive engineer and engine foreman in charge of said locomotive, *negligently and carelessly, without whistle being blown or bell rung or any warning or signal of any kind or character being given before reaching said public highway and county road* [italics ours], ran one of its locomotives, operated by steam, in a southerly direction along said tracks, across said highway and county road at said crossing, at a great and negligent rate of speed; that the defendants negligently and carelessly operated said locomotive at a high and careless rate of speed at said place, notwithstanding the fact that said public crossing was concealed from view by buildings and box cars along the side of said crossing, which said buildings and box cars obstructed the view thereof by the persons in charge of said locomotive, which fact was well known to said defendants at and prior to said 14th day of July, 1914; *that, by reason of said negligent and careless rate of speed, and by reason of said careless and negligent operation of said locomotive, and by reason of the careless and negligent omission and failure to blow a whistle, or ring a bell, or to give any warning or signal of any kind or character before reaching said public highway and county road as aforesaid, the said locomotive struck said automobile* [italics ours], which said Thomas V. Fimple was operating and driving as aforesaid, throwing said Thomas V. Fimple out of said automobile a distance of 20 or 30 feet, thereby killing said Thomas V. Fimple; that said defendant William J. McKnight was at all of the times mentioned herein the locomotive engineer in charge of said locomotive, and was acting jointly in conjunction with said defendant corporation, in the care, management, direction, and control thereof at said time."

[3] It will not be denied that, if the plaintiff intended to rely upon the maintenance of the alleged obstruction referred to as a ground for recovery against the appellant, it was requisite that the alleged negligence therein involved should have been specially pleaded and in such manner as clearly to show that, by reason of such negligence, the appellant itself contributed to the damage complained of.

It is not necessary to take apart or analyze herein the averments of the complaint, and thus consider them to show that nowhere does that pleading disclose any act or acts of negligence except those involved in the allegations italicized above, which are confined to the alleged acts of negligence of the engineer in running the train at a great and an unauthorized rate of speed and the failure of the engineer to sound a whistle or ring a bell or give any other of the usual warnings of the approach of trains to a station or a crossing. While the complaint plainly says that, "by reason of said negligent and careless rate of speed, and by reason of said careless and negligent operation of said locomotive, and by reason of the careless and negligent omission and failure to blow a whistle, or ring a bell, or to give any warning or signal of any kind or character before reaching said public highway," etc., there is no averment that the deceased lost his life by reason of the obstruction of the view of the crossing because of the buildings and box cars referred to so that said crossing could not be seen by those having charge of the locomotive at the time of the accident.

In Thompson v. S. P. Co. et al., 31 Cal. App. 567, 161 Pac. 21, supra, the complaint alleged that, for a long time prior to the time of the accident therein complained of, the railroad company negligently and carelessly permitted to grow up and mature on the right of way of its track where the same crossed the public highway at which the company's train collided with the plaintiff's automobile, resulting in the injuries complained of, a dense growth of sunflowers and weeds to such a height that thus the view was so obstructed that a person traveling on said highway in an easterly direction across the company's track could not see the railroad track or a locomotive engine or a train of cars thereon for any distance looking in the southeasterly direction of said railroad track, "except at a point near and almost immediately upon said railroad track."

The gravamen of the plaintiff's cause of action as it was set forth in the complaint in that case was that the engineer and fireman in charge of the locomotive failed, upon approaching the crossing where the alleged injuries were received, to give warning in due time of the approach of the train by blowing a whistle or ringing a bell or otherwise signaling its approach to the crossing.

It is plainly manifest that the allegations in that case as to the weeds and sunflowers growing near the track of the company, thereby obstructing the view of approaching trains, come much nearer to charging that the railroad company actually participated in the accident than do the allegations as to alleged obstruction caused by the buildings and box cars in this case; yet this court, in the Thompson Case, referring to the contention that "appellant did actually participate in the accident by reason of permitting the growth of weeds and trees so as to obstruct the view of the track," said:

"But from respondent's standpoint upon the assumption that he was exercising ordinary care, it is quite clear from the record that he would have been apprised of the danger if the bell had been properly rung and the whistle sounded. He can justify his cause of action only upon the theory that these precautions were omitted. If he had conceded that these usual warnings were sounded, he would have had no cause with which to go to the jury, as he showed no reason why he would or could not have heard them in time to avoid the collision. Indeed, he alleges in his complaint that he would have heard the warning if it had been given. The presence of the weeds simply emphasized

the importance and duty of great care on the part of those in charge of the train, and we repeat that, since they were acquitted of negligence, the jury, to be consistent, should have gone a step further and exonerated the appellant."

[4] As before stated, the negligence pleaded and so relied upon by the plaintiff in this case is in the omission of the engineer to sound the whistle and ring the locomotive bell, and, as in the Thompson Case, the maintenance of the obstruction referred to only made it the more imperative that that duty should have been performed by the engineer as his train approached the crossing. But, after all, we are not prepared to say that the mere maintenance of the buildings and the side-tracking of the cars as indicated would constitute negligence in the appellant, unless it were additionally shown that the company had also negligently failed to employ the necessary means for protecting the traveling public against the added danger, if any, which had been created in and about the crossing by reason of the presence of the said buildings and box cars. Weeds and sunflowers have absolutely no value, so far as a railroad is concerned, but, indeed, are a nuisance where they are permitted to grow along the roadway of a railroad to a height to interfere with the proper and safe operation of railroad trains. Buildings erected near railroad tracks are generally put there for some purpose in connection with the business of the railroad, and the side-tracking of box cars on sidings may always be assumed to be necessary for the purposes of the company's traffic. Neither is a nuisance of itself, and can only become so when it is shown either that they are unnecessarily maintained, or are put in a place where the exigencies of the company's business and traffic do not require them to be maintained, or where their maintenance, though necessary for the business of the company, has had the effect of making a crossing near which they are maintained more dangerous or perilous for use by the traveling public and the company has not employed added precautions for the safety of the public commensurate with the perils of the crossing thus added thereto.

Thus we are constrained to reverse the judgment. It is not necessary, in view of the law applicable to this case, for us to decide whether there is evidence sufficient in probative force to support the finding of the jury that the death of Fimple was due to the negligence of the engineer by failure to give due and proper and the usual warning of the approach of the train toward the crossing; yet it is not at all improper to say that, if the negligence of the engineer, as claimed, was at the bottom of the unfortunate and fatal accident which is responsible for this action, it is greatly to be deprecated that the law—the law as we have presented it herein and which has been plainly laid down and explained by the higher courts—is such that the guilty cannot be made to suffer for the consequences of their culpability, and, at the same time, those who have therefrom suffered so grievous a wrong given some reparation for the great loss sustained. But a fundamental mistake in this case, in view of the law as it has been expounded and is now applied by the courts in this kind of a case, was in joining the engineer with the appellant as a defendant, even though it may be true, as has been expressly held to be so in some other jurisdictions, that a railroad company or other defendant, in a case for the recovery of damages for a tort, may compel his servant, who has negligently committed an injury to person or property while engaged in performing his duties as such servant to come in and defend the action, if such servant has not already been joined as a defendant by the plaintiff. A verdict against the principal, if there was evidence to support it, would be upheld, and if it transpired that the delict complained of was the result solely of the negligence of the servant, or that the principal did not personally participate in such negligence, the matter of reimbursement of the principal for the loss so sustained by reason of the negligence of his servant would be a matter to be fought out between the principal and his culpable employé.

But, as declared, we are required to apply the law as we find it laid down to the facts as they have been made to appear in the record, and, thus guided, there is no other alternative open to us in this case but to reverse the judgment, and such is the order.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Rehearing.

PER CURIAM. In an application for a rehearing of this case it is intimated that it was the duty of the fireman on the locomotive to ring the bell and sound the whistle as the train approached crossings, and that in this case, therefore, the negligence of the Southern Pacific Company results from the failure of the fireman, who was not made a party to this action, to give those warnings as the train was approaching the crossing where the automobile was struck by the locomotive.

[5, 6] There are, we think, two answers to the proposition so made, viz.: (1) That the undisputed testimony of the engineer is that he, as such engineer, was in charge of the locomotive on the occasion of the accident, and from this testimony it is to be assumed, if not presumed, that the fireman, in the discharge of his duties as such, was entirely subject to the control and orders of the engineer, and whether in such case the fireman's duty was to sound the whistle or ring the bell, or to perform both such acts, when ordered by the engineer to do so, is not ma-

terial; (2) that the complaint contains no charge of negligence against the fireman and nowhere attempts to impute to the Southern Pacific Company any negligence of which the fireman might have been guilty. To the contrary, the complaint alleges that the engineer, McKnight, was "the locomotive engineer and engine foreman in charge of said locomotive," and that the "said defendant Southern Pacific Company, through and by its agent, servant, and employé, defendant William J. McKnight, negligently and carelessly" did the damage complained of. Thus it is very clear that the plaintiff did not rely upon the negligence of the fireman, if any he was guilty of, but that the whole theory of her case, as made by her complaint, was that, if the Southern Pacific Company was at all culpable in the matter, it was wholly through the alleged negligence of McKnight, the engineer then in charge of the locomotive. We think that, if the plaintiff intended to rely upon any negligence of the fireman, and thus connect the Southern Pacific Company with such negligence upon the doctrine of respondeat superior, it was incumbent upon her to plead such negligence, just as it would have been her duty to do if she had relied on negligence of the company's station agent or any other servant of the defendant company.

As gratifying as it would certainly be to this court to see the plaintiff receive adequate compensation for the great loss she has sustained, assuming that the damage was the direct result of the negligence of the company's locomotive engineer and servant, we cannot see our way clear to recede from the conclusion at which we originally arrived herein.

The petition must be denied; and it is so ordered.

---

38 Cal. App. 764

## HIRSCH v. JAMES S. REMICK CO. et al.

(Civ. 1899.)

(District Court of Appeal, Third District, California. Nov. 26, 1918.)

1. DEATH ⟸49(1) — ACTION FOR DAMAGES — PLEADING.

A complaint in an action for damages for death is demurrable unless it alleges that the deceased left heirs.

2. APPEAL AND ERROR ⟸1040(10) — HARMLESS ERROR—PLEADING.

Error in overruling a demurrer to a complaint in an action for death, it not being alleged that deceased left heirs, was cured, where plaintiff, without objection, introduced evidence on the trial showing that deceased left heirs, naming them.

3. MUNICIPAL COPORATIONS ⟸821(17)—SIDEWALKS — IRON DOORS — NEGLIGENCE—JURY QUESTION.

A vault under a sidewalk, covered by iron doors of standard size, set in the pavement in the customary manner, and forming a part of the sidewalk when closed, was not in itself a nuisance, and its maintenance did not constitute negligence per se.

4. MUNICIPAL CORPORATIONS ⟸808(7)—SIDEWALKS—VAULTS UNDER SIDEWALKS—ORDINANCES—NEGLIGENCE.

The construction and maintenance of a vault under a sidewalk containing an elevator and covered by iron doors of standard size forming a part of the sidewalk when closed, and leaving a passageway of seven feet when open, was not a violation of Ordinances Nos. 346 and 716 of the city of Sacramento, providing that passageways to basements should be within the four feet next the building line, but that merchants or persons having occasion to receive or deliver goods could use the sidewalk in the daytime.

5. MUNICIPAL CORPORATIONS ⟸821(17) — VAULTS UNDER SIDEWALK—IRON DOORS—NEGLIGENCE—QUESTION FOR JURY.

In an action for death of one who fell into a vault under a sidewalk protected by open iron doors 25 inches high, on a damp, foggy evening, when it was growing dark, an electrically lighted electrolier 27 feet away being dimmed one-third by coloring the burners, whether the abutting owner was negligent *held* for the jury.

6. TRIAL ⟸136(3) — CONSTRUCTION OF CITY ORDINANCES—QUESTION FOR COURT.

The meaning of an unambiguous city ordinance is for the court and not the jury to decide.

Appeal from Superior Court, Sacramento County; H. D. Burroughs, Judge.

Action by Philip Hirsch, as executor of the estate of Markus Hirsch, sometimes known as M. Hirsch, deceased, against the James S. Remick Company, a copartnership, and James Samuel Remick and John W. Haley. Judgment for plaintiff, and defendants appeal. Reversed.

C. E. McLaughlin and C. P. McLaughlin, both of Sacramento, for appellants.

Martin I. Welsh and Ralph W. Smith, both of Sacramento, for respondent.

CHIPMAN, P. J. The action is for the recovery of damages arising from the alleged negligence of defendants whereby plaintiff's testate was injured.

It is alleged in the complaint:

That defendants were, on December 24, 1915, conducting a store at the southwest corner of Eleventh and J streets, Sacramento. That on the Eleventh street front of said store and under the pavement or sidewalk defendants maintained an area or basement, and, for the purpose of lowering and raising articles of merchandise to and from the floor of said area to the surface of the sidewalk, defendants constructed and used a shaft in which was installed an elevator. Two ordinances of the city of Sacramento—Nos. 346 and 716—are pleaded as

the basis for the averment that defendants unlawfully maintained said shaft. "That the sidewalk in front of the said store of defendants on Eleventh street, in the city of Sacramento, county of Sacramento, state of California, is some fifteen feet in width. That at a point on the said sidewalk about 60 feet southerly of the southwest corner of the curb at Eleventh and J streets, and about 8 feet to the east of the most easterly outer wall of the building occupied during all of said times by defendants' store, and about 3 feet west of the outer or eastern edge of the said sidewalk, the defendants did, during all the times herein mentioned, negligently, imprudently, and unlawfully use and maintain in the said sidewalk at the point aforesaid, above the shaft of the said elevator, the point being at a distance of more than 7 feet to the east of the most outerly easterly wall of defendants' store, a rectangular hole or opening some 5 feet square, and during all of said times herein mentioned failed and neglected to construct, maintain, equip over, about, or around the said rectangular hole or opening any barrier, fence, light, rail, protector, or warning of any kind whatever. That on the 24th day of December, 1915, in the nighttime of said day, at or about the hour of 5:30 o'clock p. m., Markus Hirsch, sometimes known as M. Hirsch, while proceeding as a pedestrian walking in a northerly direction, upon the sidewalk in front of the store of defendants on Eleventh street, the city of Sacramento, state of California, while so using the sidewalk as aforesaid, he fell into the said rectangular hole or opening in said sidewalk, to the floor of the open area, basement, and cellar below, fatally injuring the said Markus Hirsch, sometimes known as M. Hirsch, from which injuries he died on the 24th day of December, 1915, all to the loss and damage of this plaintiff in the sum of $10,000."

A general and special demurrer was overruled, and defendants answered denying the accusatory averments of the complaint, and alleged that "said shaft or opening in the sidewalk on Eleventh street was guarded by perpendicular iron barriers 25 inches in height above the sidewalk on the northerly and southerly sides of said shaft or opening and on the east and west ends of said shaft or opening by iron rods; that at all times during said use on said day said barriers were visible to any person walking northerly or southerly on Eleventh street, for a distance of more than 150 feet"; that deceased well knew of the existence of said shaft and the purpose for which it was used, and that by the exercise of ordinary care he could have seen and have avoided said shaft and could have used the sidewalk between said shaft and the wall of said store "which was clear of all obstructions for a width of about seven feet"; that on said December 24, 1915, and a few minutes before he was injured, he passed southerly along Eleventh street between said opening and the wall of said store, and then and there observed and knew that said shaft was being used by defendants and the purpose for which it was being used, and observed the said iron doors forming a barrier 25 inches in height above the sidewalk, and observed the said clear space of 7 feet between said shaft and said building; that the injury and death of deceased alleged in the complaint were caused by his own negligence and want of ordinary care, and could have been avoided had he exercised ordinary care by the use of said open space next to the wall of said building; denied that deceased was injured at 5:30 o'clock p. m. of said day or at any hour later than 5 o'clock p. m.

The cause was tried by the court with a jury, and plaintiff had the verdict. Judgment was accordingly entered, from which defendants appeal.

[1, 2] Defendants' first point is that the complaint is fatally defective in failing to allege that the deceased left any heirs. The general demurrer should have been sustained on this ground, for it is well settled that the action runs to the heirs only, and that a recovery is for their benefit, and not for the benefit of the estate of the deceased. Munro v. Dredging, etc., Co., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248; Ruiz v. Santa Barbara Gas & Electric Co., 164 Cal. 188, 192, 128 Pac. 330. It appears, however, from the record that, without objection, plaintiff introduced testimony showing that the deceased left heirs, naming them. Under similar circumstances, we held, in Slaughter v. Goldberg, Bowen & Co., 26 Cal. App. 318, 147 Pac. 90, that the admission of evidence without objection cured the omission of the allegation as to the existence of heirs. We did not, as appellants seem to read the opinion, rest the decision on the fact that the omission was cured by the answer. A petition to the Supreme Court for a hearing of the case in that court was filed and especial attention given in the petition to the point now here. The petition was denied, and we must assume that the Supreme Court concurred in the view of the question taken by this court. The point was referred to in Boyle v. Coast Improvement Co., 27 Cal. App. 714, 151 Pac. 25, and the decision in the Slaughter Case was affirmed. A hearing in the Supreme Court in the Boyle Case was also denied. We gave the question our best attention in Slaughter v. Goldberg, Bowen & Co., and, notwithstanding the able argument now presented by the learned counsel for the defendants, we must adhere to our decision heretofore rendered. See Noakes v. City of Los Angeles, 175 Pac. 409.

The sidewalk on Eleventh street is 14 feet wide. In this sidewalk 2 feet from the curb is the opening into which deceased fell. The opening is 5 feet east and west and 4 feet north and south and is covered by two iron doors flush with the sidewalk when in place. When open, these iron doors, one on each side, 25 inches in height, stand upright and are held in position by an iron rod across the west side of the shaft. An elevator is operated in this shaft to carry goods to and

from the basement or area under the sidewalk. At the time of the accident, the elevator platform was at the bottom of the shaft and it was not for the moment then being used. There was an electrically lighted electrolier near the curb 27 feet north of this opening and another similar one 74 feet south of this shaft. They had, however, been dimmed by coloring the burners so as to diminish the radiance of the lamps one-third. It was a damp, foggy evening and growing dark. The sun set on that day at 4:35 p. m. Deceased left his store on J street between Tenth and Eleventh streets at about 5 o'clock that evening to purchase some coffee at a store on the corner of Eleventh and K streets. He passed this shaft in going and was met on his way back by a witness between the corner of Eleventh and K and the opening. This was about 5:15 or 5:30 p. m. Continuing his course north, deceased fell into this shaft and received injuries from which he died during the same night. No witness saw him fall into the shaft.

It is contended by respondent that said shaft was constructed and is being used in violation of the ordinances above referred to, and hence was a nuisance and constituted negligence per se. This contention is stoutly contested by defendants, thus presenting an important and perhaps the principal question in the case.

The court instructed the jury as follows:

"When the owners or occupants of property abutting on the public highway do anything or continue the use of anything that will obstruct the free passage of the public upon such highway, street, or sidewalk, such parties are maintaining a nuisance if they maintain the same contrary to the provisions of the law regarding the same. In this connection, I will read to you the ordinances of the city of Sacramento relating to the regulating and use of sidewalks. (Here reads Ordinances Nos. 346 and 716.)"

Then follows an instruction to the effect that—

If the jury find that defendants were using or maintaining "the alleged area, basement window, or cellarway in the sidewalk," and that the said opening "was not kept or maintained or continued in use in accordance with the terms of the ordinances just read," the defendants "were guilty of maintaining a nuisance, and the defendants would be liable to persons who sustained injuries as the proximate result of the maintenance of the said nuisance, if such injuries were sustained by said party when he was in the exercise of ordinary care."

The court gave the following instruction:

"The court instructs the jury that if you find from the evidence that the defendants were maintaining an opening in the said sidewalk in which the deceased fell, and that in so maintaining the same they were violating the provisions of the said ordinances of the city of Sacramento, and such violation of the ordinances was the proximate cause of the decedent's death, and that the decedent at such time was in the exercise of ordinary care, it is your duty to find for the plaintiff."

Defendants requested an instruction which set forth the uncontradicted facts as to the place where the shaft was constructed and the manner of its construction, and stated that, if the jury should find the facts thus set forth to be true, then "the maintenance and use of said opening and said iron doors was not in and of itself a nuisance, or in violation of the ordinances introduced in evidence in this case." The court refused to give this instruction. Another instruction requested by defendants was refused, reading as follows:

"If you find from the evidence that the opening in the sidewalk through which deceased fell was used by defendants for business purposes, and that the iron doors when closed constitute part of the pavement, and when opened constitute a guard or railing on each side of the opening, then you are instructed that such iron doors and their use are not forbidden by the ordinances introduced in evidence and did not constitute a nuisance."

Another instruction requested by defendants was refused, which instructed the jury "that the iron doors and opening maintained and used by defendants were not forbidden by said ordinances."

"There is no rule of law better established than that the construction of written instruments is a matter of law for the court, and not of fact for the jury, unless when the meaning and construction are doubtful and depend upon extrinsic evidence." Aguirre v. Alexander, 58 Cal. 30.

"It is error for the court to submit to a jury the question of the legal effect of written documents offered in evidence during the trial." Syl. Carpentier v. Thirston, 24 Cal. 269, 285.

It was the contention of respondent at the trial, and is his contention here, that the construction and maintenance of this opening or shaft was unlawful because in violation of the ordinances pleaded; and that this unlawfulness did not consist in the character of the shaft or opening, but in its position; that the ordinance authorized only the opening or stairway next to the building. It seems to us that, when the instructions given and refused are considered, the court not only left the question of the construction to be put upon the ordinances to the jury, but conveyed the impression to the jury that the shaft or opening in question was in violation of the ordinances, and hence a nuisance.

Section 1 of Ordinance No. 346 provides for the construction of a passageway to the cellar or basement next to the building, in doing which not more than four feet of the sidewalk next to the building shall be used and must be inclosed by "a strong iron railing" and in a "manner to prevent accident to foot passengers." Section 2 authorizes business firms "to occupy three feet of the sidewalk from the building line, for the purpose

of exhibiting their wares during business hours." Then follows the proviso:

"That merchants or persons having occasion to receive or deliver goods may use such sidewalk for the period not to exceed ten hours in the daytime for the purpose of receiving and discharging such goods; and provided further that a space of six feet in width shall at all times be kept clear for the accommodation of persons passing."

Section 3 allowed a space of four feet of the sidewalk for stairway entrances to the first floor of any building erected prior to June 1, 1894.

Ordinance No. 716 amends section 2 of Ordinance 346 by providing for the space of three feet next to the building for accommodating bicyles and also for space at the outer edge of the sidewalk for bulletin boards for managers of theaters and newspapers. The remaining portion of section 2 is the same as in Ordinance No. 346, namely:

"That merchants having occasion to receive or deliver goods, may use the sidewalk in front of the premises occupied by them for a period of not exceeding ten hours in the daytime for the purpose of receiving or delivering such goods; * * * and provided further, that a space of six feet in width shall at all times be kept clear for the accommodation of persons passing."

The provisions of the ordinances relating to receiving and delivering goods authorized the use of the sidewalk next to the curb for that purpose. It has been held that the abutting owner, whose rights extend to the center of the street, may excavate a vault or cellar under the sidewalk. Elliott on Roads and Streets, § 690, and cases cited. Where the area under the sidewalk is utilized for storage purposes and to receive and discharge goods, which is quite common in cities and in towns of considerable importance, the universal custom is to effect those objects by constructing and using an opening in the sidewalk near the curb, just such as was constructed and used in the present case.

[3] The evidence was that the iron doors used by defendants were of standard size and set in the pavement in the customary manner and when closed formed a part of the sidewalk. In itself it was not a nuisance and did not constitute negligence per se. The Supreme Court, in Rider v. Clark, 132 Cal. 382, 385, 64 Pac. 564, 566, speaking of just such an opening and covering as here said:

"It is generally the usage and custom to allow openings to be made in the sidewalks of cities, in order to obtain entrance into the basement, such openings and the coverings thereof being subject to proper municipal regulation"—citing cases, and 2 Dillon on Municipal Corporations, § 699.

Morrison v. McAvoy, 70 Pac. 626, 7 Cal. Unrep. Cases, 37, was a case where an ordinance of the city of Oakland was drawn in question. In that case an opening in the sidewalk near the curb was made as in this case and for like purposes, the only difference being that the iron doors were 16 inches in height when open, whereas in the present case they were 25 inches and the area underneath the sidewalk was utilized by stairs in the opening instead of an elevator as here. The ordinance provided that "no person shall * * * so occupy or obstruct any sidewalks as to interfere with the convenient use of the same by all passengers"; also, that "every person shall keep around every * * * flight of stairs descending from the sidewalk to the basement owned or occupied by him, a fence or railing at least three feet high." Plaintiff, walking along the sidewalk in the daytime, fell into this opening and was injured. She brought the action, alleging a violation of the ordinance. A demurrer to the complaint was sustained by the lower court and the judgment on appeal was affirmed. Said the court:

"The iron doors appear not to have been an obstruction when closed, and no defect in the manner of their construction is alleged, and it is averred that they constituted part of the pavement when closed. Such doors, as means of ingress and egress to and from the basement of buildings in towns and cities, are not unusual, and do not constitute a nuisance per se, and are not forbidden by the ordinance pleaded"—citing Rider v. Clark, 132 Cal. 382, 64 Pac. 564.

Speaking further of the situation, the court said:

"The first part of the ordinance above quoted was not infringed by the construction of the doors, for they formed part of the sidewalk, and were safe when closed, so far as is alleged. The second portion of the ordinance refers to open stairways as they are sometimes constructed next to the building, or next to the curb, and where the protection around the stairs is by a railing; in which case the protection or railing must be three feet high, and is permanent, and is the only protection required. The iron door openings in the present case are entirely different, and the usual protection to pedestrians are the sides of the door, as was the case of Rider v. Clark. The complaint seems to proceed upon the theory that the opening, with the doors, the stairs, and the cellar, were all unauthorized, and in violation of the ordinance, and together constituted a nuisance. There is nothing to show that the use of the basement by these means was unauthorized, except the ordinance, and this does not go so far."

In further considering the case, the court said:

"If there had been a distinct allegation—which there is not—that the sides of the door were not high enough to offer reasonable protection to footmen in the daytime, or had alleged clearly that the doors were opened out and laid flat on the pavement, offering no protection, there would have been a different case

presented." Again, "plaintiff might have presented the distinct issue, on which she would have the right to be heard, that the iron doors, when open and standing upright, was a negligent and dangerous use made of the opening to the basement, irrespective of the ordinance. She evaded this issue, and relied on the prohibitions of the ordinance, which, as we have seen, do not cover her case."

[4] In the present case, while general negligence was in part relied upon and it was not necessary that the specific acts constituting such negligence should be alleged, this issue is entirely distinct from the issue arising from the claim that the opening in the sidewalk constituted a nuisance per se. To hold that such use of the sidewalk is in itself a nuisance, importing negligence per se, would be a serious infringement of a right universally exercised and having the sanction of long and well-recognized usage by the owners of business houses on lots abutting on public streets. That the city council was aware of this usage when it enacted these ordinances cannot be doubted. It is very clear that the ordinances in question do not in terms forbid such use. The only regulation or restriction coupled with the use as given is that it shall not exceed 10 hours in the daytime and that a space of six feet in width shall at all times be kept clear for the accommodation of persons passing. In the present case it appeared that there was a clear space of seven feet between the opening and the store building.

We have considered this question quite apart from the further question of general negligence involved in the issues arising out of the circumstances and facts relating to the manner in which the shaft and elevator were being used at the time of the accident, and the alleged negligence of defendants in connection therewith.

Considering the condition of the weather, the lateness of the hour in the day, that there was no one at the opening or using it at the time of the accident, and that the elevator was at the bottom of the shaft, the question of negligence imputed to defendants, as well as the question of the contributory negligence of deceased, claimed by defendants, was for the jury.

[5] If we could say that the verdict rested alone on defendants' negligence in leaving the shaft open under the circumstances shown, there would be no ground for disturbing the judgment. But as we think the jury were given to understand that this opening in the sidewalk was a nuisance and constituted negligence per se, we cannot say but that this view of the situation controlled the verdict and relieved the jury from considering the question of defendants' negligence as a question of fact.

[6] We think it was prejudicial error to send the case to the jury with instructions in effect implying that this opening on the sidewalk constituted a nuisance and in refusing to instruct them as to the meaning of the ordinances in this regard.

The judgment is reversed.

We concur: BURNETT, J., HART, J.

---

(39 Cal. App. 39)

INTERNATIONAL MORTGAGE BANK v. EATON et al. (Civ. 2548.)

(District Court of Appeal, First District, Division 1, California. Dec. 3, 1918.)

1. MORTGAGES ⟸159—AGREEMENT AS TO PRIORITY OF LIEN—VALIDITY.

Instrument signed and delivered by defendants appellants before plaintiff mortgagee advanced money to mortgagors, and providing that any lien of defendants should be subordinate to plaintiff's mortgage, *held* valid, and, although it contained the words "have borrowed," to be a part of consideration supporting plaintiff's promise to make loan for which mortgage was given.

2. EVIDENCE ⟸419(10) — CONSIDERATION — PAROL EVIDENCE.

In action to foreclose a mortgage plaintiff mortgagee was entitled to show what the actual consideration was and when it passed, in view of Code Civ. Proc. § 1962, subd. 2, as to presumption from facts recited, not applying to recital of consideration, and Civ. Code, § 1647, as to explanation of contract by reference to circumstances.

3. MORTGAGES ⟸486—FORECLOSURE—RIGHTS WHICH MAY BE ADJUDICATED.

Appellants, who made some improvements on mortgaged premises without first having obtained a contract from the mortgagee or mortgagors for reimbursement, *held* to have no rights which could be enforced in mortgage foreclosure action.

Appeal from Superior Court, Santa Cruz County; Benj. K. Knight, Judge.

Action by the International Mortgage Bank, a corporation, against Robert W. Eaton, George Sully, Matilda Sully, his wife, and others. Judgment for plaintiff, and George Sully and wife appeal. Affirmed.

Reed, Nusbaumer & Bingaman, of Oakland, for appellants.

H. A. Van C. Torchiana, of San Francisco, and Wyckoff & Gardner, of Watsonville, for respondents.

STURTEVANT, Judge pro tem. This is an action brought by the plaintiff to foreclose a mortgage against R. W. Eaton and E. Steinhauser, the mortgagors. Judgment went for the plaintiff against a large number of defendants; but George Sully and Matilda Sully are the only defendants who have ap-

pealed. They have presented their appeal as under section 953a, Code of Civil Procedure. By the record they have made, they make one contest as against the plaintiff and another as against some of their codefendants. As the principles involved are quite different, we will take up the two contests separately in the order as stated above.

1. If the plaintiff's lien is superior to the claim of the Sullys, the judgment should be affirmed as to the respondent, the plaintiff in the trial court. This question is hardly debatable. When the loan of the money by the plaintiff to the mortgagors was about to be made, it transpired that there were of record certain instruments which the plaintiff desired to be protected against; and the Sullys executed and delivered, before the money was paid over, an instrument, in part as follows:

"Know all men by these presents:

"That whereas, on the 17th day of March, 1913, by written instrument of that date, R. W. Eaton and E. Steinhauser entered into a contract with the undersigned, George Sully, Jr., and Matilda Sully, his wife, which said contract was thereafter recorded and is now of record in volume 13 of Agreements, page 184, in the office of the county recorder of the county of Santa Cruz, state of California, and is hereby expressly referred to and made a part hereof; and

"Whereas, the said R. W. Eaton and E. Steinhauser have borrowed from International Mortgage Bank, a corporation, of Apeldoorn, Holland, the sum of ten thousand dollars, and as security for the repayment of the same, have executed and delivered to said bank, a mortgage bearing date April 19, 1914, and covering the real property hereinafter particularly described; and

"Whereas, the said undersigned, George Sully, Jr., and Matilda Sully, his wife, ever since the 17th day of March, 1913, have been and now are the sole owners and holders of the said contract so recorded in volume 13 of Agreements, page 184, Santa Cruz Records:

"Now therefore, in consideration of the sum of one dollar and other valuable considerations to them and each of them in hand paid, the receipt whereof is hereby acknowledged, the said George Sully, Jr., and Matilda Sully, his wife, do and each of them does hereby acknowledge and agree that as to them and each of them as to the said contract dated March 17, 1913, and as to their and each of their rights and interests thereunder, the said mortgage dated April 9, 1914, and so executed to said International Mortgage Bank, is and shall be a first mortgage and lien on the real property hereinafter and in said mortgage described, and that whatever interest or rights they may have in or to the said real property are subject, subordinate and second to the lien of said mortgage."

[1, 2] The appellants point out the words "have borrowed," and argue that their act followed and was not therefore any part of the consideration for the making of the loan which plaintiff is seeking to foreclose. While such a phrase, "have borrowed," is pertinent in support of such an argument, it is not conclusive. In this case it clearly appears that all papers were signed and delivered before the money was paid by the plaintiff to the mortgagors, and that defendants' waiver was a part of the consideration supporting the plaintiff's promise to make a loan to the mortgagors. The plaintiff was entitled to show, as it did, what the consideration actually was and when it actually passed. Code Civ. Proc. § 1962, subd. 2, and Civ. Code, § 1647; Anderson v. Read, 106 N. Y. 333, 344, 13 N. E. 292. The waiver was valid, and operated to place the plaintiff's lien superior to the lien, if any, of the appellants.

[3] 2. By its judgment the trial court ordered that the appellants take nothing. Their claim, if any, arises out of these facts. The mortgagors owned the land which was mortgaged. Before the mortgage was executed the owners and the appellants formed a corporation, El Pajaro Springs Company; the mortgagors and the corporation executed a contract to sell and buy the land in suit; on the same date the corporation and the appellants executed a contract of employment by which the corporation hired the appellants at a stated compensation per month for a stated period of time. While those contracts were alive the appellants made improvements on the mortgaged property. The corporation was a defendant in this case, and by its pleadings merely put in issue the amount of the plaintiff's claim for attorney's fees. The appellants in their pleadings do not claim that, as stockholders, they are defending for the corporation, El Pajaro Springs Company; nor do they allege, or attempt to prove that, as stockholders, they demanded that the El Pajaro Company defend this action and that it did not; nor do they claim that they are defending for it; nor do they allege that El Pajaro Springs Company ever performed or offered to perform its contract of purchase. The most that can be said is that the record contains some evidence that the appellants made some improvements on the mortgaged premises without first having obtained a contract with the mortgagee or the mortgagors for reimbursement. They have no rights which the courts can, in a mortgage foreclosure action, enforce.

The judgment is affirmed.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

38 Cal. App. 721

MUTHER et al. v. CAPPS. (Civ. 2555.)

(District Court of Appeal, First District, Division 1, California. Nov. 22, 1918. On Rehearing in Supreme Court in Bank, Jan. 21, 1919.)

1. MUNICIPAL CORPORATIONS ⟸706(8)—USE OF STREETS—CROSSING ACCIDENT—INSTRUCTIONS.

In action for death in automobile accident at street crossing, evidence *held* insufficient to warrant instruction as to negligent rate of speed, where chauffeur's view of road traffic is obstructed.

2. MUNICIPAL CORPORATIONS ⟸706(8)—INSTRUCTIONS—MISLEADING INSTRUCTION.

In action for death in crossing accident at intersecting highway as defined by Gen. Laws Supp. 1917, Act 2331b, § 1, subd. 14, instruction on negligence of driver of automobile over "regular crossing for pedestrians" *held* misleading in view of Gen. Laws 1915, Act 2331b, § 22.

3. MUNICIPAL CORPORATIONS ⟸592(1)—ORDINANCES—CONFLICT WITH STATUTES.

Where there is a conflict between the state law and the law of a city holding a freeholders' charter in regard to a municipal matter, the city ordinance will prevail.

4. EVIDENCE ⟸32—JUDICIAL NOTICE—ORDINANCES.

The court cannot take judicial notice of a city ordinance.

5. MUNICIPAL CORPORATIONS ⟸592(1)—USE OF STREET—LAWS APPLICABLE.

In action involving question of whether driver of automobile on city streets was negligent, State Motor Vehicle Law will govern, where there is no ordinance in the record.

On Rehearing in Supreme Court.

6. MUNICIPAL CORPORATIONS ⟸705(4)—ACCIDENT AT "INTERSECTING HIGHWAY"—LAW APPLICABLE.

An automobile accident where one street meets but does not cross another took place at an "intersecting highway," as defined by Gen. Laws Supp. 1917, Act 2331b, § 1, subd. 14.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Ernst Muther and another against William H. Capps. Judgment for plaintiffs, and defendant appeals. Reversed.

D. Hadsell, Joe G. Sweet, and E. A. Ingalls, all of San Francisco (Hiram W. Johnson, Jr., of San Francisco, of counsel), for appellant.

Geo. J. Steiger, Jr., and S. S. McCahill, both of San Francisco, for respondents.

LENNON, P. J. This is an action in tort to recover damages for alleged negligence on the part of the defendant. The action grows out of the death of Anna Muther, who was the wife of Ernst Muther, plaintiff herein, caused by injuries received by her by being run over by an automobile owned and driven by the defendant. The plaintiff sues individually and as guardian ad litem for his minor children. Judgment was given on a verdict for plaintiffs for the sum of $15,000. The defendant has appealed, and assigns as error, among other things, certain instructions given by the court to the jury over the objections of defendant.

The trial court instructed the jury as follows:

"If you believe from the evidence that the defendant operated his automobile over the regular crossing for pedestrians, along Market street at the intersection of Valencia street, and that the defendant's view of the road traffic was then and there obstructed, at a greater rate of speed than 10 miles an hour, such operation of said automobile at said speed in excess of 10 miles an hour, constitutes a prima facie case of negligence, and the defendant is liable to the plaintiffs for all loss and damage proved to have been sustained by them by reason of such negligence."

This instruction evidently was prompted by the provisions of section 22 of Act 2331b of the General Laws of the state of California, which reads in part, as follows:

"* * * Provided, further, that in any event, no person shall operate or drive a motor or other vehicle on any public highway where the territory contiguous thereto is closely built up, at a greater rate of speed than 20 miles an hour, or in the business district of any incorporated city and county, city or town, at a greater rate than 15 miles an hour, or at a greater rate of speed than 10 miles an hour, where the operator's or chauffeur's view of the road traffic is obstructed either upon approaching an intersecting way, or in traversing a crossing or intersection of ways, or in approaching or traversing a crossing or intersection of ways. * * *"

[1] We think this instruction was not warranted by the evidence as disclosed in the record. There is no evidence in the record that the view of the defendant was obstructed. On the contrary, the evidence of plaintiffs' own witnesses is that there was nothing to prevent the defendant from seeing the deceased. The only evidence relied upon by respondent in his brief in support of this portion of the instruction is the testimony of the defendant as follows:

"Q. When you made that stop at Haight and Gough streets, did you notice any other jitney busses stopping with you? A. Yes, several all around me.

"Q. Any in front? A. One or two, I think.

"Q. And any at the sides, and behind? A. Yes, sir.

"Q. After the car passed, did you go out Market street? A. Yes, sir.

"Q. Did you notice whether or not any jitney

busses were in front of you or not? A. There were three or four turned out Valencia street."

From an examination of the map of the territory, which is embodied in the record, it will readily be seen, as pointed out by appellant, that automobiles which turned out Valencia street could not possibly have obstructed the view of defendant at the place where the accident occurred.

Moreover, we are of the opinion that no "crossing or intersection of ways," within the meaning of the law, exists at Market and Valencia streets, as stated in the instruction given, and which would be necessary to make the 10-mile speed limit apply.

In order to understand the relation of the two streets above mentioned, it is necessary to examine a map of that district, which map is a part of the record. From this it will be seen that the line of Valencia street never crosses Market street. The territory of Valencia street merely comes up to and meets Market street. According to the definitions given in Webster's Dictionary, the words "intersect" and "cross" mean practically the same thing, and the situation here does not fall within any of the definitions. The Supreme Court of Connecticut, in discussing a very similar condition in the case of Atwood v. Conn. Co., 82 Conn. 539, 74 Atl. 899, cited by appellant, said:

"Ordinarily we do not speak of a street which starts from or terminates in another as intersecting it. It is only when it crosses or cuts through the other that it is said to intersect it."

In that case the court, in discussing the matter, said that while some reason might exist for the application of an ordinance regulating speed at crossing and intersecting streets, to a place where one street terminates at another, yet the necessity for it is much less in such a case than it is where one street actually crosses the other. In the latter case there is likely to be more traffic in the intersecting street, and the through traffic would be directly across the railroad tracks, and also travel turning from one street into another is apt to be at less speed and to be accompanied with more caution than direct travel across an intersecting street.

[2] The words "regular crossing for pedestrians," used in the instruction, do not occur in the state law, and there is nothing therein which limits the speed to 10 miles an hour at such a place. The crossing referred to in the state law is a "crossing of ways" or streets. A pedestrian crossing may or may not be at the same place, but the insertion of such words in the instruction, we believe, was misleading to the jury.

If it be true that the place where the accident happened did not come under the prohibition of speed in excess of 10 miles an hour, then the defendant was entitled under the law to maintain a speed of 15 miles an hour. The testimony is all to the effect that he was going at about 15 miles an hour. It would have been necessary for the jury to have found that he was exceeding that speed in order to raise a prima facie case of negligence. The instruction complained of was not warranted by the evidence or the law, and under the particular circumstances of the case it was misleading to the jury, and to that extent was prejudicial to the defendant.

Although this conclusion is decisive of this appeal, yet in view of the fact that the case must be retried, it seems desirable for us to consider another point raised by defendant, which may become material upon the retrial.

The trial court instructed the jury in terms of the general laws of the state of California regulating the speed of motor vehicles, etc. The defendant insists that the regulation of the speed of motor vehicles, being a regulation of the use of streets, is clearly a "municipal matter" and the control of the same is given to the city of San Francisco under section 6 of article 11 of our state Constitution, and by the terms of the city charter of San Francisco, and that the state law is therefore inoperative, and instructions in terms of the state law are erroneous.

It has been held in the case of Loop Lumber Co. v. Van Loben Sels, 173 Cal. 228, 159 Pac. 600, that, in so far as a freeholders' charter makes provision relative to any municipal affair, it is the supreme law paramount to any law enacted by the state Legislature, and general laws enacted by the Legislature in regard thereto have no application. The court decided in that case that a state law requiring the furnishing of a bond by a contractor for the protection of materialmen, etc., before such contractor shall enter upon the performance of any work upon buildings, etc., for the state or any county, city, town, or district therein, is ineffectual for any purpose whatsoever where the city of San Francisco has provided in its charter all the conditions to be imposed upon a contractor prerequisite to doing such work, which conditions do not include the giving of such a bond, and that a bond given to comply with such a statute is given without consideration.

But this case proceeds upon the theory that such a provision in the state law would be in conflict with the city law, and the state law must therefore give way to the city ordinance.

To the same effect is the case of City of Los Angeles v. Central Trust Co., 173 Cal. 323, 159 Pac. 1169, in which it is said:

"These provisions (in the city charter of Los Angeles) relate to municipal affairs, and, as we have said, they are paramount to general laws and supersede such laws where inconsistent therewith."

[3] The law, then, seems to be that where there is a conflict between the state law and

the law of a city holding a freeholders' charter, in regard to a municipal matter, the city ordinance will prevail. While there is a statement in Re Hoffman, 155 Cal. 114, 99 Pac. 517, 132 Am. St. Rep. 75, indicating that, where a conflict exists between the charter and the state law, the state law will prevail, the decision of this question was not necessary to the determination of the case, because the court decided in that case that the laws under consideration were not in conflict, and therefore such statement was mere obiter dicta, and the case cannot be considered as in conflict with the other two cases above mentioned. The authorities, such as In re Smith, 26 Cal. App. 122, 146 Pac. 82, holding that in case of conflict the state law will prevail, will be found upon examination to deal with the laws of cities which have not freeholders' charters.

[4, 5] Under the principle enunciated in the cases of Loop Lumber Co. v. Van Loben Sels and City of Los Angeles v. Central Trust Co., supra, the question presented in the case at bar would be whether or not the two laws were in conflict. But an examination of the question of whether or not the state Motor Vehicle Law is in conflict with the city ordinance regulating the speed of motor vehicles could not be made by the trial court for the reason that, so far as the record discloses, there was no city ordinance before the court. The court cannot take judicial notice of a city ordinance, and, if defendant wished to negative the effect of the state law, he should have made the city ordinance a part of the record so that the court could determine whether or not the two were in conflict. In the absence of any city ordinance in the record, the court cannot proceed upon the theory that a conflict exists between the city and the state laws, and therefore, for the purposes of this case, the state law must necessarily be operative. For it has been held that, where no conflict exists, both laws will stand (Ex parte Snowden, 12 Cal. App. 521, 107 Pac. 724), and, of course, either would stand alone in the absence of the other.

The judgment is reversed.

We concur: BEASLY, Judge pro tem.; STURTEVANT, Judge pro tem.

On Rehearing in Supreme Court.

PER CURIAM. [6] The petition for a rehearing is denied; but in doing so it should be noted that, while ordinarily the definition of an intersecting street or highway may be that declared in the opinion of the District Court of Appeal, nevertheless the statutory definition of an "intersecting highway" (section 1, subd. 14, Act 2331b, General Laws Supp. 1917) is the only one which can be properly applied to the law and the facts of the case.

39 Cal. App. 60

## BASSOT et al. v. UNITED RAILROADS OF SAN FRANCISCO.

(Civ. 2362.)

(District Court of Appeal, First District, Division 1, California. Dec. 4, 1918. Rehearing Denied by Supreme Court Jan. 30, 1919.)

1. PARTIES ⟸6(2)—"REAL PARTY IN INTEREST"—EMPLOYÉ.

Although adjustment and payment of compensation operated, in view of Workmen's Compensation Act, § 31, to transfer legal title to employé's claim for damages against defendant, alleged to have caused the injury to the employer, or his surety, the employé still retained an equitable interest, and was a real party in interest, in view of Code Civ. Proc. § 378; section 369 being permissive only.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Real Party in Interest.]

2. APPEAL AND ERROR ⟸1036(5)—DISMISSAL AS TO PARTIES—HARMLESS ERROR.

After adjustment and payment of compensation employé's interest in action by him and compensation insurer against defendant alleged to have negligently caused injuries was equitable only, in view of Workmen's Compensation Act, § 31, and error in dismissing employé as a party was harmless, where jury found that defendant was without fault, and case was conducted by counsel which employé had selected to represent him.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Marcel Bassot and another against the United Railroads of San Francisco. From judgment of nonsuit entered against him, plaintiff named appeals. Affirmed.

L. M. Hoefler and George F. Snyder, both of San Francisco, for appellant.

Wm. M. Cannon and Wm. M. Abbott, both of San Francisco, for respondent.

LENNON, P. J. This is an action for damages for personal injuries sustained by plaintiff Bassot in a collision with the street car of defendant. At the time of the accident, Bassot was an employé of a corporation that carried compensation insurance with plaintiff insurance company. The compensation due Bassot having been adjusted and paid, this action was commenced in the name of Bassot and the company. Defendant's demurrer to the complaint on the ground of misjoinder of parties plaintiff was overruled, and, after issue joined, the cause proceeded to trial. At the close of the evidence, defendant made a motion for nonsuit as to both plaintiffs, which was granted as to Bassot on the ground that he was improperly joined as a party plaintiff, and denied as to the

insurance company. The trial proceeded as between the company and defendant, and resulted in a verdict for defendant. This is an appeal by Bassot from a judgment of nonsuit entered against him. The record in the case consists simply of the judgment roll and the proceedings on the motion for nonsuit.

[1] Section 31 of the Workmen's Compensation Act (St. 1913, p. 295) provides that the making of a lawful claim for compensation "shall operate as an assignment" of any right to recover damages which the injured employé may have against any other person for the injury, and the employer or his surety "shall be subrogated to any such right." The section also provides that "any amount collected by the employer * * * in excess of the amount paid by the employer, or for which he is liable, shall be held by him for the benefit of the injured employé." Respondent is correct in its contention that this section operates to transfer the legal title to the claim for damages to the employer or his surety, but it is also true that the employé still retains an equitable interest therein as to any surplus that may be recovered over the amount paid him by the employer, and he is therefore a real party in interest in the litigation. Although section 369 of the Code of Civil Procedure provides that "a trustee of an express trust * * * may sue without joining * * * the person for whose benefit the action is prosecuted," section 378 of that Code provides that "all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except when otherwise provided in this title." There is ample authority in this state to the effect that the provisions of section 369 are permissive only, and that the beneficiary of the trust may properly be joined as a party plaintiff with the trustee by virtue of section 378. Daley v. Cunningham, 60 Cal. 530; Cerf v. Ashley, 68 Cal. 419, 9 Pac. 658. It therefore follows that, while Bassot was not a necessary party to the suit, he was at all events a proper party thereto, and that the lower court was in error in granting the motion for a nonsuit and dismissing the action as to him.

[2] We are of the opinion, however, that the judgment should be affirmed because it affirmatively appears from the record that the error of the trial court was harmless. Although Bassot was dismissed from the action, he remained represented in court by the agent designated by the statute to represent him as plaintiff. The case was conducted to its conclusion by the attorney whom Bassot had selected to represent him. The verdict of the jury, amounting as it does to a finding that the defendant was without fault in the accident out of which the action arose, was a negation of the existence of any right whatsoever in Bassot, as Bassot's interest in the case was of necessity predicated upon a showing of negligence upon the part of the defendant and a recovery in excess of the sum that Bassot had already received as compensation.

Judgment is affirmed.

We concur: STURTEVANT, Judge pro tem.; BEASLY, Judge pro tem.

---

39 Cal. App. 24

## PEOPLE v. HARTWELL. (Cr. 614.)

(District Court of Appeal, Second District, California. Dec. 2, 1918. Rehearing Denied by Supreme Court Jan. 30, 1919.)

1. JURY ⟸63—CHALLENGE TO ENTIRE PANEL—LIST DRAWN BY COUNTY SUPERVISORS.

Defendant cannot successfully contend that list from which jury panel was drawn was not list of names made up by county supervisors, as law requires, where changes in list were made merely in process of compiling, and list in fact adopted by supervisors was that remaining after all changes.

2. JURY ⟸120 — CHALLENGE TO ENTIRE PANEL—BURDEN OF PROOF—SUPPORT.

The burden of proof was upon defendant to present facts sufficient to support his challenge to the entire panel of the jury.

3. JURY ⟸63 — CERTIFICATION OF JURY LIST PENDING CHALLENGE.

Trial judge properly permitted clerk to attach certificate to jury list drawn by county supervisors, from which certain names were stricken by clerk, while defendant's challenge to whole panel because list from which it was drawn was not list made up by supervisors was pending.

4. JURY ⟸120 — CHALLENGE TO WHOLE PANEL—LACK OF SUPPORT IN EVIDENCE.

Court properly overruled defendant's challenge to whole panel of jury on ground population of county was in excess of 100,000, so that jury list should have been made up by judges of superior court, instead of supervisors, where only evidence offered in support of claim was incompetent.

5. JURY ⟸120—MAKING UP JURY LIST—SUPERIOR COURT OR COUNTY SUPERVISORS—STATUTES.

Court cannot be required, on trial of challenge to whole panel of jurors, to take evidence to ascertain exact population of county on given date, to determine whether jury list should have been made up by judges of superior court instead of by county supervisors, population referred to under Code Civ. Proc. § 204, being that as ascertained by Legislature and set forth in Pol. Code, § 4005c.

---

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

6. Jury ⟸63 — Making up Jury List — Placing Names by Request—Act of Supervisors.

Because county supervisors placed on jury list names of persons who requested they be so placed, making up of list did not cease to be act of supervisors.

7. Jury ⟸97(4) — Challenge for Bias — Discretion of Court.

Trial judge, in prosecution for crime, did not abuse discretion in denying defendant's challenge to a juror, who, on his voir dire, answered certain questions so as to indicate bias, but whose answers to others were such as to disprove bias.

8. Indictment and Information ⟸110 (48)—Statutory Language.

Information which charged violation of Pen. Code, § 288, denouncing lewd conduct with a child, in the language of the statute, and further alleged the facts constituting the offense in that language, was not demurrable.

9. Infants ⟸20 — Conviction of Lewd Conduct with Child — Sufficiency of Evidence.

Evidence *held* sufficient to sustain conviction for violation of Pen. Code, § 288, denouncing lewd conduct with a child, though testimony of prosecuting witness was somewhat impeached by showing she had made contradictory statements on preliminary examination.

10. Criminal Law ⟸442—Evidence—Admission—Letter.

In prosecution for lewd conduct with a child, letter purporting to have been written by defendant to parents of prosecuting witness, whose contents, in connection with circumstances of writing and delivery, were construable as admission of guilt, *held* admissible, despite absence of proof that body of letter was in defendant's handwriting, where it was proved that the signature was defendant's, and that he delivered letter to his wife to be given to the addressee.

11. Criminal Law ⟸406(6) — Evidence — Conversation Amounting to Admission.

In prosecution for lewd conduct with a child, testimony of witness as to conversation between her and defendant and defendant's wife, on afternoon of day offense was alleged to have been committed, *held* admissible, conversation and circumstances amounting to tacit admission by defendant of facts tending to connect him with the crime charged.

12. Criminal Law ⟸829(1) — Instruction—Repetition.

Defendant's requested instruction, fully covered by another instruction given, was properly refused.

13. Criminal Law ⟸809 — Instruction —Misleading Character.

Defendant's requested instruction, which, even if not technically erroneous, was calculated to mislead the jury, was properly refused.

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

F. S. Hartwell was convicted of a violation of Pen. Code, § 288, in having been guilty of lewd conduct with a child, and from the judgment and order denying motion for new trial he appeals. Judgment and order affirmed.

See, also, 175 Pac. 21.

L. E. Dadmun, of San Diego, for appellant.

U. S. Webb, Atty. Gen., Joseph L. Lewinsohn, Deputy Atty. Gen., and Jerry H. Powell, of Los Angeles, for the People.

MYERS, Judge pro tem. [1-3] Defendant appeals from a judgment of conviction under section 288 of the Penal Code, and from an order denying his motion for a new trial. His first point is that the court erred in denying his challenge to the entire panel of the jury. In support of this challenge he called as a witness the county clerk, who produced and identified the list of jurors selected by the county supervisors to serve for the current year 1918. This consisted of a typewritten list of several hundred names and addresses, and bore no certificate. It appeared upon inspection thereof that some of the names, 21 in number, had been stricken off by drawing a line through them, and that changes had been made in various others of the names. These changes, for the most part, were apparently mere corrections of spelling, but in a few instances they were more material, such as the substitution of one initial for another, and in two or three instances the change of a first name. The clerk testified that all of these changes were made by him, or under his supervision, when the list was submitted to him by the board of supervisors; that they were made by him without any request or direction therefor; that he compared the names with the register of voters; and that when a name on the list did not appear on the register he struck it off the list. No explanation was made of the changes of names not stricken off. Appellant argues from this testimony that the list from which the jury panel was drawn was not the list of names made up by the supervisors, as the law requires, and that therefore his challenge should have been allowed. But the evidence falls short of establishing such a state of facts. It does not appear from the evidence when the changes in question were made with reference to the time when the list was adopted by the board of supervisors as a jury list. Of course, if the changes were made merely as a part of the process of compiling a list, and if the list which was in fact adopted by the supervisors was the list remaining after all the changes had been made, then defendant's objection has no force. Five hundred and seventy-nine names remained on the list after the changes were made. As the order of court designating the

number of jurors that would be required for that year is not in evidence, we must assume that 579 was the required number. The burden of proof was upon the defendant to present facts sufficient to support his challenge, and the trial court correctly decided that he had failed to sustain this burden. The judge of the trial court permitted the clerk to attach his certificate to the jury list in question while the challenge was pending. There was no error in this action. People v. Young, 108 Cal. 8, 12, 41 Pac. 281.

[4, 5] Defendant offered, in further support of his challenge, to prove that the population of San Diego county on the 1st day of January, 1918, was in excess of 100,000, and that, therefore, the jury list should have been made up by the judges of the superior court, instead of by the supervisors, to which offer the court sustained an objection. It might suffice to say that this ruling was not error, because no competent evidence was offered by defendant in support of his claim. He proposed to prove the alleged facts by showing the total number of registered voters and multiplying that by 2.6, which he claimed was the ratio established by the Governor and Secretary of state in estimating population; also by the estimates of witnesses based upon the numbers of persons using water, gas, and electricity within the county, and multiplying that by a certain index figure; also by witnesses who would testify that it was common knowledge throughout the county that the population was then in excess of 100,000; and also by an estimate contained in a pamphlet issued and authorized to be published by the board of supervisors in conjunction with the Chamber of Commerce. But aside from considerations of the incompetency of such opinion evidence, it is manifest that a court cannot be required, on the trial of a challenge to a panel of jurors, to take evidence for the purpose of ascertaining and determining the exact population of the county on a given date. If this could be done, it might well happen that in counties whose population is somewhat near the 100,000 mark a considerable portion of the time of courts and juries might be occupied in this way. It is apparent, of course, that the determination and finding of this fact in any one case would not be conclusive or even prima facie evidence in any other case. We think that the population referred to in section 204, Code of Civil Procedure, is the population as ascertained and determined by the Legislature and set forth in section 4005c, Political Code.

[6] Defendant also offered to show, in support of his challenge, that some of the names on this list were placed there by the supervisors at the request of the persons themselves, to which offer an objection was sustained. Appellant argues that if any of the names were placed there at the request of the persons named, it follows that the making of the list was not the act of the supervisors, but must be regarded as the act of those persons. The objection was properly sustained. The good policy of placing on a jury list the names of persons who volunteer their services may well be questioned, but, if that is done, it no more follows that the doing of it is not the act of the supervisors than it follows that an order of court is not the act of the court because made at the request of a litigant.

[7] It is further urged that defendant's challenge to the individual juror Long should have been sustained. This juror upon his voir dire made answer to certain questions in such a manner as to indicate bias on his part against the defendant, but his answers to other questions were such as to rebut this inference. We cannot say that the trial judge abused his discretion in denying the challenge. The question of bias of a juror is a question of fact, or of mixed law and fact, to be determined in the first instance by the trial court. Such determination is to be predicated, not upon the answer to any single question, but upon all of the answers considered together. "This court should interfere with the determination of that question only when the evidence adduced on the voir dire is of such a character that it can be said from it, as a matter of law, that the juror is so prejudiced or biased in the case that he will not be a fair juror." Graybill v. De Young, 146 Cal. 421, 423, 80 Pac. 618, 619; Baker v. Borello, 136 Cal. 160, 68 Pac. 591.

[8] Appellant contends that the court erred in overruling the demurrer to the information. There is no merit in this contention. The information charged the offense in the language of the statute, and further alleged the facts constituting it in apt language, from which it clearly appears that the offense intended to be charged is the one denounced by Penal Code, § 288.

[9] There is nothing in appellant's contention that the evidence is insufficient to sustain the verdict. This contention is based upon the circumstance that the testimony of the prosecuting witness was in some measure impeached by showing that she had made contradictory statements at the preliminary examination. This, of course, went to the weight of her testimony, but still left it a question for the jury to pass upon. In this case there was ample corroboration of her testimony as given at the trial.

[10] Appellant urges that the court erred in admitting in evidence a letter purporting to have been written by the defendant to the parents of the prosecuting witness. Apparently this contention is predicated in the main upon the absence of proof that the body of the letter was in the handwriting of the defendant. The signature thereto was proven to

be defendant's signature, and its delivery by the defendant to his wife with the request that she deliver it to the persons to whom it was addressed and the reading of it by her to those persons were all proven. The contents of the letter were such as, when considered in connection with the circumstances of its writing and delivery, were fairly inferable as amounting to an admission of guilt by the defendant, and it was therefore entitled to go to the jury.

[11] Appellant also contends that the court erred in admitting in evidence the testimony of Mrs. Orth as to a conversation had between her and the defendant and defendant's wife on the afternoon of the day the offense is alleged to have been committed. According to her testimony, in this conversation defendant's wife accused him of misconduct with Ruth Moran (the prosecuting witness), and said to him that he "had taken liberties with this child, Ruth Moran, in the garage" (that being the place of the alleged commission of the offense here charged), and that he replied, in substance, "that Ruth Moran was an unusually cute child * * * and he also said that he guessed it was just an infatuation. * * * He also said that lots of men had done worse things than that." This conversation, under the circumstances as detailed by the witness, amounted to a tacit admission on the part of defendant of facts which had a tendency to directly connect him with the crime here charged. In this respect it differed materially from the conversation held by this court to be inadmissible in the case of People v. Hartwell, 175 Pac. 21. We think that the ruling of the trial court in this case was correct.

[12, 13] Complaint is made of the refusal of the court to give three certain instructions requested by the defendant. The points contained in his requested instructions, numbered 9 and 13, respectively, were fully covered in other instructions which were given by the court. His requested instruction numbered 14 was properly refused for the reason that it was calculated to confuse and mislead the jury, even if it was not technically erroneous.

The points made in support of the motion for a new trial are those which we have here considered.

The judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; JAMES, J.

# MEMORANDUM DECISIONS

179 Cal. 467

CITY OF SANTA MONICA et al. v. RAILROAD COMMISSION OF CALIFORNIA et al. CITY OF PASADENA et al. v. RAILROAD COMMISSION OF CALIFORNIA et al. (L. A. Nos. 5974, 5975.) (Supreme Court of California. Dec. 27, 1918.) In Bank. Petitions by the City of Santa Monica, the City of Venice, the City of Pasadena, the City of South Pasadena, and the City of Alhambra, all municipal corporations, to review certain orders of the Railroad Commission of the State of California, raising certain rates or charges for the transportation of passengers on the Pacific Electric Railway Company. Applications denied. Victor R. McLucas, of Los Angeles, for petitioner City of Santa Monica. Rush M. Blodget, of Los Angeles, for petitioner City of Venice. John Munger, of Pasadena, and William Hazlett, of Los Angeles, for petitioner City of Pasadena. Alfred Barstow, of Los Angeles, for petitioner City of Alhambra.

PER CURIAM. By these proceedings it is sought to review certain orders of the Railroad Commission raising certain rates or charges for the transportation of passengers by the Pacific Electric Railway Company. Section 20 of article 12 of the Constitution provides that in such matters "the decision of the said commission * * * shall not be subject to review by any court except upon the question whether such decision of the commission will result in the confiscation of property." We are satisfied that the petitions filed herein do not allege facts showing any "confiscation of property" within the meaning of this constitutional provision. The applications are denied.

179 Cal. 58

COCHRAN v. SUPERIOR COURT et al. (S. F. 8891.) (Supreme Court of California. Sept. 30, 1918.) In Bank. Petition by Mary Gertrude Cochran for writ of mandate against the Superior Court and others. Petition denied. R. W. Barrett, of San Francisco, for petitioner.

PER CURIAM. We are of the opinion that the application for a writ of mandate should be denied. Our action is not to be taken, however, as indicating an opinion that the provisions of the Soldiers' and Sailors' Relief Act of March 8, 1918, providing for a stay of proceedings prior to judgment, are applicable to actions commenced prior to the passage of the act. We are not prepared to hold that the superior court was guilty of any abuse of discretion in refusing to proceed with the trial of the action at this time, in view of the showing made as to the necessary absence of the defendant, entirely independent of the provisions of the act referred to. In the event of such a change in the existing conditions as would make further refusal to proceed with the trial an abuse of discretion, another application may be made to the superior court. The application for a writ of mandate is denied.

WILLIAMS v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA, Respondent. (Sac. No. 2911.) (Supreme Court of California. Jan. 2, 1919.) In Bank. Application by Ruth Williams for a writ of mandate to be directed against the Industrial Accident Commission of the State of California. Application denied. Theodore A. Bell, of San Francisco, for petitioner. Chris. M. Bradley, of San Francisco, for respondent.

PER CURIAM. The respondent commission is acting entirely within its jurisdiction in hearing and determining the application pending before it, and we have no authority to supervise its conduct of the proceeding in the manner suggested. The application is denied.

ANGELLOTTI, C. J., and SLOSS, MELVIN, and WILBUR, JJ., and RICHARDS, Judge pro tem., concur.

38 Cal. App. 568

PEOPLE v. FRYER. (Cr. 452.) (District Court of Appeal, Third District, California. Nov. 7, 1918.) Appeal from Superior Court, Trinity County; James W. Bartlett, Judge. Loren A. Fryer was convicted of murder, and he appeals. Affirmed. See, also, 175 Cal. 785, 167 Pac. 382. J. W. Threshie, of Redding, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. This case was on the calendar for September 10 for oral argument, but no appearance was made for appellant. An order was made, however, allowing him 15 days in which to file a brief and the Attorney General notified appellant's counsel to that effect. No brief has been filed and no application for extension of time has been made. We are justified in concluding, therefore, that the learned counsel for appellant can find no reasonable ground for urging a reversal of the judgment. Notwithstanding this virtual abandonment of the appeal, we have examined the record and find that the evidence is overwhelming and conclusive that the defendant committed a deliberate, cold-blooded murder, and that he was justly convicted of the offense. In fact, he admitted the crime in all its gruesome details, and the only

defense was of a technical character. The interests of justice demand the affirmance of the judgment of conviction; and it is so ordered.



NATIONAL UNIVERSITY LIBRARY
3 1786 10046 8484

NATIONAL UNIVERSITY
LIBRARY SAN DIEGO

NON CIRCULATING

